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Is My Body My Property?

A Proposal for the Recognition of Property Rights over Bodily Materials

Aileen Editha

A thesis submitted for the Degree of

Master of Jurisprudence

Durham Law School

Durham University

November 2020

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Untuk keluargaku, yang selalu mendukungku dan mendorongku untuk menjadi lebih baik.

Terima kasih untuk segalanya.

Abstract

Although it seems axiomatic that a person should own her body, the law in England and Wales is less straightforward. The "no property" rule, which emerged as an *obiter dictum* in *Hayne's Case* (1614), still stands today. This principle seems incompatible with medical and scientific advances which treat bodily materials as valuable commodities, and the increased societal and legal recognition of principles of autonomy and self-determination. Consequently, the law has strenuously attempted to reconcile these two by creating common law exceptions such as the "work and skill" exception (rooted in Lockean-Nozick labour theory) and the so-called *Yearworth* exception. However, there is an absence of a fundamental principle underlying the law's current approach.

This thesis proposes a widening of the definition of "ownership" by adopting the rule-preclusionary conception. First advanced by Beyleveld and Brownsword, the rule-preclusionary conception recognises that I, as a subject, have exclusive control over my body and bodily materials, and I am precluded from having to justify what I do with them on a case-by-case basis. This principle is sufficiently fundamental and rudimentary which can then be used in conjunction with other conceptions such as the "bundle of rights" theory. This thesis provides a two-fold retrospective and prospective argument in support of this. The former argues that the current legal framework already implicitly recognises rule-preclusionary ownership, whereas the latter argues that explicit recognition of property rights provides an attractive solution to prominent problems in the wider medical field.

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Acknowledgements

I would like to thank my supervisors Professor Shaun D Pattinson and Dr Benedict Douglas, who have provided me with invaluable guidance and support—both academically and emotionally—throughout my undergraduate and postgraduate degrees. I am also indebted to Dr Samantha Halliday and Dr Camilla Pickles whose encouragement, insight, and comments throughout the review process have been most helpful. I would also like to thank Professor Robert Schütze whose kindness has continually inspired me.

This thesis would never have been completed without the help and support of my friends, peers, and colleagues at Durham Law School who have generously and constantly motivated me throughout the stressful, strange, and challenging year of 2020. A special thanks goes out to Nick Kilford as, without his guidance, I would not have had the courage to do the MJur in the first place. Finally, I would like to thank my cat Shiu Shiu who has never failed to bring me joy from thousands of miles away.

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R v Kelly and Lindsay [1999] QB 621 [1999] 2 WLR 384.

R v R [1992] 1 AC 599.

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Chapter 1

Introduction

In today's society, it seems axiomatic that a person should own her body. The amplification of rhetoric such as "my body is mine" follows the increased recognition and attestations of principles such as autonomy and self-determination in modern liberal society. However, the law is much less straightforward. The debate on whether we—in a legal sense—own our bodies has proceeded for centuries. The law's "no property" rule (*res extra commercium*) first emerged as an *obiter dictum* in 1614.[1] Four hundred years on, it is treated as a universal cornerstone in medical law; the principle is found in international instruments as well as in the judicial reasoning of major common law jurisdictions. However, as science and medicine advance and commodification increases, so has the perception of the body as a valuable raw material. This prompted the common law to create an exception which permits bodily materials to be treated as property upon the application of "work and skill". Although this exception has recently broadened, the "no property" rule still exists. The principle is regarded as fundamental in the overall effort to preserve the sanctity of life, as the body is often perceived as 'the substratum of personhood'.[2] The discourse is thus not only emotionally evocative, but it is often divisive as it touches on the wider debate of materialism and dualism, as well as ontological and epistemological philosophy. This thesis, however, seeks to explore the subject of property over the body without delving into this discourse. Instead, it contends that a more persuasive approach is one that can be adopted independently of one's philosophical beliefs.

Aims

Firstly, this thesis aims to reconcile seemingly irreconcilable aspects of the law concerning property rights over bodily materials. Although the "no property" rule is still upheld, individuals are granted with some form of control over their excised or separated bodily materials. Some argue that this is justified on the basis of privacy rights. However, as we will see, this argument does not provide sufficient justification for the current framework.

Secondly, this thesis seeks to clarify the terminology used in the debate. Terms such as "ownership" and "property rights" are often used without elaboration on what they mean. This thesis seeks to resolve this by ensuring that these terms are first explored, expounded, and clarified. This thesis

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1 *Hayne's Case* (1613) 12 Co Rep 113, (1614) 77 ER 1389.

2 Christian Lenk and Nils Hoppe, 'Preventing conflicts of interests in the field of human biological materials: the "contractual model" as an avant-garde' in Michael Steinmann, Peter Sýkora, Urban Wiesing (eds.), *Altruism Reconsidered: Exploring New Approaches to Property in Human Tissue* (Routledge 2009) 133

applies Beyleveld and Brownsword's concept of rule-preclusionary control to the term "ownership", which offers a persuasive and practicable approach to the debate.[3] This thesis will draw important distinctions between these key terms, which will then form the basis of the rest of the thesis' argument for property rights.

Thirdly, this thesis seeks to draw an important distinction between the concept of ownership as a relationship and the law's decision to legally recognise the rights arising from that relationship. The "no property" rule is often perceived as the basis for s 32 of the Human Tissue Act 2004 which prohibits commercial dealings in human materials for transplantation, except for gametes (s 32(9)(a)), embryos (s 32(9)(b)), or material that has become property through the application of work and skill (s 32(9)(c)). However, this thesis maintains that the lack of an explicit legal recognition of the right to sell, for instance, does not necessarily mean that there is an absence of ownership.

Structure

This thesis is made up of three substantive chapters. Chapter 2 seeks to establish the foundations of the discourse by exploring four key concepts: ownership of the self, ownership of external things, personal rights, and property rights. It applies the rule-preclusionary framework to the concept of ownership.

This thesis will then proceed to make a two-fold retrospective and prospective argument for property rights. Chapter 3—the retrospective argument—seeks to show how the current legal framework already *implicitly* recognises rule-preclusionary ownership over bodily materials. The chapter will explore systems of acquisition of bodily materials and the control given to individuals over their separated bodily materials. After a discussion of the statutory framework and three phases of common law, this thesis argues that the law is moving towards greater recognition of the so-called property rights over certain materials. Chapter 4—the prospective argument—seeks to show how an *explicit* recognition of property rights will be beneficial, particularly in three areas of the law. First, "property for reality" argues that explicit recognition can help reconcile the altruistic and commodified realities. Second, "property for protection" argues that a property framework can provide a "safety net" for individuals. Third, "property for organ scarcity" explores how this thesis' property analysis can help illuminate the organ scarcity issue in England and Wales. It argues that property can be utilised to encourage living organ donations, and examines how an opt-out framework for deceased donations is still compatible with the property framework proposed in earlier chapters.

Finally, this thesis will conclude that the recognition of rule-preclusionary ownership—implicit and explicit—offers an attractive solution to both retrospective and prospective problems. Retrospectively, this thesis' proposal clarifies the law's approach to bodily materials. Prospectively,

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[3] Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press 2001) 176.

this thesis argues that an explicit recognition of property rights offers an attractive solution to three substantive problems in the wider field of medicine and scientific research.

Chapter 2

The Complex Relationship between Us and Our Bodies

Introduction

This first substantive chapter seeks to explore fundamental questions about the relationship we have with our bodies. To evaluate this, four key concepts will be discussed: ownership of the self, ownership of external things, personal rights, and property rights. This is an important task as it is crucial to approach the debate with, first and foremost, an *understanding* of these underlying key concepts. Answering this question, however, is not easy task due to the prominent terminological issue where different terms are used to mean different things. Not only does this cause confusion to readers, but it also distracts from the essence of the debate. The aim of this chapter is thus to clarify these key terms which will then set a solid foundation for the forthcoming chapters where the law itself will be explored.

This chapter will first set out the terminological issue in the discourse and its negative impact on the subject. Although these four principles form the essence of this debate and are frequently used, 'there have been surprisingly few systematic efforts to expound the legal meaning of the concept[s] in all its legal contexts, to examine its internal logic.'[1] This lack of clarity comes from the incorrect presumption that there is a consensus on the definition of these concepts, and thus academics see no need to define them in the first instance. Consequently, the literature is littered with inconsistent use of key terms, which causes the discourse on ownership over bodily materials to be confusing and difficult to follow. The most prominent trend the author has observed is the interchangeable use of terms such as "ownership" and "property rights" in the academic sphere and everyday lives. Although this is not inaccurate *per se*, it becomes problematic and confusing when one tries to make sense of the relevant jurisprudence and literature. This thesis argues that these terms could be better utilised and more appropriately applied to non-interchangeable concepts. This will enable the expression of a crucial distinction between key concepts that are so important to the debate.

After establishing the importance of defining these concepts, the chapter will then move on to first explore the concept of ownership. In constructing an appropriate definition for ownership, this thesis considers Beyleveld and Brownsword's helpful two-fold formulation of the

[1] Ngaire Naffine, 'The Legal Structure of Self-Ownership: Or the Self-Possessed Man and the Woman Possessed' (1998) 25(2) *Journal of Law and Society* 193, 195.

issue. The first methodological issue questions what the concept of ownership itself is, whereas the second semantic question concerns what the subject (A) means when A claims that an object (O) as subject to A's ownership.[2] It is argued that the more rudimentary methodological issue must initially be resolved by first distinguishing between the legal concept of ownership and the more fundamental concept of ownership as a functional relationship between a subject and their object. This is because the fundamental and inherent concept of ownership does not tell us anything about how the law protects or treats that relationship. This thesis argues that this functional relationship could be regarded as that of "rule-preclusionary control", a concept seminally advanced by Beyleveld and Brownsword. Here, ownership grants the subject exclusive control over the object and are precluded from having to justify what they do with or towards the object on a case-by-case basis. The rule-preclusionary conception is persuasive as it is the most fundamental and rudimentary form of control an individual can have over an object—especially their body—as it is essential to agency (which is defined as the ability to act for a voluntarily chosen purpose). As we shall see, ownership of external things and rights, personal or proprietary, would not be possible in its absence. The rule-preclusionary conception is persuasive as it is sufficiently rudimentary and addresses both methodological and semantic issues previously explored. This thesis thus utilises "ownership" as a legal shorthand to mean a subject's rule-preclusionary control over an object.

There is a widespread consensus that ownership of the self is the basis of the relationship between us and our bodies. This is evidenced by how self-ownership is treated as an inalienable fundamental human right. Although some academics find it necessary to delve into the realms of ontological or epistemological philosophy when discussing self-ownership, this thesis approaches self-ownership from a neutral philosophical perspective.[3] Regardless of one's philosophical convictions, it can be agreed that the body has a special, important, and necessary role: without it, one simply will not be able to exist, let alone act, in this world.[4] The rule-preclusionary concept acknowledges this, supports the fundamental nature of self-ownership, and can be adopted based on a neutral standpoint. Self-ownership also acts as the *terminus a quo* of ownership of external

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2 Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw* (Oxford University Press 2001) 176. The original wording pertained to property rights, as Beyleveld and Brownsword sought to find a definition to property rights and not ownership.

3 Although the term "philosophically neutral" is problematic—as its plausibility itself is questionable—this thesis uses the term to mean that the approach proposed could be adopted without asking the readers to adopt a prior philosophical perspective.

4 It is on this basis that several academics argued that self-ownership, in the sense of property-in-self, does not have to lead to a divided and fragmented self. See: Naffine (n 1); GA Cohen, 'Self-Ownership, World-Ownership and Equality' in Frank Lucash (ed.), *Justice and Equality Here and Now* (Cornell University Press 1986).

things or ownership in a more general sense. This is supported by John Locke's conception of ownership: without ownership of the self, the non-owned cannot own, and regardless of the validity of the first point, there would be little or no point in owning external things. This thesis classifies "self-ownership" into two: ownership of the self that is the person ("self-ownership" for short) and the ownership of extensions of the self, which includes one's bodily auxiliaries. Building on Maurice Merleau-Ponty's work, this thesis defines bodily auxiliaries as items which are integrated into the person and impact their existence or ability to act as an agent. These include examples such as a pacemaker in an arrhythmic patient or a blind woman's walking stick. [5]

Following an evaluation of ownership, both of the self and of external things, this thesis will discuss the rights that arise from those ownership relationships. This thesis adopts Pattinson's three-fold classification of rights: bodily rights, property rights, and non-ownership rights.[6] They can first be categorized into two: ownership and non-ownership rights. There are two key distinctions between ownership and non-ownership rights: the first is the rights' starting presumptions, and the second is exigibility. Ownership rights, as we shall see later, starts with the presumption that the subject has rule-preclusionary control, or ownership, over the object. Thus, the onus falls on others to justify an interference with that ownership relationship. Non-ownership rights, on the other hand, are those where the starting presumption is non-ownership or the absence of rule-preclusionary control. An example of this is contractual rights as it is not until A signs a contract that she then has ownership over O. Further, ownership rights are exigible or enforceable against the world whereas non-ownership rights, such as contractual rights, are only exigible or enforceable against a specific person. Although this thesis makes a three-fold distinction, it will only focus on ownership rights as these are the ones that pertain to the body and bodily materials.

Ownership rights can be further divided to include bodily and property rights. The key distinctions between them are the object concerned and the control exercised over said object. Bodily rights are applicable to the body and concern objects that are of the person. This includes the right to bodily integrity which, for instance, forms the basis for a patient's right to refuse medical treatment. Although these could also be termed "personal rights", use of this term could cause confusion with non-ownership rights which can also be referred to as personal rights. Thus, use of the term "bodily rights" is done to increase and ensure clarity. Property rights, on the other

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5 The term was seminally advanced by Maurice Merleau-Ponty in 1945. Merleau-Ponty, however, only utilised the term to encompass objects that impact one's perception. This thesis, as we shall see later, seeks to expand this definition. See: Maurice Merleau-Ponty, *Phenomenology of Perception* (C Smith tr., 1st edn, Routledge 2013) 176.

6 SD Pattinson, 'Directed donation and ownership of human organs' (2011) 31(3) *Legal Studies* 392.

hand, concern objects that are outside of the person such as a separated or extracted bodily materials or external things. This is evidenced by the importance of consent for use and storage of gametes. Further, bodily rights only bestow negative control to the subject (A) over the object (O) whereas property rights give A positive control over O. Negative control is the ability to restrict use of the body, whereas positive control is the ability to restrict and direct use of bodily materials. Ultimately, bodily rights give rise to rights such as bodily integrity or the right to liberty, whereas a proprietary ownership goes beyond these rights and permits the legal recognition of "common" property rights such as rights to income or capital. These are rights that are derived from the long-standing "bundle of rights" theory. After an exploration of various conceptions of property rights, this thesis uses AM Honoré's prominent "bundle of rights" theory to define property rights. However, because it is used in conjunction with the more fundamental concept of ownership, the term "property rights" can now be used solely to refer to the legal recognition of proprietary ownership but *not* the relationship itself. In other words, the term "property rights" is used to answer Beyleveld and Brownsword's semantic question, i.e. what it means for A to have property over O. Drawing this distinction enables a valuable reframing of the relationship between bodily and property rights. Instead of an either or, they could coexist as they both fall under the umbrella term of ownership rights. Furthermore, drawing this distinction will aid in explaining unusual cases in the discourse which will be discussed in Chapter 3. Ultimately, it is hoped that this chapter sufficiently and clearly addresses the fundamental and rudimentary issues, thus providing a strong foundation for the next chapter which will delve into the legal and regulatory landscape.

The Issue of Terminology

The question on the relationship we have with our bodies has long captured the attention of academics from various disciplines, but the debate is far from resolved. The literature on this discourse is vast and rich, but it can also—at times—be very difficult to follow and understand. In part, this is due to the complexity of the ideas and concepts discussed. However, a prominent two-fold terminological issue—which we will now discuss—also greatly contributes to this.

First, it is the lack of definitions in the discourse. Important concepts in the debate—such as self-ownership, ownership in general, personal and property rights—have become so entrenched in everyday society that they are seen as a given. This is partly caused by the increased value and fundamentality placed on principles such as self-determination, autonomy, and liberty. This unintentionally creates a presumption that readers and other academics would—or, at least, should—know what these terms mean. This, in turn, presupposes that there is a singular correct definition for each of these concepts but, unfortunately, this is incorrect. Simon Douglas, for

instance, has classed ownership as a type of property right,[7] whereas Wall believes that ownership is distinct from property rights.[8] He argued that the former refers to a functional relationship, which encompasses the notable bundle of rights theory prominently advanced by Honoré,[9] whereas the latter is the legal recognition of said relationship.[10] Meir Dan-Cohen argued that ownership is an ontological relationship and is something entirely different from property rights.[11] He argued that ownership, which has "ownership value", could be seen as a prerequisite or element of property rights, which requires ownership *and* proprietary value.[12] It is also unclear what ownership means. Several academics seem to define ownership only as an absolute property right, meaning a "sole and despotic dominion" over the object, as was suggested by Sir William Blackstone in the 18th century.[13] Several academics such as Hardcastle,[14] Björkman and Hansson,[15] and Quigley have tailored AM Honoré's prominent "bundle of rights" theory to bodily materials. Björkman and Hansson argued for five principles of bodily rights, but argued that whether they fall into the term 'property' is a secondary issue.[16] Harris, on the other hand, argued that the term property we use today is a mere rhetoric, and had been alleviated of its meaning.[17]

None of these academics are outright wrong. It is just that there is not one single correct definition for each concept. It has been argued that these definitions are a reflection of how academics themselves subjectively value the tissues. Human tissue is special and unique in its nature, and it also possesses the ability to save lives whether through therapy or research.[18] The

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7 Simon Douglas, 'Property Rights in Human Biological Material' in Imogen Goold and others (eds.), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart Publishing 2014).

8 Jesse Wall, *Being and Owning: The Body, Bodily Material and the Law* (Oxford University Press 2015).

9 AM Honoré, 'Ownership' in AG Guest (ed.) *Oxford Essays in Jurisprudence* (Oxford University Press 1961).

10 Wall (n 8).

11 Meir Dan-Cohen, 'The Value of Ownership' (2000) UC Berkeley Public Law and Legal Theory Working Paper No.11 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=189830> accessed 16 November 2019.

12 ibid.

13 Unless the reader adopts the view of academics such as Narveson, who stated that property rights means to have absolute freedom to use your property, as he regards all rights as freedom rights; see Jan Narveson, *The Libertarian Idea* (Temple University Press 1988).

14 Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing 2007).

15 Barbro Björkman and SO Hansson, 'Bodily rights and property rights' (2006) 32(4) *Journal of Med Ethics* 209.

16 ibid 209.

17 JW Harris, 'Who owns my body' (1996) 16(1) *Oxford Journal of Legal Studies* 55.

18 This argument was presented in Catherine Waldby and Robert Mitchell, *Tissue Economies: Blood, Organs, and Cell Lines in Late Capitalism* (Duke University Press 2006) 37. However, they used labels such as 'ontological' or 'epistemological values' which carries implied value judgments.

definition of "property" with regards to human materials is thus dependant on these values. Furthermore, the writers' definition of these terms has not always been clarified. Although it is acknowledged that this is not always possible in shorter publications where space is limited, some clarification would help readers attain a clearer idea of what ownership or property rights mean to the writer. This thesis acknowledges and respects that there is no single right definitions for these terms as there is 'no definitive catalogue which can be drawn up but one might offer the following as plausible categories of rules describing the "thing-person" relationship.'[19] Nor does this thesis purport to provide definitive authority on how these terms should be defined. Rather, this thesis aims to highlight the benefit of clarifying definitions and, in doing this in later sections, argue that this thesis' definitions can help explain the legal framework and difficult cases in the debate.

The second issue pertains to a more fundamental issue of the circular reasoning fallacy. This was first identified by Dworkin and Kennedy, stating that: 'property does not exist unless certain rights normally attach to it; but it may not be possible to determine whether those rights are attached to that subject-matter without first determining whether the subject matter is property!'[20] Thus, the question "what is property" is often defined by referring to the rights which arise *because of* property. This thesis, echoing Dworkin and Kennedy, argues that there should be a more fundamental concept—separate and distinct from the *legal* concept of property rights—that can answer this question. Getzler noted that property had two notions. First, a pre-social, natural right expressing the rights of persons which are prior to the state and law and, secondly, as a social, positive right created instrumentally by community, state or law to secure other goals.[21] The first notion of "property" is thus more fundamental than the latter. Defining the more fundamental notion of property is beneficial in combating the circular reasoning fallacy. It is also helpful to consider Beyleveld and Brownsword's two-fold formulation of the issue with defining property.[22] They argued that there are two issues with defining property: the methodological issue questions what the concept of property itself is, whereas the semantic issue questions what A means when A claims P as A's property.[23] Answering the methodological issue before the

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These labels are not used in this thesis as this thesis wishes to approach the discourse without delving into contentious philosophical debates of such.

19 Andrew Grubb. '"I, Me, Mine": Bodies, Parts and Property' (1998) 3 *Medical Law International* 299, 301.

20 Gerald Dworkin and Ian Kennedy, 'Human Tissue: Rights in the Body and Its Parts' (1993) 1 *Medical Law Review* 291, 293.

21 Joshua Getzler, 'Theories of Property and Economic Development' (1996) 26(4) *Journal of Interdisciplinary History* 639.

22 Beyleveld and Brownsword (n 2).

23 ibid 176.

semantic one is imperative to break away from the circular reasoning fallacy as it allows us to examine the concepts from a more rudimentary perspective.

The terminological issue has, to an extent, distracted readers and academics from the essence of the discourse. It is on this basis that Grey has advocated for the abolition of terms such as "property" and "ownership" from the law.[24] However, the debate is more than a mere semantic disagreement as these are also disagreements on the concepts themselves and what they mean. These terms are still valuable as they are entrenched and frequently used in everyday life and the law. The task is thus to elaborate what they mean—at least when we use them—in hopes of increasing clarity surrounding it. This brief discussion on the terminological issue has highlighted the benefits of defining these key terms and, additionally, the importance of finding a sufficiently rudimentary definition to avoid the circular reasoning fallacy. These will be the focus of the rest of the chapter, and this thesis will propose definitions to and uses of these terms which can provide an attractive explanation to the legal framework as well as difficult cases.

Ownership

This section aims to explore the concept of ownership, which acts as the foundation for future discussions on the rights which arise from that relationship. The discussion on ownership will be divided into ownership of the self and ownership of external things. The concept of self-ownership has increasingly become the 'norm', but what exactly does this thesis use the term "ownership" to mean?

First, the concept of ownership itself will be discussed. It will be argued that the term, in a more fundamental sense, should be used to refer to the functional relationship between a person and an object, instead of a more legal view of ownership which refers to the rights arising from ownership. As stated above, this thesis defines ownership to mean rule-preclusionary control, a concept that was seminally advanced by Beyleveld and Brownsword. This thesis argues that self-ownership can be approached from a philosophically neutral perspective which acknowledges the inherent importance of the body. It will then discuss ownership of external things, i.e. things that are outside of the self, which can be justified on the basis of self-ownership. Finally, it will provide a quick summary of ownership before the thesis moves on to the next section which discusses the rights which arise from ownership relationships.

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[24] Thomas C Grey, 'The Disintegration of Property' in JR Pennock and JW Chapman (eds.), *Nomos XXII: Property (Vol 22)* (American Society for Political and Legal Philosophy 1980).

Ownership as a Fundamental Concept

It is imperative that one resolves the more fundamental question discussed above. This asks what *justifies* ownership and property, instead of focussing on what ownership and property means. This thesis argues that, to answer the fundamental question, a distinction must be made between the legal concept of ownership and a more fundamental one, which is the concept of ownership itself. Legal ownership tells us about the rights that a subject has or is entitled to because of an ownership relationship, but the latter concerns the nature of ownership itself. Adopting this distinction acknowledges two things. First, that ownership, as a concept, exists notwithstanding the absence of its legal recognition. The concept of ownership itself is a basis and prerequisite for the legal framework, but they are separate. This is an important distinction because the concept of ownership, inherently, does not tell us anything about how the law protects or treats that relationship.[25]

Second, it acknowledges that there must be a separate, underlying justification for ownership itself. Wall rightly notes that the law's conventional definition of ownership, which relies on the legal concept of ownership, contributes to the circular reasoning fallacy.[26] Drawing this distinction provides a more rudimentary answer for "what is ownership/property", instead of answering those questions with "it is when A have X and Y rights over O." Furthermore, this helps explain other important fundamental concepts and hard and unusual cases in the discourse as we shall later see.

This thesis argues that the concept of ownership, more fundamentally, can be defined as a functional relationship between the subject and the object. More specifically, it agrees with Cohen's statement that a 'functional relationship of use and control'[27] forms the 'fullest right.'[28] This "functional relationship" model has also been adopted by other academics such as Wall. He drew upon the classic "bundle of rights" model, viewing 'each entitlement [as representing] a distinct functional relationship between the person and object.'[29] Further, 'an entitlement in bodily material can be justified on different, sometimes competing, bases.'[30] Although this thesis agrees with Wall's definition of ownership as a functional relationship, it contends that there should be one justification. To Wall, the answer to the methodological issue, i.e. "what justifies ownership", depends on what specific functional relationship is being discussed, e.g. is it the right to use or

25 Wall (n 8) 25.
26 ibid.
27 Wall (n 8) 41.
28 Cohen (n 4) 218.
29 Wall (n 8) 30.
30 ibid 37.

the right to capital? This makes Wall's argument more complicated, and it does not necessarily solve Dworkin and Kennedy's circular reasoning issue either. Based on these findings, this thesis contends that Wall's definition is not sufficiently rudimentary. Instead, a more persuasive definition of ownership is one that provides a singular, overarching justification to answer the methodological question while still satisfying the semantic question of what ownership means.

The element of control forms the commonality between all the "bundle of rights" entitlements, as we will see later, and is uncontroversially regarded as an important and essential factor of ownership. Control, however, can take many forms and some are more basic than others.[31] Rule-preclusionary control grants subject (A) exclusive control over object (O) and precludes A from having to justify what they do with or towards O on a case-by-case basis. Rule-preclusionary control therefore awards A with exclusive control or use, which is consistent with the common and prominent view that ownership is *prima facie* exclusive. The rule-preclusionary conception also shifts the burden of proof: the onus is now on those who want to interfere with A's relationship with O to justify interference, and not on A to justify non-interference. The rule-preclusionary conception, however, views this relationship as 'not absolute but *prima facie* only',[32] and so A's ownership of O can be overridden—but not negated—by other justifications.[33]

The rule-preclusionary conception addresses both methodological and semantic issues raised in the previous section. Let us start with the importance of rule-preclusionary control to one's agency, which answers the methodological issue. Ultimately, it is the most basic control an individual can have as 'my body and body parts are metaphysically related to me, I act through my body.'[34] In its absence, self-ownership would not be possible and, thus, ownership in general and rights arising from it would not be possible either. Beyleveld and Brownsword provided a three-fold justification to the rule-preclusionary conception. Firstly, rule-preclusionary control is implicitly recognised in Art 22 of the Biomedicine Convention.[35] Art. 22 highlights the

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31 As previously stated, Beyleveld and Brownsword first used this concept to define property rights. However, because of how the terms are uses in this thesis (see previous section on the Terminological Issue), the concept will be used as a definition of ownership. Some of the direct quotations taken from Beyleveld and Brownsword containing the terms "property rights" will be replaced with "ownership" to avoid confusion to the readers.

32 Beyleveld and Brownsword (n 2) 186.

33 ibid.

34 ibid.

35 Art 22 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (hereinafter "Biomedicine Convention") relates to the 'Disposal of a removed part of the human body': 'When in the course of an intervention any part of a human body is removed, it may be stored and used for a purpose other than that for which it was removed, only if this is done in conformity with appropriate information and consent procedures.'

importance of a patient's consent and how materials obtained from the patient can only be used in accordance with their consent. This supports exclusive ownership and shifts the burden of proof to the medical practitioner to justify why they want to use A's bodily materials for a different purpose. Secondly, it is justified on the basis that 'if anything at all can stand in such a relation… to me then my body can.'[36] Here, it is highlighted how rule-preclusionary control is proportional to the degree of seriousness of others' claims required to override the A's control. Thirdly, the important role a body plays in a person's agency is consistent with a principle they have used throughout their book, which is Alan Gewirth's Principle of Generic Consistency (PGC). They argued that the PGC is the underlying philosophical principle in bioethics.

Additionally, the exclusive and preclusionary right which follows from this control answers the semantic issue of ownership. The rule-preclusionary conception regards ownership as exclusive and exclusionary. It simply states that the subject, A, is the only one who has ownership over her body and, consequently, others must justify if they want to interfere with her ownership. The rule-preclusionary conception has also attracted support from other academics such as Price, who regarded the conception as 'especially persuasive'[37] in explaining the proprietary nature of the consent, which is the 'fundamental character and the philosophical underpinnings'.[38] Similarly, Pattinson has argued that the rule-preclusionary conception can be used to explain the system of acquisition in the law on the removal, storage and use of bodily materials.[39] Furthermore, the rule-preclusionary conception can also help explain the issue of the transferability of ownership and the rights which arise from ownership. The transferability of ownership helps explain the basis on which transactions over gametes and body parts take place. It is also on this basis that commercialisation of bodily materials can—but *not* must—be permitted under rule-preclusionary ownership.[40] This is a theme that will be explored further in Chapter 4, along with other arguments for the explicit recognition of property rights. For now, however, more will be said on how the concept of ownership applies to the self and external things more generally.

Self-Ownership

Ownership—or rule-preclusionary control—is applicable to the most fundamental form of ownership, which is that of the self. The concept of self-ownership seems to be a given in today's

36 Beyleveld and Brownsword (n 2) 182.
37 ibid.
38 David Price, *Human Tissue in Transplantation and Research: A Model Legal and Ethical Donation Framework* (Cambridge University Press 2014) 232.
39 Pattinson (n 6).
40 Beyleveld and Brownsword (n 2) 194.

modern liberal society though some argue it has been reduced to 'a sort of legal shorthand, a rhetorical device.'[41] Nonetheless, the concept by no means has a clear definition as it has been the subject of contention across numerous disciplines. It is hoped that this section will clarify what this thesis means when it refers to the concept of self-ownership.

This thesis, first and foremost, separates self-ownership into two categories based on the object concerned: ownership of the person, and ownership of extensions of the self. The shorthand "self-ownership" will be used to refer to ownership of the person. On the other hand, ownership of extensions of the self encompasses external things such as separated or excised bodily materials. This classification was made for two reasons. First, because it is important to note that certain external objects are so important to the self that they could be classed as "extensions". This is because the former was, prior to removal, a part of the person. For instance, ownership of gametes that have been removed and stored for the use of future treatment cannot necessarily be synonymised from ownership of chattel, such as a house or a car. The starting presumption for the gametes is ownership, whereas the starting presumption for the house or car is that of non-ownership (it was not until a contract was signed that the rights over the objects were bestowed upon the individual). Further, there are certain objects whose ownership is much more essential and important to our agency and ability to act, such as a pacemaker or a blind man's walking stick. These will be explored further in later sections. Second, drawing this distinction now will help set a solid foundation for this thesis' three-fold distinction of rights arising from ownership. This section will first discuss ownership of the person and move on to explore ownership of separated bodily materials. It will then discuss ownership of external things more generally in the next subchapter.

Ownership of the Person

Discussions on self-ownership are often preceded by philosophical questions on ontology. Consequently, its definition depends on whether you ask a dualist or a materialist. The former argues that the world is physical and resulting from material interactions, whereas the latter recognises a split between the mind and the body. Dualists are particularly challenged by the issue of 'curious reflexivity',[42] i.e. the supposed split between that which owns and that which is owned, more specifically there is the difficulty in pinpointing who owns which part.[43] This is why dualists

41 Naffine (n 1) 194.

42 John Frow, '"Elvis" Fame: The Commodity Form and the Form of the Person' (1995) 7 *Cardozo Studies in Law and Literature* 131, 155.

43 This was highlighted by Naffine (n 1) 202.

argue that recognising self-ownership as 'property-in-self' will inevitably lead to a divided self and a 'dichotomisation of ourselves into subject and object… into mind and body.'[44] Although some see these issues as necessary to the discussion, this thesis does not. Instead, as Cohen argued, the use of the word "self" has a purely reflexive significance and simply means that what owns and what is owned are one and the same.[45] Acknowledging this allows us to consider a more attractive definition of self-ownership, one that is based on a neutral philosophical position and one that has been advocated for: rule-preclusionary control.

Regardless of dualist or materialist views, it is common ground that the body plays an important and unique role in one's existence. Without a body, an individual simply cannot exist let alone act. This is why the 'legal being in modern society is the self-determining, autonomous and self-owning',[46] or, in other words, the 'full individual'.[47] Furthermore, *prima facie* exclusive control over one's own body and the ability to preclude others from interfering that relationship are regarded as axiomatic in the everyday sphere, and are legally treated as fundamental rights. Dan-Cohen argued that the increased usage of pronouns concerning the self reflects the increased importance of self-ownership in the everyday sphere.[48] Individuals justify non-interference simply with the words "it (the object) is mine" or "it is my body", and there is often no need to elaborate on reasons why interference should not be allowed. The former confirms the widespread acceptance of ownership as an exclusionary control, whereas the latter confirms that ownership is the right to preclude others. In the legal sphere, self-ownership is regarded as an inalienable fundamental human right by international instruments such as the European Convention on Human Rights. Particularly important provisions include the right to life (Article 2), the prohibition of slavery and forced labour (Article 4), and the right to liberty and security (Article 5). These are given effect domestically in England and Wales through the Human Rights Act 1998. In medical law, this is evidenced by the consent-based legal framework covering medical treatment and more specific practices such as tissue donation which, in turn, encompasses organs and other bodily materials. This is the case internationally, as reflected in Article 5 of the Biomedicine Convention,[49] as well as domestically, as evidenced via the Human Tissue Act

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44 Margaret Davies, 'Feminist Appropriations: Law, Property and Personality' (1994) 3 *Social and Legal Studies* 365, 380.

45 Cohen (n 4) 110.

46 Naffine (n 1), 193.

47 Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985) 22.

48 Dan-Cohen (n 11) see particularly pp. 12, 27-29, 31.

49 Article 5 of the Biomedicine Convention states: 'An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as

2004.[50] In England and Wales, as we shall see later, increasing consideration has been given to patients' intentions or past will and wishes, especially when it comes to medical treatment and the control of separated bodily materials. This supports the notion that self-ownership is considered important.

However, self-ownership has been—and still is—recognised for some more than others. First, the concept of owning oneself is historically recognised for men but women have always been regarded as men's property. Marriage was—and, in some cultures, still is—a trade between two men for which the bride is the chattel, abortion was initially made unlawful as it was regarded as destruction to the man's property,[51] and, until the 20th century, a husband could not rape his wife as her consent to marriage is taken as her consent to be his property and, consequently, all sexual relations.[52] Although these laws have been altered, the problems of a 'self-possessed man' and a 'woman possessed' still resonates loudly today.[53] In the conjugal sphere, 'it is women who are possessed in the act of sex, and men who take possession.'[54] This 'possessive understanding of sex' is also evidenced by how rape is still a sex-specific offence.[55] Ultimately, women cannot be self-containing individuals so long as a man's personhood is at stake thus forcing them to be containers for men.[56] Nor was self-ownership recognised for people of colour. This is evidenced by the troubling practice of slave owning and slave trading where black people were literal commodities belonging to their white masters. Although the practice is now morally and legally condemned,[57] the problems still persist. The law purports to promote equality but the intricacies and the execution of the law is littered with racial injustice and systemic racism.[58] Similarly,

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well as on its consequences and risks. The person concerned may freely withdraw consent at any time.'

50 See particularly Part I of the Human Tissue Act 2004, specifically ss 2-8 which regulate consent and different types of bodily materials.

51 Roman law regarded abortion as a destruction to property, not to protect the embryo itself. See DS Davies, 'The Law of Abortion and Necessity' (1938) 2(2) *Modern Law Review* 126, 131. For an interesting article on this, see Sally Sheldon, 'The Decriminalisation of Abortion: An Argument for Modernisation' (2016) 36(2) *Oxford Journal of Legal Studies* 334.

52 It was not until the Married Women's Property Act 1882 that married women were recognised as legal persons with ability to own property, and it was not until *R v R* [1992] 1 AC 599 that marital rape was criminalised.

53 Naffine (n 1) 193.

54 ibid 207.

55 ibid 211.

56 Ngaire Naffine, 'The Body Bag' in Ngaire Naffine and RJ Owens (eds.) *Sexing the Subject of Law* (LBC Information Services 1997) 79.

57 International instruments such as the ECHR recognise the rights to life and liberty as fundamental rights (Arts 2 and 5 respectively), and Art 4 explicitly and specifically prohibits slavery and forced labour.

58 For an interesting article on this, see Michael Paulin, 'Racism and the Rule of Law' (*UK Human Rights Blog,* 18 June 2020) <https://ukhumanrightsblog.com/2020/06/18/racism-and-the-rule-of-law/> accessed 10 October 2020.

modern slavery still exists today and black, indigenous and people of colour (BIPOCs), especially women and girls, remain victims of the practice.[59] These are points that will be considered again in Chapter 3 as we examine the relevant jurisprudence.

It could be argued that, perhaps, these injustices and inequalities are exacerbated due to the absence of a fundamental definition of ownership, one that is separate from and more rudimentary than its legal institution. It is hoped that this thesis' definition of ownership will help alleviate this issue. Rule-preclusionary ownership emphasizes the fundamentality and essentiality of ownership over oneself; the existence of rule-preclusionary control over one's body is necessary for one's agency and ability to commit generic acts. This, in turn, also provides a solid foundation and justification to why the law formally treats self-ownership as a fundamental right.

Ownership of Separated Bodily Materials

We have discussed ownership of the person and its essentiality and fundamentality to existence and agency, especially in today's modern liberal society. This thesis, however, further argues that self-ownership is also comprised of external objects that are extensions of the self, i.e. separated or excised bodily materials. These are materials that were once part of the person but have now been separated or excised from the body. This includes blood and other tissues such as organs, gametes, bodily waste, and hair and nails once they are extracted from the body. This could also cover the individual's genetic materials. The literature on ownership over separated bodily materials and genetic materials is vast and interdisciplinary, and this thesis does not purport to provide an extensive overview of this discourse. Instead, the classification of "extensions of the self" was made to acknowledge that some objects are more that of the "self" than others. There are two distinctive characteristics of "extensions of the self". First, these materials are traceable back to the source or the individual. Secondly, the starting presumption for excised bodily materials it that of ownership or rule-preclusionary control. All of the materials mentioned were initially a part of the person and, as we have discussed in the previous section, they are subject to A's rule-preclusionary control by virtue of self-ownership.

Creating this classification and acknowledging these characteristics will be beneficial in the next chapter where the relevant jurisprudence on ownership of separated bodily materials will be discussed. These cases have been the subject of contention among academics, as they struggle to unravel how separation creates ownership. How is it that B suddenly, as if by magic, has rights

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[59] For statistics on this, see International Labour Organisation, Global Estimates of Modern Slavery (2017) <https://www.ilo.org/global/publications/books/WCMS_575479/lang--en/index.htm> accessed 19 September 2020.

over his semen once it is extracted and stored in a fertility unit?[60] However, how is C not regarded as owning his cells which were derived from his spleen?[61] This thesis argues two things. First, that ownership of these separated materials was not created from nothing as the starting presumption was already ownership. Secondly, that the differentiating factor between A and B is intention. Let us consider the case of B. B owns (has rule-preclusionary control over) his semen and sperm when it is inside his person, based on the thesis of self-ownership previously explored. In one instance, after sexual intercourse, B ejaculated into a condom which he then discarded and disposed of. In another instance, B went to a fertility unit and his semen was removed and stored for the purposes of future treatment. The second argument of this thesis argues that the focus in these two scenarios is B's intention. In the first scenario, disposal of his semen is often labelled as abandonment. However, this thesis contends that B *intended* for the semen to never be used again. In A's case, it was decided that A's spleen had been classed as waste which, consequently, made it common property.[62] Although this will be discussed in further detail in Chapter 3, it must be noted that abandonment is often—rightly—regarded as a relinquishing of one's ownership over an object.

However, in this case, B's disposal of the sperm is not abandonment. Rather, B intended that his semen should not be used by him, his partner, or anyone else. This seems like the logical argument: if A had taken B's semen from a used condom to impregnate herself, then B would feel that he had been wronged. This, however, seems to contradict a 2005 ruling from a three-judge panel in Chicago.[63] The plaintiff, Phillips, alleged his ex-partner, Irons, of storing his semen following oral sex and using it to impregnate herself. A three-panel judge ruled that Phillips' claim of theft could not succeed as he had gifted his semen to Irons, and it was "an absolute and irrevocable transfer of title to property from a donor to a donee… [t]here was no agreement that the original deposit would be returned upon request."[64] Though Phillips also claimed wrongful birth and emphasised the distress the incident has caused him, his case was unsuccessful. The argument proposed by this thesis seems irreconcilable with the case, but the latter concerned oral sex whereas, in B's scenario, his semen was stored and discarded in a used condom. An important feature to recognise, which will be discussed later, is that the judge referred to Phillips' semen as

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60 This is a simplification of *Yearworth v North Bristol NHS Trust* [2009] EWCA Civ 37 [2010] QB 1, which will be explored in greater detail in Chapter 3.

61 This is a simplification of the facts of *Moore v Regents of the University of California* 51 Cal. 3d 120, which will be explored in greater detail in Chapter 3.

62 Waldby and Mitchell (n 18), see particularly pp 89, 96-98.

63 Associated Press, 'Sperm: The "gift" that keeps on giving' (*NBS News*, 24 February 2005) <http://www.nbcnews.com/id/7024930/ns/health-sexual_health/t/sperm-gift-keeps-giving/#.XwRY9yhKhnI> accessed 3 March 2020.

64 ibid.

"property". In the second scenario, B's consent for removal and storage was for his own future use. If B's semen was then used for C's treatment or if the semen was not stored and kept properly and left to thaw, then the fertility unit is in the wrong.[65]

The legal implications of these scenarios and Phillips' case will be discussed in further detail in Chapter 3 but, for now, it is important to note that the definition of ownership and self-ownership advanced by this thesis regards the source's intention as an important consideration, even when it is over their separated bodily materials.

Ownership of External Things

Thus far, we have discussed the definition of ownership as a fundamental concept and how it is applicable to self-ownership, which is broken down into ownership of the person and ownership of separated bodily materials. However, to what extent does rule-preclusionary ownership apply to completely external things that do not stem from the person at all? This section will first discuss how, as a general rule, rule-preclusionary ownership cannot be applicable to these external things. However, some objects, which this thesis identifies as bodily auxiliaries, can be subject to rule-preclusionary ownership. This thus lays the foundations for the rights which arise from ownership relationships, which we will discuss in the next section.

First, it is important to note that ownership of external thing stems, first and foremost, from self-ownership.[66] Locke viewed the ownership of external things and objects to expand our sense of self and for our flourishment. This, consistent with what we have discussed in the previous section, highlights the importance of self-ownership as it forms the basis for ownership in a more general sense. This is certainly true for ownership of a plot of land, a house, or other material things. Although agreeing with Locke, this thesis recognises that some objects are closer to the self than others.

External Objects

As a general rule, external objects which do not originate from the person will fall outside the scope of rule-preclusionary ownership. This is due to two reasons. First, because the starting presumption of these external objects is non-ownership. This means that it is not until something is done or a contract is signed, that the object becomes subject to A's rule preclusionary control. An example of this is a house or a car: D does not own house O until a certain point of conveyance

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65 For more on this, see Sally Sheldon, 'Sperm Bandits', Birth Control Fraud and the Battle of the Sexes' (2001) 21(3) *Legal Studies* 460.

66 This is the view advanced by Locke in John Locke, *Second Treatise of Government* (CB Macpherson ed,, Hackett Publishing 1980).

which then transfers the ownership of house O from E, the previous owner, to her. This thus makes her the freeholder of the house and the land it is built on. Although E's ownership over house O passes absolutely (i.e. D still owns the house even after the contract is signed and completed), ownership was bestowed by the contract and conveyancing to D. In other words, *but for* the contract, D would not have owned house O. This could be distinguished from ownership of the self which we have previously discussed. In such cases, A had already intrinsically owned the object, which is her body and/or her bodily materials. Other contractual rights would also fall outside the remit of rule-preclusionary ownership by the same reasoning. One would think that, with this distinction, all external objects would be excluded from the remit of rule-preclusionary control. However, we shall see that this is not the case as we explore a specific category of external objects termed bodily auxiliaries.

The Exception: Bodily Auxiliaries

All external objects start with the presumption of non-ownership. However, this thesis recognises that some are more essential to own than others as they contribute more to the agency and generic rights of the agent A. Further, there are certain objects that, once owned, will always be part of the individual. This thesis uses the umbrella term "bodily auxiliaries" to describe such objects. The term was first advanced by French philosopher Maurice Merleau-Ponty in his book *The Phenomenology of Perception.*[67] He gave the example of a blind person who is learning to find their way with a walking stick. 'Once the stick has become a familiar instrument, the world of feelable things recedes and now begins, not at the outer skin of the hand, but at the end of the stick'.[68] At this point, the walking stick thus becomes a bodily auxiliary. Wall adopted Merleau-Ponty's argument and, like Merleau-Ponty, focussed on the impact of the bodily auxiliary on an individual's perception. However, it is unclear how far their definition of bodily auxiliaries goes: would a pair of glasses, contact lenses or hearing aids fall under their definition of bodily auxiliaries? According to Merleau-Ponty's definition, they will be classed as bodily auxiliaries as they aid one's perception. However, this has not been explicitly clarified by Merleau-Ponty. More crucially to this thesis, however, it is unclear whether their notion of bodily auxiliary would cover external objects that are put *inside* the body and does not necessarily have a direct impact on one's perception. Nonetheless, these objects may become essential to one's existence and can significantly improve their lives. Would A's pacemaker or B's prosthetic hip joint be encompassed by this term? What about when C receives a kidney transplant from D?

67 Merleau-Ponty (n 5) 176.
68 ibid.

This thesis wishes to adopt and expand Merleau-Ponty's term "bodily auxiliaries" so it may encompass other external objects that are separate and distinct from the person for which the starting presumption is not rule-preclusionary ownership. A has no ownership over a pacemaker until a heart surgery is performed and it is fitted into her. B did not own her artificial hip until a hip replacement was performed. Similarly, D had rule-preclusionary ownership over her kidney but, upon the transplant, it is now C who has sole ownership over it. These examples have several things in common with Merleau-Ponty's original definition of bodily auxiliaries. First, the objects concerned were all external and separate from one's body. Secondly, because none of them originated from the person, the starting presumption is that of non-ownership, i.e. no rule-preclusionary control. It is through embodiment, either by usage or incorporation into the body, that they become subject to rule-preclusionary ownership. Merleau-Ponty's original term of "bodily auxiliaries", however, only encompasses objects that would directly affect one's perception. The examples given by this thesis do not influence perception but still provide additional support to the individuals and, in some cases, are indispensable to one's life and agency. Thus, this thesis proposes a broadening of the term. The pacemaker significantly reduces the chances of A dying from a cardiac arrest, B can move much more freely because of her artificial hip, and C's quality of life and life expectancy have significantly increased due to the kidney transplant. They are all important to A, B, and C just as a walking stick is to a blind person. It is on these bases that these completely external objects (both actual objects and organs) can become subject to rule-preclusionary ownership.

To summarise, external objects are excluded from the scope of rule-preclusionary ownership because their starting presumption are non-ownership. Some external objects can, however, fall into the category of "bodily auxiliaries" if they have been embodied into the self, either by usage or incorporation into the body, and thus have been made subject to A's rule-preclusionary ownership.

Rights Arising from Ownership

The fundamental concepts that have been discussed so far will not be of much use unless they bestow rights to the individual. These rights are the mechanisms by which the law recognises and protects ownership relationships. Consequently, this thesis uses the term "rights" to mean a legal, rather than a philosophical or fundamental, concept. This thesis adopts Pattinson's three-fold distinction of rights.[69] First, rights can be distinguished into two: ownership and non-ownership rights. The key distinctions between them are the starting presumption of these rights, their

[69] Pattinson (n 6).

enforceability or exigibility and the object concerned. This third distinction builds on from the previous section on the different types of external objects. Ownership rights can then be further divided into two: bodily and property. The main differences between these two are the type of control they bestow to A and the object in question. It is hoped that a further discussion on these rights provide an answer to Beyleveld and Brownsword's semantic problem, i.e. what A means when they say they have ownership rights over O. In summary, there are three categories of rights which will be explored in this section: bodily, property, and non-ownership rights. Although the distinction between them will be discussed, this thesis will only focus on ownership rights (i.e. bodily and property rights) as these are the ones that pertain to the body and bodily materials.

Ownership vs Non-Ownership Rights

First, rights arising from ownership relationships can be broadly distinguished into two: those arising from ownership (termed "ownership rights") and those that do not ("non-ownership rights"). Ownership—or, as this thesis defines it, rule-preclusionary control—starts with the presumption that there is rule-preclusionary control exercised by subject A over O. A starting presumption of ownership or rule-preclusionary control means that A has *prima facie* exclusionary right over O and is precluded from having to justify non-interference on a case-by-case basis. As previously argued, it is justified on the basis of its necessity to agency and the fundamentality of rule-preclusionary control. More specific examples of this will be given in the later section when ownership rights are discussed in further detail.

On the other hand, non-ownership rights are those that arise from scenarios in which the starting presumption is non-ownership or no rule-preclusionary control. An example of this is contractual rights. A wants to buy house X, so she signs a contract with B, the seller, in exchange for money. It is true that A now has the rights to the house, but these rights have been bestowed *by* the contract that she signed. Prior to the contract, she did not have control over the house—B did. It is important to highlight this distinction as not all rights stem from rule-preclusionary ownership. Consequently, it can be said that objects that are of the person or are related to the person will *always* fall under the remit of ownership rights. This is because any person will always have rule-preclusionary control over their bodies. This is the starting point of self-ownership which we have explored above. This is justified on the basis that the body plays a crucial and essential role in one's existence and ability to act. Ownership rights thus encompasses the person and her separated bodily materials (i.e. this thesis' definition of "self-ownership") as well as bodily auxiliaries. It, however, does not encompass ownership of other external things. This distinction in rights mirrors the previously discussed classification of self-ownership and ownership of external things.

The second distinction between ownership and non-ownership rights is who the right is enforceable or exigible against. Ownership rights are always exigible against the world, whereas some non-ownership rights are only enforceable against the person who is bound by the contract. However, some non-ownership rights, such as over a plot of land or a house, are also enforceable against the world. This is why exigibility alone cannot distinguish ownership and non-ownership rights, and why the starting presumption of the rights, as covered above, provides the most important distinction. Due to the scope and aims of this thesis, further discussions of these rights will focus on ownership rights, as these are the rights that are applicable to the body and separated bodily materials.

Bodily and Proprietary Ownership

Ownership rights can be further classified into two categories: bodily and property rights. Both bodily and property rights, stemming from ownership rights, have the starting presumption of ownership and they are enforceable against the world. Although both bodily and property rights have these two characteristics in common, they are differentiated with regards to the object concerned. Bodily rights are concerned with the body or the person themselves whereas property rights encompass bodily materials that have been excised and separated from the body and bodily auxiliaries. Each of these types of ownership rights will now be further explored.

Bodily rights, at the very essence, concern rights over one's person. These rights are more commonly known as "personal rights" which forms the basis of rights to bodily integrity, for instance. This thesis prefers the shorthand "bodily rights" as it finds the label "personal rights" potentially confusing to the readers. This is because the term is also used to refer to rights that are not held against the world. The term is also used to refer to rights that are non-body, such as those that would fall within the wider remit of "non-ownership rights", such as a personal right to repairs held by A, a tenant, against B, her landlord. This thesis argues that bodily rights forms the basis to the right to bodily integrity which, in turn, forms the basis for offences such as assault or battery and consent more widely, as seen in the "private" (e.g. sexual intercourse) as well as the "public" (e.g. medical treatment). The *prima facie* rule is that a second or third party must not interfere with A's person (bodily rights) *unless* she gives her consent. This is why a medical practitioner will not be committing battery if she obtained the patient's consent prior to a specific medical examination or procedure. This is consistent with the rule-preclusionary conception of ownership. Just as an individual has the right to preclude others from interfering with their ownership, they also have the right to permit others. In the next chapter, we will further see how bodily rights operate in practice and how it forms the foundations for a consent-based legal framework in medicine. Another key feature of bodily rights which differentiates it from property rights is that

of negative control. A, an adult patient, has the right to refuse medical treatment but she cannot rely on her bodily rights to force a medical practitioner to perform a certain treatment. This is evidenced in *Burke*.[70] Although this is rarely a problem in practice (since there will almost always be another medical practitioner willing to treat the patient), it shows the limits of bodily rights.

On the other hand, property rights are applicable to objects that are separated or excised from the body. These rights are justified on the basis of ownership of extensions of the self, i.e. separated bodily materials and ownership of bodily auxiliaries, as we have discussed in the previous chapter. This was also proposed by Grubb who argued that recognising any control over a separated bodily material is an exercise of property rights.[71] It must be noted that property rights with regards to these objects are different from non-ownership property rights, which do not have the starting presumption of rule-preclusionary control. Property rights goes a step further than bodily rights as they bestow the individual with both negative and positive control over subsequent use of their materials. This, however, does not necessarily mean that A has 'sole and despotic dominion'[72] over the objects as public policy restrictions may limit the exercise of these rights. Thus far, this thesis' classification of bodily and property rights complies with Beyleveld and Brownsword's work, but there is one minute point where it diverges, purely because this thesis use key terms differently. They argued that bodily rights can apply to separated bodily materials so long as it is negative control. They used the example of a Roman Catholic woman's ability to prevent certain uses of her separated ovarian tissue if it is against her good conscience or religious beliefs. However, due to the different definitions used by this thesis, the woman is exercising her property rights—not her bodily rights—over her tissue. Although her objection is on the basis of her personal beliefs and her 'right to *personal* integrity',[73] the tissue had been separated from her and thus is encompassed by property rights. This shows that property rights are not always impersonal in nature and that it is beneficial to view property rights from the object concerned.

This section has covered the classification of rights which arise from ownership. This includes non-ownership rights and ownership rights, which can be further divided into bodily and proprietary rights. Although the key characteristics of bodily and proprietary rights have been explored, the semantic question of property has been the subject of long-standing debate. What

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70 *R (on the application of Burke) v General Medical Council* [2005] EWCA Civ 1003 [2006] QB 273.

71 Grubb (n 19) 299.

72 William Blackstone, *Commentaries on the Laws of England in Four Books* (G Sharswood ed, 1893 [1763]) which defined property as 'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.' (2).

73 Beyleveld and Brownsword (n 2) 177 (emphasis in original).

do property rights mean in practice? This will be discussed in further detail in the next and final section of this chapter.

Property Rights

The term "property rights" is an essential one to the debate on how one's body and bodily materials should be regulated but defining the term "property rights" itself is not an easy task. We have already seen in the previous section that property rights are applicable to separated bodily materials as well as bodily auxiliaries. But what exactly does A mean when A says she has property rights over her excised tissue? The term will now be evaluated and unpacked. This section ultimately sets out to answer the semantic problem of property. The views on the term "property" are so diverse that Grubb rightly remarked that there is 'no definitive catalogue which can be drawn up but one might offer the following as plausible categories of rules describing the 'thing-person' relationship.'[74] The incorrectly-held belief that there is such a definition has perhaps contributed to why the 'law of the body is currently in a state of confusion and chaos.'[75] Nonetheless, it is still important to attempt to define the term as it will lead to increased clarity in further discussions. The aim of this section is to first explore different definitions of property rights and then to clearly set out what this thesis means when it uses the term "property rights".

This section will first start by exploring the problems and complexities of property rights which have contributed to the confusion and obscurity in the discourse. It will then explore several key conceptions of property rights which have been advanced throughout the years. The literature on the conceptions of property is rich, thus it must be clarified that this chapter does not purport to provide a comprehensive view on all conceptions of property that have been argued. Such a task exceeds the scope and goals of this thesis. Instead, some of these conceptions will be explored in hopes of identifying some key characteristics which will give an indication as to some agreed or commonly held positions about what "property rights" are. The conceptions that will be explored are those that have been more prominently advanced and specifically applied to this discourse. These include long-standing theories such as the Lockean-Nozick labour theory as well as the prominent "bundle of rights" conception most famously advanced by AM Honoré. This section will then move on to establish what this thesis means when the term "property rights" is used which will set the foundation for the substance of the upcoming chapters. This thesis defines "property rights" as a form of legal recognition of ownership which aligns with the long-standing theories, particularly the bundle of rights conception. Finally, this thesis will highlight the benefits

74 Grubb (n 19) 301.

75 Radhika Rao, 'Property, Privacy and the Human Body' (2000) 80 *Boston University Law Review* 359.

of using the bundle of rights to answer *only* the semantic problem of property but relies on the more fundamental philosophical concepts to justify the existence of property rights.

The Problems of Property

Conversations on whether property rights should be recognised for bodily materials has somewhat been 'clouded by emotive reactions'[76] as it concerns the sensitive area of life, death, and bodily materials. The public often regard the recognition of property rights over the body and bodily materials as synonymous to encouraging the commercialisation of bodily materials. There is also widespread hesitance from discussing this issue because the practice itself is seen as *eo ipso* wrongful. It must thus first be clarified that, although a discussion on commercialisation or trade of bodily materials *does* presuppose the recognition of property rights, it is not the other way around: a discussion on property rights over bodily materials does not require a discussion on commercialisation. Although it *may* be used to argue for commercialisation, which will be the subject of Chapter 4, it is entirely possible to recognise property rights whilst acknowledging the importance of restrictions on one's ability to sell certain objects. This is an important albeit trivial clarification, as it seems that this specific objection has hindered much-needed discussions on this issue.

Another prominent issue with regards to recognising property rights over bodily materials is the different approaches taken by academics. Some academics have used more general conceptions of property and applied them to bodily materials whereas some academics are of the view that body-specific conceptions are required. Although body-specific conceptions are appealing as they bestow a rightly regarded special status upon the body, there is worry that it will cause this regime to operate separately and distinctly from a general regime of property. This thesis argues that the main goal here is not to find a conception of property rights specific to bodily materials that are unworkable for other external objects. Instead, the aim is to ensure that the proposed framework of property rights is workable within the larger sphere of property rights. Although, this does not necessarily mean that we must treat the body and bodily materials just like we treat other everyday objects. Instead, perhaps it could be an expansion of our general conception of property. This has previously been done by the law with regards to the recognition of intellectual property rights. Instead of devising a proprietary regime specific to IP rights, the definition of 'property' was expanded to include intangible rights.

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[76] Dworkin and Kennedy (n 20) 291.

Conceptions of Property

This section explores some of the most prominent conceptions of property. As there are perhaps hundreds or even thousands of different conceptions of property rights, not all of them can be covered by this thesis. Instead, this thesis will only discuss specific conceptions of property rights which have been the most notable and prominent in the discourse and the more general legal sphere. This section will provide an overview of each theory of property and discuss its application to the body and bodily materials. It will then proceed to explore its advantages as well as the criticisms against it.

First Occupancy Theory

The first theory of property to consider is the first occupancy theory. The conception allows *res nullius* objects (belonging to no one) to be brought into A's dominion if A is the first person to take or occupy it. This conception was derived from the Roman principle of *occupation* which states that ownership is justified by an intent to own. However, it is slightly different from the first occupancy theory where intention, in and of itself, is not a requirement.[77] It is thus possible for A to accidentally or unintentionally have property rights over O so long as she is the first person to take O. The first occupancy theory was included in the Nuffield Council on Bioethics' 1995 press release on issues regarding human tissue, as they drew the analogy of ownership over bodily materials to the taking in of a wild animal or plant.[78] Tettenborn[79] argued that the first occupancy theory is reflected in the seminal case of *R v Kelly*.[80] The extent to which this is true will be discussed in Chapter 3. There is, however, some indication that the Court of Appeal has relied on the first occupancy theory in *Re Organ Retention Group*[81] as, concerning *Doodeward v Spence*,[82] Gage J remarked that 'the pathologists became entitled to possess the organs, the blocks and slides until a better right is asserted.'[83] Grubb noted that relying on the first occupancy theory leaves a number of questions unanswered: does the source thus have natural property rights as a result of a first claim? Or do the rights go to the remover? How would this change if the object concerned is a gift or a subject to abandonment? Furthermore, although the first occupancy theory

77 Hardcastle (n 14) 130.

78 Nuffield Council on Bioethics, Press Release: 'Human Tissue: Ethical and Legal Issues' (1995) <http://nuffieldbioethics.org/wp-content/uploads/2014/07/Human-tissue.pdf> accessed on 14 October 2019, [9.11]

79 Andrew Tettenborn, 'Wrongful Interference with Goods' in AM Dugdale (ed.), *Clerk & Lindsell on Torts* (19th edn, Sweet and Maxwell 2006) 1024.

80 *R v Kelly and Lindsay* [1999] QB 621 [1999] 2 WLR 384.

81 *In Re Organ Retention Group Litigation* [2005] QB 506, sub nom *AB and others v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

82 *Doodeward v Spence* [1908] 6 CLR 406.

83 *Re Organ Retention Group Litigation* (n 81) [156].

answers the methodological question of what justifies having property rights, it leaves the semantic question of what it means to have property rights untouched. More generally, it seems that property law more generally has shifted away from the first occupancy theory due to these limits.

Lockean-Nozick Labour Theory

The labour theory of property is perhaps the second-most prominent conception of property rights. The theory was famously advanced by one of the main figures in the philosophy of private property, John Locke. He argued that ownership arises when there is a mixing of labour with nature. In *Two Treatises of Government,* Locke contended that the 'labour of his body and the work of his hands… are properly his.'[84] This conception of property was built upon the concept of self-ownership. Locke, who believed 'every man has a property in his own person',[85] thought that it is only reasonable that we would also own the fruits of our labour. Furthermore, Locke viewed the ownership of external things as an extension of self-ownership: if A does not own all of herself, then she cannot own anything at all. A's self-ownership is thus a prerequisite to her owning anything. The Lockean idea of ownership is one that is exclusive, i.e. A can exclude others from interfering with his property and property rights unless, of course, the owner gives such permission. Locke's work has been greatly supported and expanded by Robert Nozick who is described as 'the most celebrated Lockean apologist of our day'.[86] Nozick also argued in favour of self-ownership and property rights as natural rights.[87] He built upon Locke's thesis of labour theory but more specifically argued that property rights are freedom rights and, thus, one should have liberal control of her private property. He used this to argue against redistributive wealth which opposes the 'classical liberal notion of self-ownership.'[88]

In the medico-legal sphere, the Lockean-Nozick theory has been directly applied to cases concerning the ownership of separated bodily materials. In England and Wales, this application first became evident in *R v Kelly*, a key case which we will extensively explore in Chapter 3. In *Kelly,* the Court of Appeal recognised that separated bodily materials could acquire a proprietary nature following the application of work and skill, making a clear reference to the Lockean-Nozick labour theory of property. Thus, the Court bestowed property rights over the body parts to the labourers. This exception has then since been codified in s 32(9)(c) of the Human Tissue

84 Locke (n 66).
85 ibid.
86 Harris (n 17) 69.
87 Robert Nozick, *Anarchy, State and Utopia* (Basic Books 1974), see particularly chapter 7.
88 ibid 174.

Act 2004. The provision states that materials that have been subject to the application of human skill is excluded from the prohibition of commercial dealings. There are also several adaptations to the labour theory. Harris, for instance, used the work of Locke and Mill to create the 'creation-without-wrong-argument.'[89] Hardcastle has also proposed a reliance on the specification doctrine, which is an original mode of acquisition of ownership derived from Roman law which concerns the creation of ownership over something that was *res nullius.* [90] Like the labour theory, it bestows a proprietary nature upon the application of work and skill. However, it requires the labour to produce a new object. The focus on output, as Barker contends, recognises labour's unique ability to create added value.[91]

The long-standing Lockean-Nozick labour conception gives a clear and straightforward answer to how ownership arises and allows it to simply be traced back to the labourer. However, its simplicity may also mean that the theory may lack nuance on how to deal with the complexity of ownership in practice, which can be amplified when the object is the body or a bodily material. Consider the scenario of a living organ transplant. After a surgical procedure to remove A's kidney, would the surgeon then have ownership over it? What about when the kidney is removed from A and transplanted into B? Can B own the kidney despite not having exercised any work or skill? There is no simple answer.[92] Secondly, there are remaining questions on the extent to which labour itself is a good measure. Nozick himself had reservations about Locke's idea that the mere mixing of labour with nature would be sufficient to create property rights as not all labour adds value.[93] Would *any* labour be sufficient to bestow a proprietary nature to the object in question? Even if the answer is in the affirmative, it seems unfair to disregard the differences in labour: can we hold the work and skill put into creating an entirely different object as equivalent to the work and skill put into preservation or storage? Furthermore, as criticised by Coval and others, labour theory of property can be seen as excessively focusing on action while neglecting intention and/or consequence.[94] Others such as Lorenne Clark have been more critical of the patriarchal origins of Locke's labour theory as 'one of Locke's major objectives was to provide the theoretical basis for

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89 Harris (n 17) 73.

90 This is to be contrasted from a derivative mode of acquisition such as succession, which looks at ways whereby property rights and ownership can transfer from one owner to another. See Hardcastle (n 14) particularly chapter 2.

91 ibid.

92 These questions were also considered by Grubb (n 19) who specifically argued that some dispositional liberties must be created to resolve the issue of transfer of property rights to others.

93 Nozick (n 87) asked this question with the tomato juice analogy: if he poured a can of radioactive tomato juice in the ocean, does he now therefore own the ocean, or has he wasted a can of tomato juice?

94 Simon Coval and JC Smith, 'The foundations of property and property law' (1986) 45(3) *Cambridge Law Journal* 457.

the absolute right of the male to pass property to his rightful heirs.'[95] Finally, as with the first occupancy theory, Lockean-Nozick's labour theory answers the methodological question of what justifies property rights but does not answer the question on what it means to have property rights.

Bundle of Rights Theory

The most prominent conception of property in Anglo-American and Western European private law is the "bundle of rights" or "bundle of sticks" conception of property rights. Here, property rights are treated bundles of legal relationships between A and O. These legal relationships may vary from case to case, depending on who A is and what O is. The concept was proposed based on Hohfeld's seminal analytical framework of rights which structured ownership and property rights into claim-right, privilege, power and immunity.[96] The term 'bundle of rights' could be traced back to Lewis in 1888 and Sidgwick in 1891 but the most prominent proponent of this conception remains AM (Tony) Honoré who formulated the so-called 'incidents of ownership'.[97] Honoré's bundle consisted of eleven elements: the right to possess, right to use, right to manage, right to income, right to the capital, right to security, incident of transmissibility, incident of absence of term, duty to prevent harm, liability to execution and the incident of residuarity.[98] Honoré's formulation is applicable to private and tangible properties such as chattel or land and, as property is conventionally regarded as encompassing real and tangible objects, it is not a surprise that Honoré's theory is greatly favoured. The bundle of rights formulation has also made fundamental principles of trusts or land much easier to understand, as it acknowledges the possibility that multiple people can have different property rights over the same object at the same time. Academics such as Quigley has taken Honoré's bundle of rights theory and expanded on each of them, particularly on how they would be applied to bodily materials.[99] Quigley specifically chose Honoré's theory as it 'is better and complete in and of itself, and its Wittgensteinian heritage makes it an open, adaptable and meaningful tool.'[100] Bjorkman and Hansson have also adapted Honoré's bundle of rights and proposed the adoption of five principles

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95 Lorenne Clark, 'Women and John Locke; or, Who Owns the Apples in the Garden of Eden?' (1977) 7 *Canadian Journal of Philosophy* 699, 699.

96 Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Campbell and Thomas eds., Ashgate Publishing 2001 (1919)).

97 Honoré's formulation utilises the term "ownership" as an umbrella term to encompass these eleven rights. This thesis will maintain the use of this term for consistency with Honoré's formulation. However, as previously explained, these actually mean "property rights" as these are the rights that are a result—and not indicative—of ownership. See Honoré (n 9).

98 Honoré (n 9).

99 Muireann Quigley, 'Property and the body: Applying Honoré' (2007) 33 *Journal of Med Ethics* 631.

100 Ibid 634.

of bodily rights[101] which can 'be used to guide a decision on which of [the individual rights] should be included in an appropriate bundle of rights for the type of material in question.'[102] Although Quigley and Björkman and Hansson have attempted to show a more specific bundle of rights applicable to the body, their formulations seem to distract from the actual bundle itself. It generates confusion and further questions on what exactly is meant by each principle of bodily rights.

Honoré's bundle of rights conception is well-established and familiar to the more general legal sphere. The theory also allows for flexibility, malleability, and adaptation to specific situations and objects. This makes it a good candidate to be used with regards to bodily materials. However, there are still several aspects of the concept that are unclear. First, it is unclear whether there is a hierarchy of rights in the bundle. For instance, would the right to possess be regarded as superior to the right to income or capital? Ultimately, what is regarded as the "more superior" or "more important" right is relative and would depend on what the object is and what right the subject regards as more important. Secondly, it is unclear whether there exists a dichotomy of core and peripheral rights. The bundle of rights recognises some rights that would logically be regarded as a fundamental right, such as the right to exclude others from interfering with your person. However, it also includes other rights such as the right to income and capital. Are these rights thus equal or can one be held to be more fundamental? If they are equal in standing, on what basis do we explain the recognition of one but not the other? Thirdly, the threshold for ownership that must be satisfied is unclear. As there are eleven incidents of ownership, only fulfilment of all of them would constitute 'full-blooded ownership.'[103] This is a relatively high threshold. Although this does not pose a problem for tangible properties, it might be an issue when applied to bodily materials as not all of these rights could be directly applied to all types of tissues.

The most significant problem, however, is that this theory provides a strong answer to the semantic problem of property, i.e. what having property rights entails, but not to the

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101 '(1) No material may be taken from a person's body without that person's informed consent. (2) Under conditions of informed consent, removal of bodily material is allowed as a means to obtain significant therapeutic advantages for the person herself. (3) Under conditions of informed consent, removal of bodily material is allowed as a means to obtain significant therapeutic advantages for one or more other persons, provided that the removal does not cause serious or disproportionate harm to the person from whom the material is taken. (4) If there is a significant risk that a certain practice in dealing with a biological material will result in exploitation of human beings, then that practice should either be disallowed or modified so that the exploitation is brought to an end. (5) The system of legal rights should promote the efficient distribution of biological material for therapeutic purposes to patients according to their medical needs.' Björkman and Hansson (n 15).

102 Björkman and Hansson (n 15) 212.

103 Harris (n 17) 59.

methodological question of property, i.e. what the justification for property rights is. If one were to ask "why does A have property rights over O?" then the answer these bundle theorists would give might be, "because O is subject to these rights by A" or "because A has these rights over O" but this unfortunately leads to the circular reasoning fallacy as described by Dworkin and Kennedy.[104] Thus, it seems that the use of the 'bundle of rights' theory would have to be coupled with another more fundamental conception that answers the methodological question. As we shall see in Chapter 3, the law initially relied on the labour theory to justify why some rights in the bundle could arise over bodily materials. However, it seems that there has been a shift away from the Lockean-Nozick labour conception. This will be further discussed in Chapter 3.

Property Rights as the Legal Recognition of Ownership

After a brief exploration of the three popular conceptions of property rights and their modifications or adaptations, an analysis could be inferred by how academics view the term property rights. Referring back to Beyleveld and Brownsword's terminology, one could draw a distinction between methodological and semantic conceptions. Methodological conceptions focus on justifying the creation or existence of property rights in the first instance. This would include the first occupancy theory and the Lockean-Nozick labour theory. On the other hand, semantic conceptions focus on what the implications of having property rights are or, in other words, what one can do with one's property. This would include the bundle of rights theory and its numerous adaptations.

Drawing this distinction allows us to avoid the circular reasoning fallacy which results from sole reliance on a semantic conception of property. Recognising this difference also permits flexibility, as multiple conceptions of property can now be used concurrently. For instance, one might choose to rely on the Lockean-Nozick labour theory to justify the creation of property rights but refer to Honoré's bundle of rights when pinpointing what those rights are. As we will see further in Chapter 3, this is what the law has previously done with regards to bodily materials. This thesis, however, takes a different approach because it has defined the key terms in a slightly different manner at the start of this chapter. This thesis defines the term "property rights" solely in a semantic way. This is because, as clarified earlier on in the chapter, the terms "self-ownership" and "ownership" is used as a justification to why one might have property rights over their bodily materials. Ownership creates a series of rights which can be personal and proprietary. This is to be distinguished from non-ownership rights, i.e. rights not arising from ownership. Self-ownership and ownership are, in turn, justified on the basis that ownership of one's own body and

[104] See Dworkin and Kennedy (n 20) above and surrounding text.

bodily materials is necessary for agency and the exercise of generic rights. Thus, the term "property rights" merely refers to the legal recognition of one's ownership rights. Thus far, only the bundle of rights theory provides a comprehensive and persuasive answer to this question. Therefore, this thesis has adopted Honoré's bundle of rights theory as a conception of property rights to be used alongside its formulation of ownership as rule-preclusionary control.

There are still, however, several clarifications to be made on the relationship between the rule-preclusionary conception of ownership and the bundle of rights theory of property rights. Firstly, the fact that the law has not explicitly recognised some of the rights in the bundle does not mean that A has no rule-preclusionary ownership over O. The former is more fundamental than the latter in the sense that recognising property rights requires ownership, but the existence of ownership does not require the legal recognition of rights from the bundle. Secondly, this distinction permits us to accurately consider property rights as a spectrum while still being able to view ownership as a binary. Harris noted that it is more beneficial to perceive property rights as a spectrum and not a binary: one's property rights over a certain object could range anywhere between 'mere property' and 'full blooded ownership.'[105] Munzer was also of this view, as he further divided property rights into weak and strong property rights.[106] On one end of the spectrum, no right is legally recognised but, on the other end, as Munzer argued, transfer of value is acknowledged and commercial property rights thus forms the strongest property right.[107] Even with regards to real and tangible properties, it is rare that the law gives us 'sole and despotic dominion'[108] over an object as there are often restrictions in place for policy reasons or to regulate the increasing complexity of property rights. Consider A's property rights over a house. A, as its legal owner, is allowed to put the house up on the market and sell it for any price she wants. She is also allowed to rent the house, subject to several conditions. As a seller or a landlord, A has the right to income or capital over the house. However, A cannot do whatever she likes with her house – it is still subject to several legal restrictions with regards to planning. Likewise, if A owned a firearm for recreational purposes, she is not legally permitted to give it to whomever she wants, especially to a minor.[109] Without drawing a distinction between ownership and property rights, ownership could be very easily mistaken as a spectrum even though it is a binary: you either own something or you do not. However, the legal recognition of that ownership, i.e. property rights, is far more complex than that.

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105 Harris (n 17) 59.
106 Stephen Munzer, *A Theory of Property* (Cambridge University Press 1990).
107 ibid 40.
108 See Blackstone (n 72) 2.
109 See specifically Firearms Act 1968, s 22.

Conclusion

This chapter has laid down the foundations of the important and complex discourse on the relationship we have with our bodies. It began by identifying four key concepts that are crucial to this debate: ownership, self-ownership, and property rights. It then proceeded to explore the difficulties in devising a definition for these complicated and abstract concepts.

This thesis then applied Beyleveld and Brownsword's rule-preclusionary conception to the concept of ownership over our body and bodily materials. The conception acts as a philosophically neutral definition of ownership, one which can be adopted by both materialists and dualists. It established how we own our body and bodily materials which, in a way, is similar to how we own other things but also extremely different because these are objects that are inherently ours. It then defined self-ownership as ownership of the self as well as ownership of extensions of the self. This justifies how we are able to own our so-called bodily auxiliaries, i.e. external objects that become "us" and contribute to our agency.

Finally, this thesis defined property rights as the legal recognition of ownership. It adopts Honoré's "bundle of rights" theory of property rights because it is the most prominent theory and because it provides a persuasive and comprehensive answer to the semantic problem of property. Although it may, at times, be difficult to understand these concepts in the abstract, it is hoped that it will become clearer as we explore the legal landscape in the next chapter.

Chapter 3

The Retrospective Recognition of Property Rights

Introduction

This chapter seeks to map the key concepts explored in Chapter 2 onto the current legal framework. Along with Chapter 4, this chapter will argue for the recognition of property rights. This thesis' argument will be made through a two-fold retrospective and prospective analysis: the former will show how the current legal framework already *implicitly* recognises rule-preclusionary ownership and, to an extent, property rights over bodily materials, whereas the latter will provide arguments as to why an *explicit* recognition is still needed.

This chapter seeks to make the retrospective argument for the recognition of property rights by exploring systems of acquisition of bodily materials and control given to individuals over their separated bodily materials. Evaluating this is particularly important for three reasons. First, it confirms compatibility with the rule-preclusionary conception, which is a prerequisite to recognising property rights. Secondly, it shows that the plausibility of the arguments advanced in Chapter 2 as these key concepts do not contradict the current law. Thirdly, it is important to draw the relationship between the key concepts and the jurisprudence because the proposed definitions, as we will see, aids us in making sense of so-called "hard cases" in the law. This is because the presumption has been shifted from "how does O become property?" to "how does O retain a proprietary nature, and how has the rights from that relationship been recognised?" Answering the latter, as it will be shown is a far easier task.

This chapter will start by exploring the law on the consent-based framework for living organ donations and the recently enacted opt-out system for deceased organ donations. It will start by outlining the law: it will focus on the consent-based legal framework and argue that the Human Tissue Act 2004 (hereinafter "2004 Act" or "HTA 2004") gives the source significant control over his bodily materials that goes beyond what can solely be justified by personal rights. It will also argue that the recent enactment of an opt-out system for deceased organ donations does not diminish the importance of consent, nor does it contradict the recognition of rule-preclusionary ownership and property rights over bodily materials, as the system still gives considerable weight to the deceased's will and wishes over others' interests. The chapter will then move on to explore the important line of jurisprudence in the discourse. It has divided the cases into three major "phases". The first phase concerns the emergence of the "no property" rule from various cases across major common law jurisdictions. Although this principle has been championed by the legislature, academics and practitioners, this thesis wishes to remind readers of its dubious origins and questionable legitimacy. The second phase of this section concerns the emergence of exceptions to the "no property rule", namely the "work and skill" and

Yearworth exceptions. This thesis argues that these exceptions are evidence of the judiciary's strained attempt to reconcile an archaic legal principle and the present needs of continuously advancing technology. Finally, the third phase will explore more recent cases with regards to gametes which suggest that the law is moving towards a greater recognition of property rights that is compatible with the rule-preclusionary conception advanced by this thesis.

Consent-Based Legal Framework and the Opt-Out System

This section will first provide a general overview of the law governing organ donations, particularly the principal statute: the 2004 Act. It will first discuss the legal framework for living organ donations, and then discuss the recently enacted opt-out system for deceased organ donations. Within the discussion of the latter, it will provide a brief background on the organ scarcity issue, which has led to the enactment of the Organ Donation (Deemed Consent) Act 2019 (hereinafter '2019 Act' or 'Deemed Consent Act').

The 2004 Act

The 2004 Act was 'born under the wrong star.'[1] The HTA 2004 is best described as a reactive piece of legislation as it was enacted following a series of organ retention controversies in Alder Hey Children's Hospital and the Bristol Royal Infirmary. These are explored later in this thesis. As Brazier and Cave rightly noted, 'the origins of the 2004 Act owe more to the controversy surrounding revelations about practice of organ retention than the needs of transplant medicine itself.'[2] Further, the 2004 Act is far from being an accessible and straightforward piece of legislation as evidenced by its lengthy provisions and convoluted wording. For instance, the 2004 Act uses six different definitions of materials, one of them being a very recent addition through the amendments made by the 2019 Act.[3] The HTA 2004 also creates a clear separation between the provisions covering living and deceased, capacitated and incapacitated, adult and child donors. This section will thus divide the discussions on living and deceased donors as such and will only cover adult donors.

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1 JK Mason and GT Laurie, *Mason and McCall Smith's Law and Medical Ethics* (9th edn, OUP 2013) 581.

2 Margaret Brazier and Emma Cave, *Medicine, Patients and the Law* (6th edn, Manchester University Press 2016) 517.

3 The definitions are: "relevant material" (s53), "transplantable material" (s33(7), "controlled material" (s32(8)/(9)), "bodily material", "excepted material", and most recently, "permitted material" (s3(9)). The main definition that pertains to this thesis is "relevant material" which, per HTA 2004, s 53, is defined as materials which consists of or includes human cells, except for gametes (s53(1)), as well as embryos outside the human body (s53(2)) or hair and nail from the body of a living person (s53(3)).

Living Donors

Criminal and civil law regulates the removal of materials from living persons, whereas the storage and use of relevant materials from living persons are regulated by the HTA 2004. There are also further restrictions on the removal or use of transplantable materials from living persons. We will now discuss the removal, storage, and use of these materials respectively.

Without their lawful consent, to touch a person would amount to an unlawful conduct. Unlawful removal of a material leads to offences of grievous bodily harm[1] or actual bodily harm under criminal law.[2] Under private law, this would fall under torts of assault or battery.[3] In the case of capacitated patients, lawful removal requires the patient's consent (s 2(2) HTA 2004). However, in patients lacking capacity, per the Mental Capacity Act 2005 (hereinafter "MCA 2005"), the existence of any advanced decisions made by the patient must be sought. If this is not possible, lawful treatment is performed under certain justifications, e.g. a proxy consent, MCA 2005 s 4 best interests test, or the Court's inherent jurisdiction. Storage and use of the materials are then regulated by s 1 of the HTA 2004, which requires the capacitated patient's appropriate consent (s 3 HTA 2004). For incapacitated adults, storage and use is permitted through deemed consent where they are believed to be in the incapacitated donor's best interest (s 6 HTA 2004, read with the Human Tissue Act 2004 (Persons Who Lack Capacity to Consent and Transplants) Regulations 2006 (hereinafter "2006 Regulation")).[4]

Consent has played an increasingly important role in medical law. As libertarian approaches prevail over so-called "medical paternalism", principles of autonomy and self-determination have become more prominent. This has also provided increasing recognition for self-ownership.[5] The current legal framework in England and Wales is a compromise between two polar ends of the spectrum. On one hand, there is respect for principles of autonomy and self-determination as the patient is encouraged to exercise their own will. On the other hand, however, their liberty is limited by public policy and public health justifications.[6] Take s 33 of the 2004 Act for example. The provision imposes further restrictions on the removal and use of "transplantable material" from living donors. For instance, a clinician commits an offence if she removes an organ for transplant when she knows or is reasonably

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1 Offences Against the Person Act 1861, ss 18 and 20.

2 ibid s 47.

3 *Collins v Wilcock* [1984] 1 WLR 1172 (QB).

4 The provision allows consent to be deemed for adults lacking capacity to consent if the activity is conducted under the circumstances specified under 2006 Regulation, s 3 such if it is reasonably believed to be in the person's best interest (s 3(2)(a)) or if it is in accordance with clinical trials regulations (s 3(2)(b)). In Wales, these conditions are specified by the Human Transplantation (Wales) Act 2013, ss 3 and 9 subject to additional regulations by Welsh ministers.

5 For a discussion on this, see Chapter 2 n 69 and surrounding text.

6 This is evidenced by the seminal case of *R v Brown* [1993] UKHL 19, [1994] 1 AC 212 which concerned the conviction of a group of men participating in consensual sadomasochistic sexual acts. *Brown* remains controversial, as some academics welcome the decision which reflects public policy and public health restrictions, whereas others view it as unnecessary paternalism.

expected to know that the donor is still alive. This, however, will be excepted if the Human Tissue Authority is satisfied that no reward is gained and that other requirements per the 2006 Regulation. This is to allow consent to be deemed for live transplants involving patients who lack capacity, if it is in their best interests. Another example is the prohibition of conditional donations and restrictions on directed donations. The 2010 Guidance prohibits donors from explicitly stating the conditions concerning their recipients. This was made following the controversial racist donation in 1998 where the hospital to the conditional donation made by a white man who requested only white recipients receive his kidneys and liver. The 2010 Guidance, however, allows requested allocations, which has the same effect as directed donations as donors are permitted to state a preferred recipient. Three conditions, however, must be fulfilled: consent must be given unconditionally, the preferred recipient must be a relative or friend of long-standing who has a recognised clinical need for the organ, and no one else must be in more urgent clinical need. Although the logic behind these guidelines is understandable, there is nothing in the 2010 Guidance to prevent clinicians and practitioners ignoring the restrictions on conditional and directed donations and proceeding on that basis. Therefore, this confirms the view that the donor's autonomy is given substantial weight in spite of the restrictions. This, as we shall see now, is also the case with deceased organ donations.

Deceased Donors

The law on removal, storage, and use of relevant materials for deceased donations is regulated by the 2004 Act (with amendments made by the 2019 Act which came into effect on 20 May 2020). Previously, the framework was exclusively an opt-in where individuals would have to consent by opting-in to become an organ donor. However, an opt-out system has recently been added. This allows the NHSBT to "deem consent" unless the individual has opted out prior to their death. However, the terms "presumed consent" or "deemed consent" are somewhat misleading as any reference made to consent is fictional. This is because an opt-out system operates on the basis of a *lack* of consent. This is why this thesis prefers to use the term opt-out. This section will first provide a brief background to the organ scarcity issue which has driven reform and explore the amended law. Although there are criticisms to be made on the effectiveness of the law, this will be done in the final section of Chapter 4.[7]

An opt-out framework is not a novel change to the 2004 Act. As we have seen, deemed consent is already used for the storage and use of materials from patients who lack the capacity to consent so long as the activity falls under the circumstances specified in the relevant provisions.[8] The recent enactment of an opt-out system for deceased organ donations, however, was done in hopes of reducing or perhaps even solving the prominent organ scarcity issue in England and Wales. The UK has had

7 See Chapter 4 n 146 and surrounding text.
8 See n 7 above.

persistently low organ donation rates. According to the NHSBT 2018/19 Activity Report,[9] there has been a 2% decrease in the number of total organ transplants,[10] a 3% decrease in living organ donations,[11] and a decreased quality of organ donations due to changing donor characteristics compared to the previous year.[12] A mere 3,941 transplants were successfully performed – a relatively low number considering there were 9,399 patients in the transplants list,[13] which was a 1% increase from 2017/18.[14] There is a long waiting time of over three years for adults and approximately 270 days for children, who are given greater priority. This queue has caused 408 deaths in 2018/19.[15] Even then, the ever-expanding transplant waiting list does not provide an accurate picture of the organ scarcity issue. This is because getting on the transplant waiting list itself is a challenge, as patients need to prove potential benefit of receiving the organ and that there is a realistic hope of obtaining an organ from the list.

It was clear that, unless change was enacted, organ donation rates would continue to decrease. This is why practitioners, academics and members of the legislature have advocated for the introduction of a presumed consent system, following the footsteps of countries with high organ donation rates such as Spain and Portugal.[16] It is estimated that an opt-out system would at least add 100 more donors per year, amounting to 200 transplants, and will hopefully continually increase. Theoretically, opt-out systems can be further categorised into hard and soft opt-outs: harder or more stringent ones give less consideration to the wills and wishes of the deceased's relatives and loved ones whereas softer ones will give great consideration to their wishes. Most legal systems adopt a softer opt-out, except for a small number of countries such as Austria and Singapore.[17] Wales was the first country in the UK to implement an opt-out system in December 2015 with the Human Transplantation (Wales) Act 2013. This change has helped improve deceased donation rates. 2018/19's rate of 24.2 pmp marked a 2%

9 NHSBT, 'Organ Donation and Transplant Activity Report 2018/19' (2019) <https://nhsbtdbe.blob.core.windows.net/umbraco-assets-corp/16469/organ-donation-and-transplantation-activity-report-2018-2019.pdf> accessed 23 January 2020.

10 ibid Table 2.4.

11 ibid Table 3.1.

12 It is reported that donors were more likely to be more obese and have died as a result of traumatic death. This influences the viability of the organs and decreases the chances of a successful transplant from taking place (NHSBT (n 9)).

13 6,077 patient are on the active transplant list whereas 3,322 patients have been temporarily suspended. See NHSBT (n 9).

14 ibid Table 2.2.

15 ibid.

16 This is with the exception of the USA who does not have a presumed consent legislation in place, but enjoys a stable high rate of 31.96 pmp. Portugal has a deceased donation rate of 34.01 pmp and Spain, with 46.9 PMP (per million person), has the highest organ donation rate in the world according to The International Registry on Organ Donation and Transplantation (IRODaT), 'Worldwide Actual Deceased Organ Donors 2017' (2017) <http://www.irodat.org/img/database/grafics/01_worldwide-actual-deceased-organ-donors-2017.png> accessed 23 January 2020.

17 Anand Damani, 'Why 99% of Austrians donate their organs' (*Behavioural Design*, 11 August 2015) <http://www.behaviouraldesign.com/2015/08/11/why-99-of-austrians-donate-their-organs/#sthash.A3XB9wSS.dpbs> accessed 22 January 2020. In Singapore, opting out gives individuals lower priority should they need organ transplants in the future.

increase from the previous year and a record high for the country.[18] Wales' system also increased the number of actual donors from 1,413 in 2016/17 and 1,574 in 2017/18 to 1,600 actual donors in 2018/19. This increase resulted despite the decline in eligible donors, from 6,038 in 2017/18 to 5,815 in 2018/19. This suggests that, had it not been for Wales' opt-out system, the number of actual donors in 2018/19 would have decreased or stayed the same. Instead, the increased number of donations compensated the loss. Due to such benefits, other parts of the country has followed Wales' lead, as Scotland's Human Tissue (Authorisation) (Scotland) Act 2019 came into force in Autumn 2020 and England, whose laws we will now turn to, has implemented theirs in Spring 2020.

The changes brought about by the 2019 Act mainly concerns the removal of materials from the deceased. Firstly, the 2019 Act added the "deemed consent" an extra provision (s 3(6)(ba)) to s 3 HTA 2004, which covers general appropriate consent for adults. Appropriate consent is needed for removal and any action which exceeds minimum steps required to preserve a body for transplantation (s 43(1)-(3)). Without reasonable belief that there is appropriate consent, medical practitioners would be committing a criminal offence and be subject to penalty (ss 5(1) and (7), respectively). Appropriate consent, per s 3(6), can mean four things: the donor's consent (s 3(6)(a)), consent from the donor's nominated representative (s 3(6)(b)), deemed consent (s 3(6)(ba)), or the consent of a qualifying relative (s 3(6)(c)). This list operates as a hierarchy, thus sources of consent lower down the list would not be able to override the donor's consent or refusal if available. The opt-out system operates on two conditions. Firstly, opt-out is only applicable to "permitted materials". The term encompasses any materials that are *not* listed in Regulation 2 of The Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020.[19] Permitted materials would therefore encompass non-novel transplant materials such as kidneys and livers. For materials which *are* stated in Regulation 2, Code F states the requirement of 'expressed consent'[20] for their lawful removal, storage, and use. Secondly, the opt-out framework does not apply to excepted adults (per s 3(9) of HTA 2004) which include those who are not ordinarily resident in England for twelve months before death,[21] and/or lacking capacity for a significant period of time before death that they did not understand the effects of the new provision.[22]

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26 NHSBT (n 9) Tables 3.1. and 3.2.

19 These include—but are not limited to—arm, brain, face, leg, and reproductive organs. For the full list, see Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020, Regulation 2 (subject to Parliamentary approval). For further information on this issue, see the House of Lords debate on this issue, see: HL Deb 18 May 2020, vol 803, cols 905-926.

20 This Code of Practice will henceforth be referenced as "Code F". Human Tissue Authority, 'Code of Practice F: Donation of solid organs and tissue for transplantation' (20 May 2020) [202].

21 HTA 2004, s 3(9)(a).

22 HTA 2004, s 3(9)(b), a 'significant period of time' depends on the judgment of a reasonable person (s3(10)) which is approximately twelve months (Code F (n 20) [124], [147]). Lack of capacity will be judged according to relevant provisions under the MCA 2005.

Individuals can opt-out online or by phone throughout their lives. However, when they have not opted-out, practitioners will ask the deceased's family (or a person in a qualifying relationship with the deceased immediately prior to death) two questions. First, whether there were any lifestyle habits (such as IV drug use) that would deem the tissue unsuitable for transplantation.[23] Second, whether there is any information that would 'lead a reasonable person to conclude that the person concerned would not have consented.'[24] This means that verbal statements made to family members or clinicians—even immediately prior to death—would suffice. As the threshold is only one of mere reasonable belief, practitioners would most likely defer to the deceased's family to avoid conflict and/or negative publicity. If s 3(6)(ba) cannot be triggered and consent cannot be deemed, then practitioners will resort to s 3(6)(c) to ask for the consent of a person who stood in a qualifying relationship to the deceased.[25]

There are, however, two issues with the new opt-out framework. First, the new opt-out system and its operation is confusing. Readers may have noticed that the opt-out system does not replace but operates in addition to the original opt-in system. s3(6)(ba), which allows removal on the basis of deemed consent, operates in conjunction with the pre-existing opt-in previsions. The opt-out system thus seems to operate as a safety net to catch individuals who have not yet opted in. Although this is potentially beneficial, other countries, whose laws inspired England's, operate exclusively on an opt-out system. Secondly, there is a discrepancy between the legislation on paper and its operation in practice. The new law seems like a compromise between to the desire to improve deceased organ donation rates while recognising the importance of respect for patient autonomy and self-determination. On paper, allowing procedures in the absence of consent seems to contradict the overall trend in medical ethics of increasing patient autonomy. However, as discussed, this is not the case in practice as patients' past wills and wishes are still given great consideration. This is evidenced by the fact that the opt-out provision is third in the s 3(6) hierarchy of consent (preceded by the patient's consent and nominated representative, respectively), and by the questions asked by medical practitioners, i.e. whether the deceased's relatives and loved ones have any reason to believe that the deceased would have wanted their organs donated.

The "No Property" Rule and Its Strained Exceptions

Dominus membrorum suorum nemo videtur, meaning "no one is to be regarded as the owner of his own limbs" and otherwise known as the "no property" rule, is regarded as a long-standing maxim in major Western common law jurisdictions. Emerging from a series of cases which could be traced back to

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23 See John Fabre, 'Presumed consent for organ donation: a clinically unnecessary and corrupting influence in medicine and politics' (2014) 14(6) *Clinical Medicine* 567; Amber Rithalia and others, 'A systematic review of presumed consent systems for deceased organ donation' (2009) 13(26) *Health Technology Assessment* 1, 31.

24 HTA 2004, s 3(6b).

25 The qualifying relationship also operates in a hierarchy: HTA 2004, s 27(4); Human Tissue Authority, 'Code A: Guiding Principles and the Fundamental Principle of Consent' (3 April 2017) [30]-[33].

1614, many academics have called its legitimacy into question. This section will do the same by exploring key cases spanning across four countries. As cases from a variety of jurisdictions will be considered, it can be confusing to follow. Thus, the reader should assume that these cases are of England and Wales jurisdiction unless otherwise stated. This thesis groups these cases into three distinct phases. The first phase explores how the "no property" rule emerged at the first instance. The second discusses the early developments of the *R v Kelly*[26] "work and skill" exception to the "no property" rule. The third examines more recent judgments which reflect a strained attempt to reconcile the archaic "no property" rule and societal needs, such as *Yearworth v North Bristol NHS Trust.*[27] Finally, it will conclude by showing how the law is increasingly willing to recognise property rights and, more importantly, how this is consistent with the rule-preclusionary conception of ownership.

First Phase: The Birth of the "No Property" Rule

The origin of the "no property" rule is often attributed to *Haynes' Case.*[28] The case concerned a William Haynes, who was caught digging up graves and stealing sheets that covered the corpses. The court's *ratio* stated that the dead cannot have proprietary interest in the sheets, but the case is best known for its *obiter* remark which held the corpse to be *nullius in bonis* (among the property of no person). This was true as, at that time, cadavers came under the ecclesiastical jurisdiction. The court, however, created a limited property right to the executor until the time of burial to ensure that corpses could be properly buried by their family members. Although the facts of *Haynes' Case* are archaic and specific, it has been taken as one of the leading authorities on the "no property" rule. Some academics, however, argued that the case has been widely misunderstood and misinterpreted. Nicol et al contended that the judgment has since been reinterpreted from 'a dead body cannot *hold* property' to 'a dead body cannot *be* property.'[29]

Over a century later, the "no property" rule was revisited in *Exelby v Handyside*,[30] which concerned a claim for conversion brought by the father of late conjoined twins against the midwife who had delivered the twins and kept their corpses. This was a legally, factually and ethically complicated case. The court ultimately dismissed the father's claim for conversion, but did so through a convoluted and unclear judgment. One could argue that the court rejected the claim as they refused to first recognise the father's property rights over his children's corpses, which is a prerequisite for a claim in

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26 *R v Kelly (Anthony Noel); R v Lindsay (Neil)* [1999] 2 WLR 384, [1999] QB 621.

27 *Yearworth and others v North Bristol NHS Trust* [2009] EWCA Civ 37, [2010] QB 1.

28 *Hayne's Case* (1613) 12 Co Rep 113, (1614) 77 ER 1389.

29 Dianne Nicol and others, 'Impressions on the Body, Property and Research' in Imogen Goold and others (eds.), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Hart Publishing 2014) 13 (emphasis added).

30 *Exelby v Handyside* (1749) 2 East PC 652 (CCP).

conversion.[31] This was a significant judgment, as it showed that the "no property" rule went beyond the scope of claims involving an executor's legal duty for burial.[32] Douglas rightly argued that the court's elaborate judgment did not only reflect the complexity of the issue, but also showed the lack of a sound foundation for the principle.[33] Ultimately, it seemed that the court's refusal to recognise property rights over the corpse was a mere decision of policy and hesitance to depart from previous jurisprudence.[34] This reluctance still persists today, as we will explore in the next section. However, after examining the rule's origins, we must question how this *obiter* remark in a 1600s case became one of the most highly regarded principles in medical law today. Further, this principle's applicability has been expanded to also apply to living materials despite the fact that these cases only dealt with cadavers.

Second Phase: The "Work and Skill" Exception

As medical and scientific developments emerged in the 20th century, it became clear that there was a gap in the law across most—if not all—common law jurisdictions. There was a growing need to protect the rights of researchers and medical practitioners who worked with cadavers and bodily materials. It was realised that the lack of legal protection offered to them would hinder and, even, de-incentivise research. Finally, the "work and skill" exception arose as a way to reconcile the 'no property' rule with this need; it created some protection of rights over bodies and bodily materials for third parties.

The Australian case *Doodeward v Spence*[35] is often referenced as the first emergence of "work and skill" exception. In *Doodeward*, the High Court of Australia recognised some limited property rights over the corpse of a two-headed stillborn baby that had been preserved in a jar and exhibited by the plaintiff. The court came to this conclusion by drawing a distinction between a body awaiting burial (which would have been *nullius in bonis*) with one that has gained other characteristics through the application of work and skill.[36] This relies on the Lockean labour conception of property previously explored in Chapter 2.[37] Although, academics have called into question whether preservation should have been sufficient to amount to "work and skill".[38] Nonetheless, *Doodeward* drew international

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31 A claim in conversion is when the claimant alleges that there had been an unlawful or inappropriate conversion of their property by the respondents. But before this claim could succeed, the claimant's property rights would first have to be recognised.

32 This was established by *Hayne's Case* (n 28) and reaffirmed in *Williams v Williams* (1882) 20 Ch D 659 which was a case concerning the legal duty imposed upon an executor to bury the deceased's body.

33 Simon Douglas, 'Property Rights in Human Biological Material' in Imogen Goold and others (eds.) (n 29) 97.

34 ibid.

35 *Doodeward and Spence* (1908) 6 CLR 406.

36 ibid 414.

37 The conception explored in Chapter 2 refers to work and skill as the "Lockean-Nozick" theory to recognise the developments Nozick made to Locke's work. *Doodeward*, however, predates Nozick. Thus, it is assumed that the case's reference to "work and skill" is only to Locke's conception.

38 See, for instance, Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart Publishing 2007) 129-130, 141-2.

attention and it marked the beginning of increasing interest in bodily materials, coupled with an increasing awareness of relevant legal bodies to provide specific regulations on this issue.

In the mid to late 1900s, the UK Parliament took statutory measures to regulate removal, storage, and use of the body through The Human Tissue Act 1961, The Anatomy Act 1984, and the Human Organ Transplants Act 1989. These statutes attempted to balance two competing interests—between the need for access to bodily materials for medical research, and the need to protect the individual/source's privacy to an extent—but they were all silent on the "no property" rule and the "work and skill" exception.[39] Although they provided some regulation, they lacked legal teeth. The 1961 Act, only addressing transplantation from deceased persons, had no civil nor criminal sanctions, which effectively made it a statutory code of practice. It was therefore ill-equipped to prevent several organ retention scandals, such as when a doctor bought kidneys from four Turkish men for approximately £3,000. Such scandals led to the adoption of the reactive 1989 Act. Interestingly, the 1961 Act operated an unusual combination of a narrow opt-in and a wide opt-out system: it allowed removal of human material either at the prior consent of the deceased (s1(1) HTA 1961) or without any request so long as relatives did not object and there are no reasons to believe that the deceased would have objected (s1(2)). This is an interesting comparison to the 2004 Act whose opt-in and opt-out systems, as we have discussed above, are equally wide.[40]

In 1990, the seminal Californian case of *Moore v Regents of the University of California*[41] emerged. Moore had hairy cell leukaemia and a splenectomy was performed by his doctor, Golde, as part of his treatment. Without Moore's knowledge, Golde and another researcher, Quan, developed his cells into the patented and profitable "Mo cell line". Moore then brought a legal action against them. The first was a personal claim where Moore alleged a breach of fiduciary duties, whereas the second was a proprietary claim for conversion. Ultimately, the Californian Supreme Court rejected the latter due to concerns that recognising property rights over Moore's cells would violate human dignity.[42] Instead, the Court allowed the personal claim and provided compensation to Moore on that basis. *Moore* has attracted a considerable amount of attention as it was the first case where any judiciary had engaged with the issue and gave extensive reasoning as to why they refused to recognise property rights. One of the most notable analyses came from Dworkin and Kennedy who rightly remarked that the outcome of *Moore* was not at all a rejection of property rights as it was claimed it to be.[43] The judgment barred Moore from having property rights over his *own* cells, but, instead, granted the allegedly manipulative

39 HC Deb 20 December 1960, vol 632, cols 1231-58.
40 HTA 2004, s 3(6).
41 51 Cal. 3d 120 (1990).
42 ibid 140.
43 Gerald Dworkin and Ian Kennedy, 'Human tissue: rights in the body and its parts' (1993) 1(3) *Medical Law Review* 291, 308.

researchers such rights. Douglas, however, argued that these rights were crucial to Golde and Quan as it protected them against the vulnerability of dispossession, i.e. instances where other researchers could have easily taken the tissue samples they had obtained and individually developed them.[44] Further, the Mo cell line was already widely used in prominent researches. These suggest that the Californian Supreme Court's decision was not based on human dignity but, instead, on policy, i.e. the fear that bestowing the source property rights over his own cells would lead to an undesirable snowball effect which hinders access to valuable genetic material and lead to an impediment to scientific development. Further, they were limited by judicial competences and, as Panelli J remarked, the legislature would be better suited to resolve this issue.[45]

Although changes have taken place since *Moore*, the case is still pertinent to the debate. The prevailing view is the Lockean-Nozick labour conception of property, which acknowledges Golde and Quan's application of work and skill to the cells as sufficient to create property rights. Others such as Douglas, however, rely on the element of intention to explain why Moore was denied such rights.[46] He contended that Moore's intention was to abandon and discard his spleen which then permits use by Golde and Quan. This, however, is a less straightforward issue which will be explored later. This thesis prefers to put the significance of *Moore* into perspective: this "reasoned" judgment is better described as one of policy or an unsatisfactory attempt at maintaining the "no property" rule in light of scientific developments. *Moore* can be made sense from a policy perspective because there was a push for increased medical and scientific research in which the judiciary took part.[47] Several years before *Moore,* the US Supreme Court ruled in the case of *Diamond v Chakrabarty*[48] that genetically modified organisms can be patented. These, however, could be contrasted with the European Court of Justice's approach in the 2010 case of *Oliver Brüstle v Greenpeace.*[49] In that case, the ECJ held that cells processed from human embryonic stem cells removed at the blastocyst stage are excluded from patentability on the grounds of respect for human dignity.[50] Although experimentation concerning human embyos is still permitted, the exclusion from patentability makes commercialisation more difficult. The different conclusions could be attributed to varied values and ethics held across different jurisdictions and times. However, these cases show that both jurisdictions considered the 'scientific-legal climate…that connected basic research to the corporate production of therapeutic medical products for the public.'[51]

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44 Douglas (n 33), 80-82.
45 *Moore* (n 41) 147.
46 Nicol (n 29) 15.
47 Catherine Waldby and Robert Mitchell, *Tissue Economies: Blood, Organs, and Cell Lines in Late Capitalism* (Duke University Press 2006) 91.
48 447 U.S. 303 (1980).
49 Case C-34/10 [2010] ECR I-9849.
50 ibid [34]-[43].
51 Waldby and Mitchell (n 47) 97.

Following *Moore,* the "no property" rule was reaffirmed by the Court of Appeal of England and Wales in *Dobson v North Tyneside Health Authority.*[52] The case concerned a claim of conversion being brought by the administratix of the deceased against the Health Authorities who had disposed of the deceased's brain, which was removed following an autopsy and preserved in paraffin to be used as evidence in a medical negligence claim.[53] The CA acknowledged that the facts in *Dobson* were unusual[54] and that the plaintiff's case was pleaded in a specific manner, mainly in conversion, which they then dismissed. Contrary to what academics have suggested,[55] Peter Gibson LJ merely restated—but did not elaborate on—the "no property" rule.[56] His Lordship also made very little remarks about whether preservation was sufficient to meet the threshold of "work and skill". Thus, this ambiguity, which has been explored in previous chapter, persists.[57] Dismissal of the appeal was mostly based on the fact that the plaintiffs 'have not shown and cannot show that they had actual possession or the immediate right to possession at the time the brain was disposed of' and not on the "no property" rule.[58]

It was not until *R v Kelly*[59] that the "work and skill" exception was properly cited in England and Wales. Kelly was charged with theft for stealing body parts preserved and stored in jars from the Royal College of Surgeons. The CA drew inspiration from *Doodeward* and applied the exception. Although the starting presumption was still "no property", the Royal College of Surgeons' exercise of skill to excise and preserve them granted them property rights.[60] Kelly was therefore successfully prosecuted for theft. Much like *Moore, Kelly* has—and still is—attracting considerable academic attention. Although the CA relied on the "work and skill" exception, some academics, unconvinced, nonetheless argued that it would be better explained by other conceptions of property such as the doctrine of specification.[61]

Shortly after *Kelly,* the Alder Hey organ retention controversies surfaced. The Royal Liverpool Children's Inquiry Report (also known as the Redfern Report)[62] discovered that, for seven years, Alder Hey Children's Hospital had unlawfully retained the organs of deceased child patients following post-

52 *Dobson and Another v North Tyneside Health Authority and Another* [1996] 1 WLR 596 (CA).

53 In a separate claim, the family members of the deceased claimed that the Health Authority had been negligent in its diagnosis which caused the death of D and her foetus from brain cancer.

54 In *Dobson* (n 52), the plaintiff was appointed as the administratix of the deceased's estate *after* the deceased had been buried. Thus, even though the plaintiff did theoretically have a legal duty and right to the body for the purposes of burial, it could not be applied in this case.

55 See: Hardcastle (n 38) 129; Jesse Wall, *Being and Owning: The Body, Bodily Material and the Law* (Oxford University Press 2015) 32, 49-50, 207; David Price, *Human Tissue in Transplantation and Research: A Model Legal and Ethical Donation Framework* (Cambridge University Press 2014) 256-258, 262.

56 See *Dobson* (n 52) 600.

57 See Chapter 2, n 90 and surrounding text.

58 *Dobson* (n 52) 602.

59 *Kelly* (n 26).

60 ibid 627-631.

61 See Hardcastle (n 38) particularly Chapter 5.

62 Health Committee, *The Royal Liverpool Children's Inquiry Report* (HC 2001, 12-II).

mortem examinations without their family's consent.[63] They justified this 'widespread' and 'long-standing' practice on grounds of 'medical education and research.'[64] Waldby and Mitchell remarked that the scandal was partly caused by the institutions' failures to appreciate the emotional and sentimental values of the tissues, particularly for bereaved parents.[65] In other words, they failed to recognise the unique status of the tissue. Ultimately, the scandal led to a civil claim brought by the parents against Alder Hey in *Re Organ Retention Group Litigation*[66] and, under pressure from the public and media, the legislature adopted the Redfern Report's recommendations which reformed the 1961 Act into the 2004 Act.

The 2004 Act consolidated the previous three statutes on this issue and governs storage and use of tissue for living donations and removal, storage, and use for deceased donations. Its framework and role in strengthening the importance of consent has been previously discussed. Crucially, the HTA 2004 also prohibits commercial dealings of human materials for transplantation (s 32), which excludes gametes and materials that have been subject to work and skill (s 32(9)). The provision clearly prohibits the trade of organs. In 2007, Daniel Tuck became the first person to be convicted under this provision for attempting to sell his kidney online for £24,000 to pay his gambling debts, although he never went to jail as he committed suicide.[67] Herring and Chau made two remarks with regards to the provision to which the author respectfully disagrees. First, that the provision is a codification of the "no property" rule.[68] Although the right to sell presupposes property rights, the latter does not automatically lead to the former. This is a point of fact which stands irrespective of which conception of property the reader maintains, as it is common for A to have property rights over P but have public policy restrictions on A's ability to sell P (as elaborated in Chapter 2). Therefore, the provision is neutral with regards to the recognition of property rights over bodily materials. Secondly, s 32(9) shows that materials can only become property after the application of work and skill. Pattinson have rebutted this argument, stating a fact that s 32(9) is a non-exhaustive list of exceptions.[69] There is no indication that the exception to commercial dealings will only ever apply gametes, embryos, and materials subject to work and skill.

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63 ibid para 1.4.

64 ibid para 1.5.

65 Waldby and Mitchell (n 47) 59.

66 *In Re Organ Retention Group Litigation* [2005] QB 506, sub nom *AB and others v Leeds Teaching Hospital NHS Trust* [2004] EWHC 644 (QB).

67 Stephanie Condron, 'Gambler tried to sell his kidney online' (*The Telegraph*, 11 May 2007) <https://www.telegraph.co.uk/news/uknews/1551226/Gambler-tried-to-sell-his-kidney-online.html> accessed 5 February 2020.

68 See Jonathan Herring and PL Chau, 'My Body, Your Body, Our Bodies' (2007) 15(1) *Medical Law Review* 34, 38-39.

69 See SD Pattinson, 'Directed donation and ownership of human organs' (2011) 31(3) *Legal Studies* 392, 396-7.

The issue of ownership over one's body parts would later be considered in a criminal case. In *R v Bentham*,[70] the defendant had attempted a robbery and used his hand as a pretend firearm by concealing it inside his jacket and forcing the material out. As a result, he was prosecuted for possession of an imitation firearm under s 17(2) of the Firearms Act 1968.[71] However, as Bentham's "gun" was his hand, the question arose as to whether he could be in possession of his own attached limbs. The Law Lords unanimously held that Bentham's hand fell outside the definition of property.[72] This is a significant ruling as it was the first case that dealt with property rights over attached, not separated, bodily materials. Three important points must be noted about *Bentham.* Firstly, it is curious why the Law Lords did not consider the material covering his hand, i.e. his jacket, as the imitation firearm. After all, the gun was made through Bentham's manipulation of the material. Secondly, the Law Lords' might be reluctant to exercise a wider interpretation as the case was one of a criminal—and not civil—nature. Thirdly, *Bentham* ostensibly contradicts this thesis' argument that an individual owns their attached bodily materials as the Law Lords refused to recognise property rights over Bentham's hand. However, *Bentham* is not necessarily incompatible with the key concepts explored in Chapter 2. The Law Lords used the term "ownership" to mean the legal recognition of the conventional "bundle of rights" theory which would be equated to property rights in this thesis. According to the proposed definitions, however, Bentham's fingers—which were still attached to him—not covered by property rights. This is because this thesis only applies property rights to separated or excised bodily materials and bodily auxiliaries. Instead, they are protected under the concept of bodily rights. Although the two are forms of rule-preclusionary ownership, there are crucial differences between them.[73] This further demonstrates the importance of defining these key terms.

The cases in this second phase has relaxed—but still maintained—the "no property" rule as property rights are only recognised upon the application of work and skill. More importantly, however, property rights could only be granted to third parties, and not the individual who is the source of those materials, as in *Moore.* Additionally, as seen in *Bentham,* only the proprietary nature of separated bodily materials are recognised. Upon an exploration of the judgments of the relevant cases, there seems to be a lack of explanation as to why property rights could only be recognised in those specific circumstances. A simple yet persuasive explanation is that this exception has not been given much consideration. Instead, this piecemeal approach is a response to the specific cases brought before the court. The legislature have been intentionally silent on this matter. Although s 32 of the 2004 Act prohibits

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70 *R v Bentham* [2005] UKHL 18, [2005] 1 WLR 1057.

71 An imitation firearm is defined as 'any thing which has the appearance of being a firearm… whether or not it is capable of discharging any or other missile.' See Firearms Act 1968, s 54(7).

72 *Bentham* (n 70) [8].

73 Pattinson (n 69) argued this, distinguishing two types of rule-preclusionary control. While this thesis uses a different terminology, it reaffirms Pattinson's point which states that *Bentham* merely limits property rights but not rule-preclusionary ownership over one's body.

commercial dealings in human materials for transplantation, with the exception of gametes, embryos and materials subject to work and skill (s 32(9)), there is little reason to assume this list is exhaustive.[74] As we have seen in Chapter 2, there is a difference between recognising proprietary ownership and the rights that arise from that relationship. Much like ownership of a firearm or a house, A's property rights over them may be limited by reasons of public health and safety. However, this does not negate A's proprietary ownership over them. This is an important point that has been left unaddressed by the cases discussed above and it has proved to cause several difficulties as the legal framework struggles to catch up with the constantly advancing reality. Consequently, there is still a gap in the law as these so-called "personal rights", such as the rights to privacy or bodily integrity, provide insufficient protection to individuals. This will now be explored in the next section.

Third Phase: Moving Towards Property Rights

Yearworth[75] provided the opportunity to revisit the issue of the source's rights over their separated bodily materials.[76] As the CA remarked, the case 'raise[s] interesting questions about the application of common law principles to the ever-expanding frontiers of medical science.'[77] *Yearworth* concerned a claim brought by a group of men who had stored their sperm in the respondent's fertility storage unit following a cancer diagnosis in which its treatment may disrupt their fertility. Unfortunately, due to negligence on the bank's storage procedures, their samples thawed, and their sperms perished. The Court provided remedies under a proprietary claim which, crucially, recognised the proprietary nature of their sperm. The reasoning that the CA gave was because the men 'alone generated and ejaculated the sperm'[78] and because the 'sole object of their ejaculation…was that…it might later be used for their benefit.'[79] This was a significant ruling, not only because it provided fresh material for the discourse of proprietary rights over bodily materials, but because the CA had created the possibility of bestowing property rights *to the source* over their own separated bodily materials.

This is step forward from the second phase. As we have seen in *Moore*, property rights could only be given to third parties and not the source of that material. Although *Yearworth* has changed this position, there are still uncertainties post-*Yearworth*. What other scenarios might the *Yearworth* exception apply to? In stating their findings, the CA were particularly wary of the scope of their judgment and emphasised that the claimants had ownership 'for the purposes of their claims in negligence'.[80] Since they had deviated from the "work and skill" test, then what is the *Yearworth* test?

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74 Pattinson (n 69).
75 *Yearworth* (n 27).
76 The Court of Appeal specifically remarked that the significance is due to the fact that the case deals with 'parts or products of a living human body.' (ibid [29]).
77 ibid [3].
78 ibid [45].
79 ibid.
80 ibid.

Is this new exception applicable to other bodily materials or is it strictly confined to gametes? Unfortunately, there are no straightforward answers from the judiciary nor the legislature on these issues. Instead, we must look to other similar cases and to use the theoretical concepts discussed in Chapter 2 to deduce the possible answers.

Due to the specificity of the facts of the case, it seems possible that *Yearworth* will only be applied to gametes. Furthermore, the idea that gametes can be subject to property rights is not a novel one. In the US case of *Hecht v Superior Court of Los Angeles County*[81] for instance, is a case which gave Deborah Hecht property rights over her deceased partner's fifteen vials of sperm. The court went so far as to state that 'the nature of the sperm as reproductive material which is a unique type of "property"'[82] but the Court's key consideration was arguably Kane's wishes which, as detailed in his suicide note, was for Hecht to have their children. Similarly, in *Bazley v Wesley Monash IVF,*[83] the Queensland Supreme Court gave property rights over sperm samples to the deceased's personal representative notwithstanding the fact it was not mentioned in the deceased's will. What persuaded the Court was the deceased's intentions which he informally expressed to family members. More drastically, in *Re Edwards,*[84] the New South Wales Supreme Court gave property rights over the deceased's semen to his wife despite the fact that it was initially extracted by a court order for judicial examination. The court remarked that the semen was 'removed on her behalf and for her purposes. No-one else in the world has any interest in them.'[85] Although this seems to be factually inaccurate, it seemed that the court favoured a fair and just outcome because, without the deceased's sperm, Mrs Edwards would not have been able to conduct artificial insemination.

Upon investigating the reasoning in *Yearworth,* the CA did not seem to rely on the traditional "work and skill" exception but nor did they fully detail their reasoning. Consequently, academics are left to explain how the semen became property of the men. There is some agreement, at least, that the reasoning in *Yearworth* is separate and distinct from the "work and skill" exception as it was made explicit by the CA. Furthermore, the "work and skill" logic simply would not work on the facts: the fertility clinic applied the necessary work and skill to store the semen so, on that reasoning, any proprietary rights should have been given to them and not the claimants. *Yearworth* has also been explained on the basis of injury to autonomy. Academics such as Keren-Paz and Harmon and Laurie have argued that *Yearworth* could betaken as 'some growing judicial affinity for a free-standing right

81 16 Cal.App.4th.836 (1993).
82 ibid 849.
83 *Kate Jane Bazley v Wesley Monash IVF Pty Ltd* [2011] 2 Qd R 207; [2010] QSC 118.
84 *Jocelyn Edwards; Re the estate of the late Mark Edwards* [2011] NSWSC 478; (2011) 4 ASTLR 392.
85 ibid [91].

to autonomy.'[86] They also considered the torts case of *Chester v Afshar*.[87] In that case, the House of Lords held that a doctor's negligent failure to inform the patient of the surgical risk of a nerve damage had violated her autonomy and self-determination as she would have delayed the treatment had she known the risks. Despite her inability to prove this, the HL held in her favour. These academics argue that *Chester* and *Yearworth* suggest that injury to autonomy is a 'standalone actionable damage in negligence where the claimant is deprived of a meaningful choice'.[88] This thesis, however, is doubtful of this conclusion. Firstly, as Pattinson noted, the cases of *Shaw*[89] and *Diamond*[90] have explicitly confirmed that cases such as *Chester* do not support a free-standing claim to autonomy. Secondly, if what Keren-Paz and Harmon and Laurie argued is true, why did the CA uphold a property claim? Furthermore, in the reasoning of *Yearworth,* term "autonomy" was only mentioned once in reference to the case *Airedale NHS Trust v Bland*[91] to showcase the law's protection of the body and bodily autonomy.[92] Nor does the term seem to play a significant role in the foreign cases above. This thesis therefore contends that, although autonomy was an important consideration in *Yearworth,* it was not the primary consideration. Instead, it is better to regard autonomy as an indicator of the primary consideration which thesis argues is intention.

As discussed above, cases concerning sperm have regarded the intention of the source as an important—even, primary—consideration. Intention has also been considered in cases dealing with reproductive materials more generally, such as in *Evans v United Kingdom.*[93] In that case, Ms Evans and Mr Johnston froze several fertilized embryos prior to treatment of her pre-cancerous condition. Mr Johnston assured Ms Evans that their relationship will last and that he wanted to be the father of their children, but their relationship ended several months later. Consequently, Mr Johnston withdrew his consent for Ms Evans to use their frozen embryos thus taking away Ms Evans' only recourse to have biological children. Ms Evans brought a claim against the fertility clinic in *Evans v Amicus Healthcare Ltd,* [94] and when the Court did not rule in her favour, she brought a claim to the European Court of Human Rights. Both courts recognised the Mr Johnston's ability to withdraw his consent as the embryos

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86 Shawn Harmon and Graeme Laurie, 'Yearworth v North Bristol NHS Trust: Property, Principles, Precedents and Paradigms' (2010) 69(3) *Cambridge Law Journal* 476, 491. Also see: Tsachi Keren-Paz, 'Compensating Injury to Autonomy in English Negligence Law: Inconsistent Recognition' (2018) 26(4) *Medical Law Review* 585.

87 [2004] UKHL 41 [2004] 3 WLR 927.

88 Keren-Paz (n 86) 609.

89 *Shaw v Kovac and another* [2017] EWCA Civ 1028, [2017] 1 WLR 4773.

90 *Diamond v Royal Devon and Exeter NHS Foundation Trust* [2019] EWCA Civ 585, [2019] PIQR P12.

91 [1993] AC 789 (HL).

92 See *Yearworth* (n 27) [30].

93 (2007) 43 EHRR 21 (hereinafter "*Evans* (ECtHR)*"*)

94 *Evans v Amicus Healthcare Ltd and Others (Secretary of State for Health and Another intervening); Hadley v Midland Fertility Services Ltd (Secretary of State for Health and Another intervening)* [2004] EWCA Civ 727 [2004] 3 WLR 681 (hereinafter "*Evans* (CA)*"*).

had not yet been transplanted into Ms Evans.[95] As such, the case is a conflict between rule-preclusionary ownership claims. His intention, evidenced by the exercise of his autonomy, was considered to be more important than her rights under articles 8, 12 and 14 of the Convention. Although *Yearworth* and *Evans* both concerned the intention of men, it is postulated that the same outcome would be achieved if they had concerned women and their ovae. Although there is no way of knowing this for sure, the gender-neutral nature of the HFEA and Art 8 of the ECHR supports this and, if anything, it could be argued that women would have a greater claim to the right to private life under Article 8.[96]

The element of intention was also considered with regards to genetic materials, more specifically in the form of tissue samples, in *Washington University v Catalona.*[97] The case concerned a dispute between the researcher and the University with regard to ownership over prostate cancer tissue samples. A federal court in the United States held that the act of donation resulted in the abandonment of property rights in the tissue. This corresponds to the argument advanced in Chapter 2, which is that abandonment should not be taken *ipso facto* as "commonization" or the lack of a property relationship.[98] The fact that *Catalona* was cited in *Yearworth*[99] shows that intention was, indeed, considered important.

Furthermore, it must be noted that *Yearworth* dealt with a claim for bailment instead of conversion, which is the more common claim in cases concerning bodily materials (as we have seen above). Although they are both misdelivery claims, bailment concerns the mere transfer of property from one person to another for purposes of safekeeping without any actual transfer of rights. This shows an implied common understanding that the claimants had never intended the transfer of rights to the respondents as storage was for their own future use. This suggests the importance of the men's intentions in deciding the case. Increased consideration given to intention is consistent with the overall strengthening of principles such as self-determination and autonomy in medical law, thus showing that an intention-based account is not incompatible with the arguments proposing injury to autonomy. It also seems to be more persuasive, as the element of intention was present in the cases cited above, even when they were of foreign jurisdictions.

In light of these considerations, it seems that the law has moved—and *is* moving—away from the traditional Lockean-Nozick "work and skill" test to one that relies on intention. However, the emphasis on intention is not incompatible with the work and skill exception. Consider the cases of *Dobson* and *Kelly.* As Pattinson argued, both cases concerned preservation but their outcomes were

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95 This is according to the Human Fertilisation and Embryology Act 1990, c 37, Sch 3, paras 2(1)(a), 4(1)(2), 6(3). See *Evans* (CA) (n 94) [57]-[74] and *Evans* (ECtHR) (n 93) [11]-[12].

96 Keren-Paz, however, argued that there is a gender injustice in these cases: Tsachi Keren-Paz, 'Gender Injustice in Compensating Injury to Autonomy in English and Singaporean Negligence Law' (2019) 27 *Feminist Legal Studies* 33, particularly pp 33-48.

97 437 F.Supp.2d 985 (2006).

98 See Chapter 2, n 63-65 and surrounding text.

99 Yearworth (n 27) [48].

different: *Dobson* did not recognise property rights whereas *Kelly* did. This is because the body parts in *Kelly* were preserved with the intention of being used for teaching and exhibition whereas, in *Dobson,* preservation was done to comply with the Coroners Rule.[100] This means that a greater consideration for intention is not incompatible with the previous cases under the second phase, nor is it incompatible with s 32(9)(c) which codifies this exception. This increases the persuasiveness of the hypothesis.

However, this thesis contends that relying on intention alone is problematic due to two reasons. First, intention itself does not seem to be sufficiently rudimentary or philosophical concept to be used as a justification of *Yearworth* and, possibly, future cases concerning the proprietary status of separated bodily materials. Inferring intention without concrete evidence is a difficult task, which makes intention, as a foundation, unworkable and uncertain. Secondly, relying solely on intention is not particularly compelling. If intention alone can bestow a material with a proprietary nature, then the law would be setting too low of a hurdle. These two points lead us to the rule-preclusionary conception. The rule-preclusionary conception, as shown in Chapter 2, is a sufficiently rudimentary and fundamental principle which addresses both the methodological and semantic problems in ownership and property rights. The role of intention is becoming increasingly important, but this should be taken as a consequence of the adoption of a rudimentary conception of ownership and property that affirms principles of self-determination and autonomy. The rule-preclusionary conception also addresses the second issue and increases the persuasiveness of intention. This is because its starting presumption is recognising that one has property rights over their bodies; the question changes from "how does P *gain* a proprietary status?" to "how does P *retain* a proprietary status?" Rule-preclusionary also helpfully shifts the burden of proof to the second or third parties to justify interference with A's ownership and property rights.

This argument, however, seems to contradict the "no property" rule which the court has been very eager to maintain. In other words, if the law implicitly recognises property rights, why is the judiciary still explicitly upholding a contradictory rule? This inconsistency could be explained by considering the terminological issue of property rights we previously explored in Chapter 2 where terms such as "self-ownership", "ownership" and "property rights" have been used in varying ways by academics as well as the judiciary. It seems that the judiciary conventionally uses "property" in a narrow and rigid manner. This view regards the legal recognition of property rights as a *sine qua non* of the rights themselves. As it has been argued, this view falls victim to the circular reasoning fallacy argued by Dworkin and Kennedy.[101] The question "do we have property rights over bodily materials?" cannot be answered by simply reading judgments because a more rudimentary principle is missing. Scrutiny is instead required and it is important to focus on the outcome and impact of these cases. Consideration of the latter and the key principles in Chapter 2 tells us that the law's lack of explicit recognition of

100 SD Pattinson, *Medical Law and Ethics* (5th edn, Sweet & Maxwell 2017) 485.

101 Dworkin and Kennedy (n 43) 293. See Chapter 2, n 20 and surrounding text.

property rights does not necessarily mean that there is no property relationship between the individual and their bodies. This relationship exists regardless of explicit recognition as there is already implicit recognition of property rights over separated bodily materials.

Conclusion

This chapter has shown how the fundamental concepts discussed in Chapter 2 apply in practice. It first examined the statutory framework regulating living and deceased organ donations. We have seen that principles such as self-determination and autonomy are held to be key in medical law as evidenced by the 2004 Act and even the amendments made by the 2019 Act. This is echoed upon analysis of the long line of jurisprudence. As Rose LJ predicted in *Kelly,* 'the common law does not stand still.'[102] The law has shifted from a stringent "no property" rule to recognising the Lockean-Nozick "work and skill" exception. More recently, it seems that the law is increasingly moving towards a subjective test which focusses on the source. The courts' willingness to bestow property rights to the source and consider the source's intentions suggest an implied recognition of property rights over bodily materials. The direction of the law is compatible with and can be explained by the rule-preclusionary conception of ownership.

[102] Rose LJ in *Kelly* (n 26) 631.

Chapter 4

The Prospective Recognition of Property Rights

Introduction

Thus far, we have evaluated the philosophical underpinnings of the relationship between us and our bodies. It has been argued in Chapter 2 that this relationship is best described as a rule-preclusionary ownership relationship. Chapter 3 then went on to provide a two-fold evaluation of how property rights are already retrospectively recognised in the law. This last substantive chapter will evaluate the prospective argument for the recognition of property rights. This will done by advancing three points: property for reality, protection, and for the future. Within them, the most common objections raised against the recognition of property rights over bodily materials, *inter alia* objectification, commercialisation and exploitation, will be explored.

This chapter will begin by exploring the ethical debate or landscape. The views on property could be classified into three major camps. First, there are the "property apologists" consisting of those who believe that the body and bodily materials should be treated just like any other object and that there should be a full recognition of the rights in the bundle. Second, there are the "property supporters" consisting of those who believe that there should be recognition of property rights but that public health and public policy act as safeguards to prevent exploitation. Third, there are the "property objectors" consisting of those who have fundamental objections with the recognition of property rights. Members of this camp may believe that recognising property rights is fundamentally incompatible with the concept of altruism. The concept of altruism, also known as "the gift relationship", has underpinned the tissue donation framework in England and Wales and internationally. In *The Gift Relationship*, Titmuss conducted a comparative analysis of blood donation markets.[1] He found the altruism-based system of blood donation in England and Wales to be safer and more effective than their commercialised counterparts in Japan and USA. Many have argued that Titmuss' thesis on altruism forms the foundation of blood and organ donations in England. Although this is still true,[2] its importance has markedly decreased throughout the years.

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1 RM Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (Policy Press 2019).

2 Nuffield Council on Bioethics, 'Human bodies: donation for medicine and research' (Nuffield Council 2008) <https://www.nuffieldbioethics.org/publications/human-bodies-donation-for-medicine-and-research/guide-to-the-report> accessed 5 August 2020 pp 142-143, 145.

This chapter will then go on to consider the "prospective" arguments for recognising property rights, i.e. why the law still needs to explicitly recognise property rights over the body and bodily materials. As it has been argued, there is already implicit and retrospective recognition of property rights in the legal landscape as well as a shift favouring property rights. This thesis argues, however, that explicit recognition would be beneficial for three reasons. First, it will reconcile and bridge the prominent gap between the law in theory and how it operates in practice. This will be termed "property for reality". Secondly, it will create adequate protection for individuals against any unwanted interference with their relationships with their bodies or excised bodily materials. This will be termed "property for protection". Third, explicit recognition of property rights opens up a number of attractive solutions to current problems of organ scarcity and medical research. This section will be termed "property for the future".

"Property for reality" will explore how an explicit recognition of property rights could bridge two seemingly concurring realities of altruism on one hand and commodification on the other. This thesis contends that these realities, though often viewed as fundamentally incompatible, can—and, indeed, do—coexist. "Property for protection" will discuss the how a proprietary regime offers an attractive and persuasive infrastructure that can provide much-needed protection to individuals in research. It will first argue that there already exists a 'structural inequity'[3] which exploits and manipulates donors but rewards scientists and pharmaceutical companies for their patents. A proprietary regime can prevent further exploitation of individuals by offering a "safety net" which will allow sources to be viewed as partners—not participants—in research. "Property for organ scarcity" will explore how property rights can be used to increase both living and deceased organ donations. Explicit recognition will allow us to provide appropriate valuation and rewards for living donation services. This thesis will also argue that an opt-out system is not incompatible with a property regime, as the source's intentions are still considered. Additionally, deceased organ donations can be increased through organisational reform to increase trust in the organ procurement system. Ultimately, this chapter—and the thesis as a whole—aims to provide a foundation for advancing the debate.

Exploring the Ethical Landscape

This section aims to map the ethical landscape by reference to three major perspectives, or "camps", on property rights over bodily materials. These three camps, placed on the spectrum of property rights, range from one extreme to the other with the "property apologists" on the pro-

[3] Catherine Waldby and Robert Mitchell, *Tissue Economies: Blood, Organs, and Cell Lines in Late Capitalism* (Duke University Press 2006) 82.

property end and the "property objectors" on the anti-property end of the spectrum. In the middle, there are "property supporters" who support some or a quasi-property nature. These three camps will be further explored in this section. A brief overview of each camp will be given and some criticisms to members of those camps will also be discussed. It is hoped that this section will help readers understand the bigger picture and the applicability of the concepts that have been discussed in Chapters 2 and 3.

Property Apologists

"Property apologists" consist of those who think that property rights and market forces should dominate, and that the trade for human body parts should be normalised and, even, encouraged. It is acknowledged that this is quite a controversial position, hence the usage of the term "apologist". Members of this camp argue for an explicit recognition of property rights over bodily materials. Consequently, the question arises: if our bodies are ours to give, then surely we must be able to control what is given and why.[4] In this camp, it is argued that the key objection to recognising property rights and allowing trade based on that is based on an instinctive intuition that it is morally wrong. Radcliffe-Richards et al. identified this as the feeling of repugnance and argued that the 'weakness of the familiar arguments suggests that they are attempts to justify the deep feelings of repugnance which are the real driving force of prohibition, and feelings of repugnance among the rich and healthy, no matter how strongly felt, cannot justify removing the only hope of the destitute and dying.'[5] Consequently, it is important to first pinpoint the nature of this objection. This instinct-led, gut-feeling of wrongness originates from a "gift relationship" framework regulating the management of bodily materials to which we have grown accustomed. Many view this altruistic framework as *prima facie* antithetical to the idea of commercialisation or the existence of any monetary incentives. It must be asked, 'if it is right to give something away, can it be wrong to sell it?'[6] This will be further explored in the next section "property for reality" where we will evaluate whether the two realities can co-exist.

Furthermore, "property apologists" argue that those who oppose recognition of property rights have unjustifiably ignored the potential benefits market forces have. Market forces could be utilised to allocate scarce resource such as organs or gametes. In the case of organ scarcity, the

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4 Ann Oakley, 'Blood donation – altruism or profit? The gift relationship revisited' (1996) 312(7039) *British Medical Journal* 1114, 1114.

5 Janet Radcliffe-Richards and others, 'The case for allowing kidney sales' (1998) 352 *The Lancet* 1950, 1951.

6 JW Harris, *Wonderwoman and Superman: The Ethics of Human Biotechnology* (Oxford University Press 1992) 118-139.

demand for organs far exceeds the supply and, on the current trajectory, it is likely that this disparity will only increase. Although there are methods to manage the demand—referred to as 'demand-side ethics'[7] by the Nuffield Council on Bioethics—efforts must also be made to manage the supply, i.e. 'supply-side ethics'.[8] This specifically looks at ways to incentivise living organ donations. As discussed in previous chapters, there has been an appreciable relaxation of the common law "no property" rule. Furthermore, the scientific and medical field more generally has already treated bodily materials as commodities particularly with regards to genetic materials obtained from or donated by individuals. Major pharmaceutical companies and scientific institutes make millions from patented cell lines developed from donated or unlawfully obtained genetic materials. Thus, since second and third parties are already commodifying and commercialising these bodily materials, why is the source left unrewarded? Why not take it a step further and apply it to all materials that are short in supply, such as organs?

One of the main criticisms against the arguments proposed by "property apologists" would be with regards to the close relationship between globalisation and trade. Harrison noted that the danger in allowing such a "free" trade in the medical sphere is that it will 'simply [mirror] the "normal" system of unequal exchanges that mark other forms of trade between the developed and underdeveloped regions of the world, and between classes, ethnicities, genders, etc. within and cross these same regions.'[9] In other words, trade in bodily materials, like others, would mirror that of trade more generally: 'from South to North, from poor to rich, black and brown to white, and from female to male bodies.'[10] This is currently the case as illegal organ trade involves the trafficking of the vulnerable, especially children and teenagers. Moreover, organ brokers charge 'between US$100,000 and US$200,000 to organize a transplant for wealthy patients. Donors—frequently impoverished and ill-educated—may receive as little as US$1,000 for a kidney although the going price is more likely about US$5,000.'[11]

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7 Nuffield (n 2) 135.

8 ibid 137.

9 Trevor Harrison, 'Globalization and the Trade in Human Body Parts' (1999) 36(1) *Canadian Review of Sociology* 21, 22.

10 Trevor Harrison, 'Frontiers of the Market: Commodifying Human Body Parts' in Gordon Laxer and Dennis Soron (eds.), *Not for Sale: Decommodifying Public Life* (University of Toronto Press 2006) 15.

11 World Health Organization, 'Organ trafficking and transplantation pose new challenges' (Bulletin of WHO, 1 September 2004) <https://www.who.int/bulletin/volumes/82/9/feature0904/en/>. For further discussions on organ trafficking, see: Jean Allain, 'Trafficking of Persons for the Removal of Organs and the Admission of Guilt of a South African Hospital' (2011) 19(1) *Medical Law Review* 117; Nancy Scheper-Hughes, *The Last Commodity: Post-Human Ethics, Global (In)Justice, and the Traffic in Organs* (Multiversity and Citizens International 2008); DA Budiani-

Property Objectors

On the opposite end of the spectrum, the "property objectors" camp consists of those who have fundamental objections to recognition of property rights. "Property objectors", often dualists, argue that recognising property rights would lead to 'a fragmented relationship between the owner and their body.'[12] Radin, who coined the term 'market-inalienability',[13] divided property into two: fungible and personal. Fungible properties are easily exchanged for money, whereas the latter are closely related to the person's identity.[14] Recognising property rights, Radin argued, would blur the line between the two. Instead, personhood is best maintained through a gift framework which was popularised by Titmuss.[15] Titmuss compared the safety and efficiency of blood donation infrastructures in England and Wales to that of the US in the 1950s-60s. In the former, blood donation is controlled by the centralised public healthcare namely the NHS. In the latter, however, commercial blood banks made up the majority of US blood donations. Titmuss found that the former's donations, motivated by altruism and not monetary incentives, were more 'morally just, and more economically efficient'[16] than its US counterpart. He thus concluded that altruism 'triumphed over the market.'[17] Titmuss' altruistic model has since been applied to other bodily materials more generally. As both Titmuss and the Nuffield Council remarked, one's view on donation is indicative of important social relations and the social communal values held in the wider community.[18] Thus, recognition of property rights could be detrimental to communal values of solidarity.[19]

"Property objectors" follow the Kantian concept of 'inherent dignity, or special status, of the human body'[20] which, consequently, views dignity and price as 'mutually incompatible.'[21] This is because pricing the body, aspects of the body or bodily materials is taken as 'giving it a relative value, whereas human beings are of incomparable ethical worth.'[22] To do so would be to treat humans solely as a means to our ends and would be wrong as it violates a duty to protect the

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Saberi and FL Delmonico, 'Organ Trafficking and Transplant Tourism: A Commentary on the Global Realities' (2008) 8(5) *American Journal of Transplantation* 925.

12 Radhika Rao, 'Property, Privacy, and the Human Body' (2000) 80 *Boston University Law Review* 362, 429.

13 Margaret Radin, 'Market-Inalienability' (1987) 100(8) *Harvard Law Review* 1849.

14 ibid 1880.

15 Titmuss (n 1).

16 John Stewart, 'New Introduction' in RM Titmuss (n 1) vi.

17 ibid.

18 Nuffield (n 2) 144; Titmuss (n 1) 205, 209.

19 Nuffield (n 2) 121-2, 144.

20 ibid 120.

21 ibid.

22 ibid.

vulnerable.[23] It is on this basis that academics such as Sandel, Titmuss and Radin argue that some things are fundamentally untradeable, and the recognition of property rights and the sale of human materials are *eo ipso* wrongful. Waldby and Mitchell argued that "property objectors" uphold the uniqueness of these materials over their other features.[24] Based on these objections, it is argued that property rights over bodily materials should not be recognised. Instead, a reliance on personal rights or IP law would provide a better framework to protect the individual against unjustified interference with their bodies or separated bodily materials, respectively. However, the main criticism against the property objectors' arguments is that, in reality, property rights *has already been* recognised. Furthermore, as we will see in the later section "property for protection", sole reliance on personal rights or IP provides inadequate remedies for the individuals and could exacerbate structural and systemic inequities.

Property Supporters

"Property supporters", forming the midpoint of the previous two camps, comprise those who believe that there should be recognition of property rights but that public health and public policy act as safeguards to prevent exploitation. This camp therefore balances differing ideas from the "property apologists" and the "property objectors". Although property supporters acknowledge that property rights should be recognised over bodily materials, there is still consideration for the uniqueness and the special status of human tissues. Alongside this, however, "property supporters" still appreciates the benefit of a proprietary regime to protect the individual and provide sufficient remedies. "Property supporters" propose that a combination of market and regulations should be utilised. As Eisendrath stated, '[w]hen we need something scarce but we don't know how to get it, we resort to a combination of markets and regulations. Markets get the goods moving; regulation guides them towards fairness and social priorities.'[25] The reliance on a combination of markets and regulations will not only deal with the problems of organ under-supply, but also abuse.[26] As explored earlier, "property supporters" have the issues of transplant tourism and illegal organ trade which has led to the abuse of the vulnerable. Such abuse could be prevented by ensuring that there are appropriate safeguards in place. Furthermore, as the internationality and the global nature of illegal organ trade proves to be a challenge, this camp's proposals are often confined to a specific geographical area, such as a nation or a regional bloc. How this works in practice, however, will be explored in the last section of this chapter.

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23 RE Goodin, 'Exploiting a situation and exploiting a person' in Andrew Reeve (ed.), *Modern Theories of Exploitation* (Sage Publishing 1987).

24 Waldby and Mitchell (n 3) 114.

25 CR Eisendrath, 'Used body parts: buy, sell or swap?' (1992) 24(5) *Transplant Proc* 2212, 2214.

26 Harrison (n 9) 31.

Although "property supporters" aim to bridge the aforementioned camps, there are still some challenges that posed to members of this camp. Firstly, the camp does not resolve the issue of the fragmentation of the self that arises following the recognition of property rights. Secondly, balancing between market forces and safeguarding the vulnerable is a difficult and delicate task. Thirdly, the proposals of the "property supporters" are often only applicable to a specific place or healthcare system. Thus, the transferability and workability of a worldwide policy is likely to be low.

Property for Reality

This section considers how an explicit recognition of property rights could bridge two seemingly concurring realities. On one hand, tissue donation is still underpinned by the concept of altruism. Applying the notion of property to human tissues seems instinctively wrong as we perceive them as "gifts". On the other, implicit commodification of the human body already takes place with regards to gamete "donations" as well as blood and plasmapheresis. How, then, does one reconcile this altruistic reality to the retrospective recognition of property rights argued for in Chapter 3? This section will explore each of these two realities in greater detail and show how they can and do coexist. In this section, arguments pertaining to commodification—which sees the recognition of property rights as a clear violation of the Kantian dignity-based imperative and is thus immoral—will be explored.

An Altruistic Reality

Altruism has long been identified as the guiding principle in ethical organ donation around the world, as well as in England and Wales. However, for something so fundamental, it has been 'poorly defined in policy and position documents, and used confusingly and inconsistently.'[27] In order to understand altruism in the context of donations, a short discussion on altruism more generally is warranted. Altruism can be broadly distinguished into two: motivational and behavioural altruism.[28] The former focusses on the motivation behind an act or why an act was done, whereas the latter focusses on the act itself and its consequence. Although an act can greatly benefit others, thus making it behaviourally altruistic, it can be motivated by self-interest. A motivationally altruistic act must thus be done *for* the benefit of others and not oneself. In the context of donation of bodily materials, the shorthand "altruism" refers motivational altruism. This is evidenced by the emphasis that we put on reasons motivating donations and by the vast

[27] Greg Moorlock, Jonathan Ives, Heather Draper, 'Altruism in organ donation: an unnecessary requirement?' (2014) 40(2) *Journal of Medical Ethics* 134.

[28] This distinction was also recently cited by Nuffield (n 2) 139.

number of studies which explore donor motivations. This was also clarified by the Nuffield Council of Bioethics in their 2008 Report (hereinafter "Nuffield"), which we will further discuss later.[29] Although there is no single correct definition of altruism, numerous academics have attempted to expound the concept. Smith argued that altruism contained four key attributes which pertain to empathy.[30] Others, such as Krasner and Ullmann, have taken a more sceptical approach and argued that, since motivational altruism is difficult to ascertain, only behavioural altruism really truly exists. They argued that most altruistic acts are motivated by egoism; their outcomes just happen to benefit others.[31] In the context of donation of bodily materials, altruism is regarded as the only pathway to ethical donations but what does altruism in an organ donation context mean?

The prominence of altruism in blood and organ donation frameworks could be traced back to Titmuss' work. Titmuss, studying blood donation systems, defined altruism as giving a gift of life to a stranger or a 'free human gift.'[32] This is the opposite of self-love.[33] Titmuss argued that blood donation, motivated by altruism, is synonymous to giving a gift of life to a stranger. This "gift-relationship" phrasing is an adaptation of Mauss' *The Gift.*[34] In his eight typologies of donors, he argued that altruism was only evident in the "voluntary community donors" who chose to donate their blood even when 'there is no formal contract, no legal bond, no situation of power, domination, constraint/compulsion, no sense of shame or guilt, no gratitude imperative, no need for penitence, no money and no explicit guarantee of or wish for a reward or a return gift. They are the acts of free will; of the exercise of choice; of conscience without shame.'[35] To Titmuss, however, the impact of the study goes beyond blood donation policy as he viewed blood donation as 'one of the most sensitive universal social indicators which, within limits, is measurable, and one which tells us something about the quality of relationships and of human values prevailing in a society.'[36] To give blood is thus to take part in 'the creation of a greater good transcending the good of self-love.'[37] Nuffield also echoed this in their 2008 Report, describing altruism as

29 ibid.
30 Ann Smith, 'An analysis of altruism: a concept of caring' (1995) 22 *Journal of Advanced Nursing* 785.
31 Leonard Krasner and Leonard P Ullmann, *Behaviour, Influence, and Personality: The Social Matrix of Human Action* (Holt, Rinehart and Winston 1973) 140.
32 Titmuss (n 1) 70.
33 ibid 2.
34 Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (Routledge 2001).
35 Titmuss (n 1) 71.
36 Titmuss (n 1) 3.
37 Titmuss (n 1) 204.

'entailing a selfless gift to others without expectation of remuneration.'[38] An altruistic act is thus an act 'that is motivated by concern for the welfare of the recipient of some beneficent behaviour, rather than by concern for the welfare of the person carrying out the action.'[39] Nuffield argued four key benefits to an altruistic organ donation system: it ensures quality of supply, prevents exploitation of the poor, ensures maintenance of communal virtues, and ensures quality of supply. Out of these four reasons, they have cited the maintenance of communal virtues, 'in particular those of solidarity and of protecting the common good',[40] as being the most important. Like Titmuss, they argued that a society's approach to organ donation shows the community-wide commitment those in England and Wales have towards providing for others; 'systems of donation within any particular society have the potential to affect communal values within that society'.[41] Consequently, blood 'distribution systems cannot be treated as autonomous independent processes.'[42]

Since Mauss and Titmuss, altruism has been the foundation of the NHSBT infrastructure as well as the wider international sphere.[43] In addition to being considered an altruistic act, donation of blood and organs are also considered as supererogatory acts. A supererogatory act, derived from the Latin words *super-erogare,* refers to acts that go "beyond the call of duty." The term is colloquially known as the "Good Samaritan". Mellema identified three characteristics of a supererogatory act: fulfils no moral duty or obligation, morally praiseworthy or meritorious, and an act whose omission is not morally blameworthy.[44] The WHO, who regards organ donation as an altruistic and supererogatory act, is against the commercialisation of blood, organs and tissues. Like the Titmuss and the NHSBT, they argued that a 'blood donation is a "gift of life" that cannot be valued in monetary terms. The commercialization of blood donation is in breach of the fundamental principle of altruism which voluntary blood donation enshrines.'[45] The WHO's aim is to make 100% of blood donations in the world free and voluntary. In England and Wales, the NHSBT's campaign to encourage blood donation is centred on the slogan "Do something

38 Nuffield (n 2) 120.
39 Nuffield (n 2) 139.
40 ibid 148.
41 ibid 152.
42 Titmuss (n 1) 208.
43 Nuffield (n 2) 124.
44 Gregory Mellema, *Beyond the Call of Duty: Supererogation, Obligation and Offence* (State University of New York Press 1991) 120-30.
45 World Health Organization, 'Towards 100% Voluntary Blood Donation: A Global Framework for Action' (World Health Organization 2010) 19.

amazing."[46] This supports the view that blood donation in England and Wales is seen as altruistic and supererogatory.

In contrast, the slogan used to encourage organ donations, both living and deceased, is centred on "Yes I do(nate)."[47] Other graphics include rhetorical questions such as "If you needed an organ transplant, would you have one?"[48] The use of the Golden Law aims to evoke empathy and motivate readers to donate. However, it seems to have put less of an emphasis on the supererogatory nature of the act. This seems odd as one could argue that 'acts become less obligatory and increasingly supererogatory as the costs and risks to the donor increase'[49] and, consequently, living organ donations should be seen as more supererogatory than blood donation. This peculiarity could perhaps be explained by the absence of a difference between live and deceased organ donation campaigns as this logic of implicit moral obligation could be more applicable to deceased organ donations. Furthermore, it is acknowledged that the donation of certain bodily materials will be considered more altruistic and supererogatory than others depending on the risk of the procedure. For instance, donation of stem cells from blood and/or bone marrow might be considered inferior to kidney donation as latter involves a high-risk removal of non-regenerative tissue and requires a more complicated aftercare.

A Commodified Reality

Alongside this altruistic reality, the seemingly antithetical commodified reality exists where body and certain bodily materials are treated as commodities or objects to be commercialised. We have already seen in Chapter 3 how the law has already implicitly recognised property rights to the source over certain bodily materials. This section will now focus more on a more practical commodification and explore the contexts in which these practices happen. It argues that commodification can most clearly be seen through three things: (1) 'non-altruist-focused interventions'[50] used to encourage gamete "donations", (2) the trade of blood and plasmapheresis, and (3) the trading of genetic material derived from "waste" products. Ultimately, it seeks to show the stark reality that commodification is a prominent practice.

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46 See NHSBT, 'Give blood' (NHSBT) <https://www.blood.co.uk/> accessed 15 August 2020.

47 See NHSBT, 'Organ Donation' (NHSBT) < https://www.organdonation.nhs.uk /> accessed 15 August 2020.

48 See NHSBT, 'Organ donation social media' <https://www.nhsbt.nhs.uk/how-you-can-help/get-involved/download-digital-materials/organ-donation-social-media/> accessed 15 August 2020.

49 Paul Snelling, 'Challenging the Moral Status of Blood Donation' (2014) 22 *Health Care Analysis* 340, 357.

50 Nuffield (n 2) 132.

Gamete "Donations"

The law has more readily recognised property rights over gametes than other bodily materials. This is perhaps because sperm and eggs have, in reality, routinely treated as property in the medical sphere. Despite still being referred to as "donations", these practices are not fully donated in an altruistic sense and instead involve monetary incentives.

Nuffield helpfully created the dichotomy of 'altruist-focused interventions' and 'non-altruist-focused interventions.'[51] The former refers to methods which 'typically involve the removal of various disincentives to act'.[52] As these methods do not actually give individuals the motivation to act, it relies on a pre-existing altruistic motive from the donor. Non-altruist-focused interventions, on the other hand, 'are targeted at potential donors who have no strong motivation to help others through [donation, thus] need to be provided with different reasons for action, perhaps in the form of payment going well beyond the reimbursement of expenses.'[53] The primary example used to showcase non-altruist-focused interventions is the 'egg-sharing regimes to encourage women to donate their eggs'.[54] Fertility clinics often offer egg donors a discount or exclusive access on certain fertility treatments that would otherwise not be available. Nuffield, however, acknowledges that there is not always a clear-cut classification of these interventions as non-altruist-focused interventions could also incentivise altruistic donors all the same. For instance, the egg donor, as well as being motivated by a desire to help other couples going through fertility treatments, could also be motived by the reduction in price. In short, 'individuals who are paid, or otherwise rewarded, for their services can also be altruists.'[55] This reaffirms how difficult it is to ascertain altruism as a motive.

A clear example of a non-altruist-focused intervention is the outright payments to sperm donors. Although they are termed as "compensation", a lump sum payment of £35 is given to sperm donors regardless of how much they spend on expenses. Although this means that a man spending £40 in travel expenses will not be fully reimbursed, a man who did not spend any expenses will make a £35 profit. Nonetheless, the medical sphere—and, indeed, its regulatory counterparts—have more readily treated gametes as property than other bodily materials. The use of non-altruist-focused interventions seldom happens with other types of human tissue. Although

51 ibid.
52 Nuffield (n 2) 140.
53 ibid.
54 ibid.
55 ibid.

there are no explicit reasons given for this, it can perhaps be attributed to the varying levels of risk and consequences involved in obtaining these materials.

Blood and Plasmapheresis

Blood donation has become increasingly more complicated. The technology used nowadays allows for the fragmentation and separation of blood. As a result, even though most blood donations are in the form of "whole" blood, transfusions are rarely "whole". Blood donation has been transformed since the creation of plasmapheresis, a process that separates blood plasma from "whole" blood. Plasmapheresis, also known as therapeutic plasma exchange, is a treatment performed where a patient's plasma is removed and replaced. This practice has become significantly more common over the past few decades. After plasma is extracted from "whole" blood donations, they are frozen and processed so they could be traded and shipped to other countries.

The impact of this is not only on the scientific and medical sphere. Instead, it also influences our sociocultural perspective on blood. Blood donation, as proposed by Titmuss, only existed in the "national" sphere. This is because there is a lack of understanding in increasing the "shelf life" of blood. However, blood donation has since been transformed by increased scientific knowledge and the creation of plasmapheresis, a process which allows the extraction of blood plasma from "whole" blood. After this plasma is separated, they are frozen and processed. This means that they could be traded and shipped to other countries. As this practice became significantly more common and as scientific understanding on storing blood grows, blood becomes more multinational in nature. Blood plasma and, indeed, whole blood are now routinely perceived as commodities. The UK, for instance, buys and sells blood components and plasma within the European Union. This is why there is no blanket prohibition on commercialisation in human materials. The Human Tissue Authority, per s 32(3) of the 2004 Act, has the discretion to allow such trades. Trade is also regulated on an EU-level through Directives and its practice is overseen by organisations such as The European Blood Alliance and the European Directorate for the Quality of Medicines and Healthcare.[56] They, in turn, oversee the operation of at least 1400

[56] These include instruments such as: Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components [2004] OJ L 91/25; Directive 2002/98/EC of European Parliament and of the Council setting standards of quality and safety for the collection, testing, processing, storage and distribution of human blood and blood components and amending Directive 2001/83/EC [2003] OJ L 33/30.

blood establishments across the EU.[57] The Market Research Bureau, in 2011, estimated that ten 'Member States had a plasma proteins market with an estimated worth close to 3 million Euro'.[58] This market has also grown following the COVID-19 pandemic, as the European Commission has injected additional funding for plasmapheresis equipment to encourage COVID-19 plasma collection from convalescents and transfusion to patients.[59]

Can These Two Realities Coexist?

Upon a further exploration of these two realities, it seems that they are fundamentally antithetical. How can, if at all, these two realities coexist? The current dual existence, however, is misleading: the wider public is only encouraged to be aware of the altruistic reality and not the one which commodifies the person. We are encouraged to maintain the altruistic reality in a manufactured mission to prevent commodification of persons but our altruism is actually perpetuating commodification; 'the notion of the gift is often used rhetorically in order to obtain material that then circulates on a commercial basis.'[60] To an extent, the existence of a commodified reality itself is sufficient to suggest that the importance of altruism has decreased over the years especially as medical and scientific technologies and practices have significantly evolved. Although the importance of altruism can still be clearly seen today, it must be questioned the extent to which it remains a convincing basis. It is argued that this coexistence is made possible by the evolution of scientific technologies and medical practices, as well as the devaluing of altruism as a sole basis to regulate donations

Since Titmuss, three major changes to blood donations have taken place. Firstly, the public's view on blood donation has become increasingly multifaceted. With increased infectious possibilities of diseases such as AIDS, blood banks are sometimes viewed as a place of 'risk and

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57 European Commission, 'Blood, tissues, cells and organs' (EC Europa) <https://ec.europa.eu/health/blood_tissues_organs/blood_en> accessed 15 August 2020.

58 Creative Ceutical Report, 'An EU-wide overview of the market of blood, blood components and plasma derivatives focusing on their availability for patients (revised by the Commission to include stakeholders' comments)' (2015) 88.

59 See: Newsroom, 'European Commission strengthens support for treatment through convalescent plasma' (*Modern Diplomacy*, 3 August 2020) <https://moderndiplomacy.eu/2020/08/03/european-commission-strengthens-support-for-treatment-through-convalescent-plasma/> accessed 15 August 2020; European Commission, 'COVID-19 Convalescent Plasma Transfusion' (*European Commission*) <https://ec.europa.eu/health/blood_tissues_organs/covid-19_en> accessed 15 August 2020; European Commission, 'Emergency Support Instrument' (*European Commission)* <https://ec.europa.eu/info/live-work-travel-eu/health/coronavirus-response/emergency-support-instrument_en> accessed 15 August 2020.

60 Nuffield (n 2) 125.

contamination, simply a conduit from one infected body to another.'[61] This, Waldby and Mitchell note, is 'an inverted image of Titmuss' gift.'[62] This could perhaps, to an extent, explain how the NHSBT has framed blood donation as a supererogatory act. Perhaps, it is part of a bigger effort to shift the public's perspective on blood donation. Secondly, blood donation has become increasingly complex. During Titmuss' time, the 'civil status of blood donation was more straightforward'.[63] As we will further explore later, "whole" blood transfusion is rarely found today as most transfusions concern blood fragments. This fragmentation, to an extent, distorts the view of "the gift" and makes it more difficult to identify who exactly is "my stranger".

Thirdly, scientific technologies have improved quality control for blood donations and, indeed, donations of bodily materials more generally. Titmuss found that commercial blood banks tend to cut corners, resulting in poorer quality of blood and an increase in diseases such as hepatitis. He gave an example of a commercial blood bank in Kansas City run by a secondhand-car salesman and his wife who claimed she was a nurse despite the absence of a license. The donors were described as 'Skid-Row derelicts'[64] who responded to the "Cash Paid for Blood" sign displayed. It is unlikely that we will encounter such a practice today as the industry has become more closely regulated. It is also worth noting that commercialisation of blood has not only been done by commercial blood banks, but national healthcare services too such as the NHSBT who buys and sells blood across the EU. Furthermore, Titmuss' study has been described as the 'best-known illustration of markets crowding out non-market norms'.[65]

However, the prominence of altruism as the sole basis for ethical donations must be questioned. The 2011 NICE guidelines make no mention of altruism,[66] and it has been suggested that altruism merely desirable not necessary.[67] Nuffield have recognised the exaggeration of altruism, particularly with regards to organ donation.[68] Altruistic donations are seen as ethical, but this reasoning should be questioned. Consider the infamous 1998 racist donation where the white man agreed to donate on condition that his kidneys and liver were given to a white recipient.

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61 Waldby and Mitchell (n 3) 52.
62 ibid.
63 ibid 39.
64 Titmuss (n 1) 134.
65 MJ Sandel, 'How Markets Crowd Out Morals: A Forum on the Corrupting Effects of Markets' (*Boston Review*, 1 May 2012) <http://bostonreview.net/forum-sandel-markets-morals> accessed 15 August 2020.
66 National Institute for Health and Care Excellence (NICE), 'Organ donation for transplantation: improving donor identification and consent rates for deceased organ donation' (12 December 2011) <www.nice.org.uk/guidance/cg135> accessed 20 August 2020.
67 Moorlock (n 27).
68 Nuffield (n 2) 86-87.

This has prompted the 2010 Guidance's prohibition on directed and conditional donations.[69] De Wispelaere correctly noted that a racist donation can be altruistic according to Nuffield's definition, thus altruism does not instantaneously make donations ethical.[70] It is thus 'wrong to assume that all altruism involves moral behaviour.'[71] Furthermore, the 2010 guidance requires an absence of conditionality for donations.[72] In reality, no organ or material is ever donated absolutely freely and unconditionally; the donor's consent is for their organ to be used for the purposes they have consented to, e.g. transplantation or research. 'All this suggests that constraints on donation are only considered contrary to altruism if they fall outside the parameters already deemed acceptable by reference to other principles.'[73] It is on this basis that Moorlock and others argued that altruism, in the context of donation of human materials, is the mere opposite of a commerce-based system.[74]

This is perhaps caused by the difficulty in proving altruism. Titmuss himself acknowledged that 'no donor type can… be characterised by complete, disinterested, spontaneous altruism. There must be some sense of obligation, approval and interest'.[75] He thus tailored his definition by adapting sociologist Sorokin's work and coined the term "creative altruism", i.e. self-love but 'may also be thought of as giving life, or prolonging life or enriching life for anonymous others.'[76] This definition closely resembles behavioural altruism and seems contradictory to his previous statements: how can altruism both be the opposite of self-love and yet motivated by self-love? However, Nuffield argued that it is not important 'from an ethical perspective that altruism is thoroughly "pure".'[77] Thus, means that can 'facilitate altruism' such as 'reimbursement for loss of time, or loss of earnings' should be allowed so long as it relies on a pre-existing altruistic motive.[78]

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69 Department of Health, 'Requested Allocation of a Deceased Donor Organ' (UK Health Administrations 2010).

70 Jurgen De Wispalaere, 'Altruism, Impartiality and Moral Demands' in Jonathan Seglow (ed.) *Critical Review of International Social and Political Philosophy* (F Cass Publishers 2002) 9-10.

71 Elliott Sober and David Sloan Wilson, *Unto Others: the Evolution and Psychology of Unselfish Behaviour* (Harvard University Press 1998) 303-304. More extremely, Scott has also argued that altruism perpetuates eugenics. See: Niall Scott, 'Eugenics Perpetuated by Altruism' (2002) 11(4) *Science as Culture* 505.

72 2010 Guidance (n 69) [10]-[11].

73 Moorlock (n 27) 135.

74 ibid.

75 Titmuss (n 1) 70-71.

76 ibid 179.

77 Nuffield (n 2) 139 [5.25].

78 ibid.

Development in scientific technologies and increased scepticism towards sole reliance on altruism have allowed for the coexistence of the altruistic reality as well as the commodification reality. Nuffield acknowledged that certain bodily materials, such as gametes, have more rapidly moved further away from a completely altruistic model. However, they concluded that 'a wholesale reconfiguration of the basis for the donation of bodily material (as would be implied by creating a new system of non-altruist-focused interventions) could be reckless, and could run the risk of irreversible damage to important communal virtues.'[79] Although this is still true to an extent, one must emphasise the role of individual's altruism in allowing for and perpetuating commodification.[80]

Property for Protection

This section explores how a proprietary regime offers an attractive infrastructure that will grant individuals with much-needed protection in research. It argues that explicit recognition of property rights could give the source greater control over their separated bodily materials, even after it has been developed and processed. This section will first explore the structural inequity where donors are asked to gift their materials to later be sold by scientists and pharmaceutical companies. It will then argue that the robust and well-established proprietary regime could provide a "safety net" framework for individuals. This will grant greater continuing control to the source over their materials in research so they are viewed as partners and not participants. As Laurie and Postan note, 'growing legal protection afforded to autonomy and judicial recognition of individual property rights in tissues may offer opportunities for remedies in law where the regulatory regimes controlling uses of human tissue and personal data do not.'[81]

Existing Structural Inequity

Contrary to what has been argued in cases such as *Moore* and *Kelly*,[82] denying property rights over bodily materials to the source does not protect the uniqueness and sanctity which gives the body its "untradeable" nature. Instead, the current system protects major corporations and

79 ibid 147.

80 Michael Steinmann, Peter Sýkora, Urban Wiesing (eds.), *Altruism Reconsidered: Exploring New Approaches to Property in Human Tissue* (Routledge 2009) 2.

81 Graeme Laurie and Emily Postan, 'Rhetoric or Reality: What is the Legal Status of the Consent Form in Health-Related Research?' (2013) 21(3) *Medical Law Review* 371, 371.

82 In *Moore v Regents of the University of California* (1990) 51 Cal.3d 120, the SC of California found that 'the patented cell line is both factually and legally distinct from the cells taken from Moore's body' (141). In *R v Kelly (Anthony Noel); R v Lindsay (Neil)* [1999] QB 621 [1999] 2 WLR 384, the CA argues that the environment at that time only limited common law's recognition of property rights to those that have been subject to work and skill (631).

scientific institutions who are exempted from having reward the sources of the raw materials they process. This is exacerbated by the increasingly common practice of processing and patenting cell lines. The US market for cell lines, with an estimated value of around US$2,421.34 million in 2017,[83] is currently the largest in the world and it is expected to be worth US$7.5 billion by 2024.[84] The second-largest market for cell lines is in Europe, where a growth of 12.8% between 2014 and 2022 is expected.[85] Consequently, multinational corporations as well as bodies such as the EU have invested billions to encourage the growth of this market.[86] Considering the clearly high value ascribed to cell lines, it is curious why the property rights of these "donors" are still unrecognised in research. This thesis argues that there exists an inherent systemic inequity where companies profit from a "donor's" gift.

The current legal framework prohibits non-consensual analysis of DNA, per s 45 and Schedule 4 of the 2004 Act. The provision only allows DNA to be analysed with 'qualifying consent' (s 45(1)(a)(i), read with Sch. 4 para. 2) if its analysis was done for any purpose than for an excepted purpose (s 45(1)(a)(ii), read with Sch. 4 para. 5). Qualifying consent, however, is not needed if the use was for an expected purpose or if the material is an excepted material. An excepted purpose is, *inter alia*, the prevention or detection of crime (Sch. 4 para. 5). Per s 45(2), a material is excepted if: (a) it has come from the body of a person prior to when the Act came into force, (b) it was obtained immediately before the Act came into force and the person reasonably believes it cannot be identified, or (c) it is an embryo outside the human body.[87]

Aside from this provision, much of consent in research is governed by regulations and best practice guidance. For instance, the Royal College of Physicians and Royal College of

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83 Market Reports, 'Global Immortalized Cell Line Market Research Report – Forecast to 2023' (*Market Reports*, 21 August 2018) <https://www.marketreportsworld.com/global-immortalized-cell-line-market-12364693> accessed 25 September 2020.

84 Maggie Lynch, 'Global cell line development market to reach $7.5bn by 2024' (*BioPharma Reporter*, 1 March 2019) <https://www.biopharma-reporter.com/Article/2019/03/01/Global-cell-line-market-expected-to-reach-7.5bn> accessed 25 September 2020.

85 European Union, 'Cell line development platform for SMEs to reduce the length and cost of biologic drug development (Grant agreement ID 718711)' <https://cordis.europa.eu/project/id/718711> accessed 20 October 2020.

86 General Electric (GE) Healthcare has invested billions into a cell culture media production site in Pasching, Austria. See: Dan Stanton, 'Multi-Media Player: GE Invests in EU and US Plants to Tap $1.4bn Market' (*BioProcess International*, 18 May 2018) <https://bioprocessintl.com/bioprocess-insider/upstream-downstream-processing/multi-media-player-ge-invests-in-eu-and-us-plants-to-tap-1-4bn-market/> accessed 20 October 2020. Furthermore, the EU—via funding projects such as Horizon 2020 (H2020)—has also backed a number of researches aimed to further cell line developments. See: European Union (n 85).

87 The Human Tissue Act 2004 came into force on 1 September 2006.

Pathologists encourage the 'proactive seeking of consent'[88] from donors, particularly regarding further uses of their anonymised material if it is still traceable. The Advisory Committee on the Safety of Blood, Tissues and Organs advises 'that consent should be regarded as a process not an event'[89] and that any commercial involvement must be disclosed. The committee encourages a framework where donors have the ability to limit their consent only to non-commercial uses of their cells and tissues,[90] although they acknowledged that 'this might mean that the donation would not be taken.'[91] Furthermore, if they permit their materials to be used for commercial purposes, donors must know 'that their donation is a gift and they cannot themselves expect to benefit financially if this occurs.'[92] Consent in these situations is an '"all or nothing" affair.'[93] One could argue that donors do not have property rights over their excised materials, as they are treated as gifts. This suggests an incompatibility with the property rights argument this thesis makes. However, as previously discussed in Chapter 2 and the first section "property for reality" above, the right to income may—but not must—arise from property rights. Moreover, the act of gifting a tissue for a specific purpose can negate the source's rule-preclusionary ownership over her material so long as consent was given freely, voluntarily, and informedly.

Laurie and Postan remarked that the law's reliance on guidance shows that it has 'no legal teeth.'[94] This thesis, however, is hesitant to make such remarks as s 45(3) of the 2004 Act makes non-consensual analysis of DNA a criminal offence as it could lead to a fine, imprisonment for up to three years, or both. The current framework, however, is unsound two grounds. First, s 45 only prohibits non-consensual analysis of DNA from 'bodily material' (s 45(1)(a)), which is further defined as material that has come from a human body (s 45(5)(a)) and consists of or includes human cells (s 45(5)(b)). As DNA in and of itself is not bodily material, analysing extracted DNA and using its result outside the excepted purposes is permitted.[95] DNA testing companies, which have recently grown in popularity, does not necessarily need a license from the

88 Royal College of Physicians and the Royal College of Pathologists and British Society for Human Genetics, 'Report of the Joint Committee on Medical Genetics: Consent and confidentiality in clinical genetic practice: guidance on genetic testing and sharing genetic information' (2nd edn, RCP, RCPath 2011) vi.

89 Department of Health and Social Care, 'Donation of Starting Material for Cell-Based Advanced Therapies: a SaBTO Review' (June 2014) 8. See also pp 50-56.

90 ibid 56.

91 ibid.

92 ibid 65.

93 Laurie and Postan (n 81) 401.

94 ibid 394.

95 Human Tissue Authority, 'Analysis of DNA under the HT Act' (HTA) <https://www.hta.gov.uk/faqs/analysis-dna-under-ht-act> accessed 20 October 2020.

Human Tissue Authority.[96] This is problematic considering that the result of these analyses are often shared to for-profit companies.[97] More regulation is thus needed in this sphere. Secondly, the provision does not seem to expand on any forms of redress or restitution available if unlawful analysis of DNA had occurred. This thesis suggests that a property framework could be utilised to fill this gap within the law which might broaden as commercial DNA testing becomes more commonplace.

A "Safety Net" Approach

In light of the structural inequity prevalent in the industry, it is argued that a proprietary regime offers an attractive solution even as a "safety net" approach. By granting individuals property rights over their excised materials, there will be remedies to which they can resort. It is argued that a proprietary regime is much more attractive than other regimes, such as one that relies on bodily rights or the rights to privacy, as it is already well-established and well-founded. This thesis uses the term "safety net" to indicate how property rights can protect individuals against any breach. Like a safety net a trapeze artist, it is there to give security which helps prevent a fall as well as a solution if a fall does occur. It thus offers a two-edged solution, both in a preventative (i.e. preventing any unintended usage) as well as in a remedial sense (i.e. indicating what is to be done in the event of a breach of A's property rights). These will now be explored in turn.

First, a proprietary regime offers a preventative solution which pays greater consideration to the source's intention. The fact that A has property rights over her excised cancer cell or B over his spleen means that the use of these materials that would otherwise be classed as "waste" and, consequently, the "medical commons" will require the consent of the source.[98] This classification of "waste" which are, in reality, valuable raw materials accelerated research. This discrepancy is what Lenk and Hoppe termed as a 'normative vacuum'.[99] As briefly stated in Chapter 2, the classification of "waste" or "abandoned" material does not necessarily mean that whomever finds

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96 This is because most of these companies hold bodily materials for a short period of time, only to extract DNA from said materials (ibid).

97 Although Ancestry states that they do not sell users' personal information (Section 17.6. of Ancestry's privacy statement <https://www.ancestry.co.uk/cs/legal/privacystatement#selling>) except for what has been stated in the Terms and Conditions. However, the Terms and Conditions states that anonymised data can be shared with collaborators and users 'acquire no rights in any research or commercial products developed by [Ancestry] or [Ancestry's] collaborators and will receive no compensation related to any such research or product development.' (https://www.ancestry.co.uk/cs/legal/termsandconditions#other-companies)

98 According to Ancestry's Terms and Conditions, using Ancestry means that users have agreed that their data will be held in the public domain. (ibid term 2.1.).

99 Christian Lenk and Nils Hoppe, 'Using Tissue and Material from the Human Body for Biomedical Research: Proposals for a Normative Model' in Steinmann and others (n 80) 133.

it has free reign over its usage.[100] Rather, it is an indication of the source's intention for her and others to no longer use the material. It is argued that a proprietary rights regime could help solve this issue as it will compel third parties to respect the source's intentions, thus preventing any non-consensual or misuse in the first instance. Secondly, explicitly recognising property rights allows reliance on sufficiently robust remedies. This means that, if non-consensual use or misuse were to occur, the individual is entitled to recompense and redress such as conversion or bailment, such as in the case of *Yearworth.* The term "safety net" is also an indication of the non-controversial aspect of the model. Relating it back to the bundle of rights model explored in Chapter 2, the "safety net" model does not purport to recognise all rights in the bundle. Rather, it focusses on what have been deemed as the key incidents, namely the rights to control, to possess, and to exclude. On the spectrum previously explored, this model offers a middle ground for the property apologists, objectors, and supporters. On the spectrum previously explored, this model is attractive as it offers a middle ground for the property apologists, objectors, and supporters. To what extent this can be further stretched to a more explicit recognition of property rights, however, will be explored in the last section of this chapter.

There are two possible objections against this proposed model. First, there have been arguments which suggest that reliance on personal or privacy rights might be as—if not, more—effective than relying on property rights. Rao has argued for this, stating that reliance on privacy rights respects autonomy and dignity, and will prevent a 'fragmented relationship'[101] between the owner and their body which is often regarded as a negative consequence of recognising property rights.[102] Rao's materialist argument, however, presumes that all types of recognition of property rights will be dualist. However, as we have seen in Chapter 2, this thesis proposes a philosophically neutral definition. Furthermore, this thesis' proposed combination of rule-preclusionary ownership and the "bundle of rights" framework for property rights allows the framework to be applied differently to different types of properties and allows it to be tailored to different materials. Relying on property rights is also consistent with the prohibition of non-consensual analysis of DNA, even if it is anonymous or anonymised. This prohibition is premised on a property regime—not privacy. This is because, if privacy was the underlying principle, then analysis of anonymous or anonymised DNA should be permitted as it does not actually infringe the source's privacy.

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100 See Chapter 2 n 69 and surrounding text.
101 Rao (n 12) 429.
102 See, for instance, Radin (n 13).

Another objection to this proposed model might argue that important and life-saving scientific and medical research will be hindered if the source is given property rights over their bodily materials. This objection echoes the Californian Supreme Court's reasoning in *Moore*.[103] Herring and Chau have also argued that there should be a moral duty to participate in scientific research.[104] There are two responses to this argument. First, the utility of scientific and medical discoveries does not justify the exploitation of vulnerable individuals. Although this might be permitted under utilitarianism, it is argued that the baseline has shifted the more society respects autonomy and self-ownership and ever since the inequities have been shown to mirror those of society more generally. It is one thing to say there is a moral duty to participate in non-profit life-saving research, but it is another to do this while allowing researchers and pharmaceutical companies to greatly profit from the findings of such research. This thesis argues that conducting important research and acknowledging the source's property rights are not mutually exclusive. Secondly, it is difficult to reconcile why we object to being sufficiently recompensed for our bodily materials but allow and, to an extent, encourage paid participation in clinical trials. This will be further discussed in the next section, "property for organ scarcity."

Other persuasive models have also been proposed. Hoppe, for instance, argued that trusts and equity provide 'a number of exciting entry points into developing alternative proprietary notions'.[105] Laurie and Postan suggested viewing consent as partnership or as 'a continuing relational process'.[106] This involves treating consent as 'merely a framing instrument and only the starting point for a partnership that will evolve overtime.'[107] They argued that it would be beneficial to perceive consent forms as legal or quasi-legal instruments. This, of course, would presuppose that the individual has property rights over their materials which this thesis has already argued for. Furthermore, this is beneficial as 'in a research context, property rights would establish a strong justiciable legal interest on the part of participants to exercise control over how their tissues might be used.'[108] Their proposal was made on the back of 'growing legal protection afforded to autonomy and judicial recognition of individual property rights in tissues'.[109] The law should protect two key participant interests, namely being sufficiently informed at the time that consent is obtained and being able to exercise continuing control of one's contribution to a

103 See *Moore* (n 82) 145-146.
104 Jonathan Herring and PL Chau, 'My Body, Your Body, Our Bodies' (2007) 15(1) *Medical Law Review* 34.
105 Lenk and Hoppe (n 99) 129.
106 Laurie and Postan (n 81) 413.
107 ibid 371-2.
108 ibid 396.
109 ibid 371.

research.[110] Likewise, Tutton argues that the keyword for donations, particularly for research purposes, should be replaced from "gift" to "participation".[111] This will hopefully allow people to be viewed not just as research subjects but as participants, and will increase participants' control over their materials as the term implies active involvement. Alternatively, Laurie and Postan also noted that it is preferable to use the term "broad consent" for research. Broad consent acknowledges that not all information can be given upfront, thus there is an emphasis on using 'oversight mechanisms that monitor the research relationship overtime.'[112] Ultimately, this thesis proposes a framework that will provide greater control to donors, and an appropriate valuation of the materials. The next section will consider how these two matters with regards to organs can be increased.

Property for Organ Scarcity

This section explores the future implications of explicitly recognising property rights, specifically with regards to the organ shortage issue discussed in Chapter 3. This thesis argues that a proprietary framework could be used to increase living and deceased organ donations. It first argues that living organ donations can be encouraged by increasing "compensation". It considers Erin and Harris' proposal for a regulated monopsony for organ trading, which is still prominent today, and examine its workability. It will also explore issues pertaining to exploitation and devaluing, arguing that an explicit recognition of property rights allows a higher and more appropriate valuation of the services of live organ donors. Secondly, this section discusses deceased organ donations and shows that the soft opt-out framework does not undermine a proprietary framework. Instead, it confirms this thesis' argument for the increasing consideration for the source's intentions which consequently bestows greater control to the source. To address the organ scarcity issue, this thesis makes some proposals focussing on reforming the organ donation framework to foster trusting relationships between the public and the NHS and to increase public attention on organ donation.

110 ibid 410.

111 See Richard Tutton, 'Gift Relationships in Genetics Research' (2002) 11(4) *Science as Culture* 523.

112 Laurie and Postan (n 81) 378.

An Ethical Market in Organs

Erin and Harris' proposal for an ethical market in organs, although made in 1991, is still one of the most famous and prominent proposals for organ trading. Their proposal was made on the basis of the law's respect for individual autonomy, which is seen as more favourable than 'medical paternalism.'[113] Their proposal for a monopsonistic market in organs where the NHS acts as a lone buyer considers and implements 'safeguards against wrongful exploitation and shows concern for vulnerable people, and factors in justice and equity.'[114] This section will first provide an overview of Erin and Harris' proposal and explore the advantages and disadvantages of their model.

A monosponistic market is 'a situation where only one buyer exists for the products of several sellers.'[115] In their proposal, this role will be fulfilled by the NHS. Their model is particularly attractive because it is not a novel one: the NHS already operates on a monopsony with regards to pharmaceutical drugs and medical equipments such as kidney dialysis machines.[116] The NHS is the sole buyer for these resources which, in turn, are distributed among various NHS trusts. Ultimately, patients are on the receiving end of this chain at no cost to them. Considering issues of justice and priority allocation, they also argued that those who contribute to the scheme should be given priority if they need a transplant in the future.[117] Furthermore, the market should be confined to a certain area such as a nation state or a regional bloc of states to ensure that priority allocation would actually work and to ensure sufficient health and safety standards.[118] Erin and Harris are, however, critical of the pricing policy. They acknowledge that if the NHS had the dual role of sole-buyer and price-setter, it could set the lowest price possible. Erin and Harris, however, did not offer a solution on this issue except for urging the NHS to consider 'the need to provide sufficient incentives to attract would-be organ vendors.'[119] Although their proposal seems radical, it is plausible and workable.

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113 Nuffield (n 2) 120.

114 Charles Erin and John Harris, 'A monopsonistic market: or how to buy and sell human organs, tissues and cells ethically' in Ian Robinson (ed.) *Life and Death under High Technology Medicine* (Manchester University Press 1994) 134.

115 ibid 141.

116 ibid.

117 ibid 142-3.

118 ibid.

119 ibid 141.

Exploitation and Devaluation

However, there are several criticisms against their proposal, the most common of which is that 'it may induce primarily the poorest and most vulnerable members of society into becoming donors, with the main recipients being the better-off.'[120] Although it is difficult to devise a single authoritative definition, exploitation is often defined as wrongful use, regardless of the existence of any financial or commercial dimension.[121] Discussions on exploitation often cite the Kantian imperative that people should not be used as a means to our ends, as believed by the "property objectors". There are elements of wrongness,[122] of harm,[123] and of unfairness.[124] Exploitation, however, can be distinguished from coercion as the latter involves the violation of one's autonomy and the former focusses on the devaluing of a certain good, service, or the person themselves. Exploitation, however, 'does not necessarily harm its victim in the sense of making her worse off than she would have been, had the exploiter never interacted with her at all. Rather, it makes its victim worse off than she *should* have been, had she been treated fairly.'[125] There is therefore a different baseline upon which the harm is measured and a hidden assumption that one would never choose to engage in such an activity. The example Harris used was prostitution, i.e. no one will choose to become a prostitute no matter the level of payment.[126] In other words, the activity is *eo ipso* wicked. The Kantian ethics is that we must not use others solely as means to our ends, and Erin and Harris rightly argued that this has been done in practice.[127] The key factor, however, is their free and informed choice to participate in 'our project'.[128] As Harris remarked, consent pre-empts the claim that someone has been wronged by another's use of them.[129] In a way, blood donors are means to the ends of recipients but blood donation is still viewed as ethically permissible. Consent thus provides a persuasive counterargument to the argument on exploitation. As this thesis has argued in previous chapter, the consent-based legal framework in medical law shows the retrospective recognition of rule-preclusionary ownership and, to an extent, property

120 Nuffield (n 2) 121.
121 Harris (n 6) 120.
122 Joel Feinberg, *Harmless Wrongdoing* (Oxford University Press 1990) 199.
123 Allen Buchanan, *Ethics and Efficiency, and the Market* (Rowman & Littlefield Publishers 1988) 87.
124 Matt Zwolinski and Alan Wertheimer, 'Exploitation' in Edward N Zalta (ed.) *The Stanford Encyclopaedia of Philosophy* <https://plato.stanford.edu/archives/sum2017/entries/exploitation/> 2.2.
125 ibid.
126 Harris (n 6) 125.
127 This has been briefly explored above under the section "a commodified reality" (see n 50 and surrounding text). Also see: Erin and Harris (n 114) 628-9.
128 Harris (n 6) 124.
129 ibid 126.

rights. This shows that reliance on the rule-preclusionary concept of ownership could aid in preventing exploitation.

The exploitation argument is also often tied to the devaluing of what the specific organ or tissue is worth. Discussions on devaluation, however, presumes that there is a definitive "fair" value to compare it to. Although there is much to be said on the concept of fairness itself, this is also problematic because no one knows what the "fair" value of a kidney is. Erin and Harris acknowledged that this is a difficult hurdle which their thesis has not resolved.[130] They stated, however, that a reduced sum of the "fair" value should still be allowed for the 'poverty stricken mother'[131] to whom the reduced price to sell her kidney is 'a more attractive option to not selling an organ and being unable to provide adequately for her children.'[132] This thesis, however, contends that this is not a persuasive response and that there must be other methods to prevent exploitation and so-called "devaluation" which we will discuss in the next section.

Increasing "Compensation"

The position on the permissibility of commercialisation of bodily materials is constantly evolving as certain types of trades over certain bodily materials are seen have become increasingly accepted. Erin and Harris' proposal shows that 'certain types of scarcity might permit more radical solutions than others'[133] as the sobering reality is that 'depending on altruistic gifts simply does not save enough lives [and that] relying on gifts may in fact diminish the dignity and justice to be found in a proper system of recompense.'[134] This thesis, drawing inspiration from the proposal, argues that explicit recognition of property rights permits the provision of increased compensation to living organ donors. This differs from Erin and Harris' proposal on two factors. First, it avoids the use of alarming terms such as "organ trading" which might cause public uproar. Second, the proposed payments will be made in exchange for the *services* of the donors instead of the organ itself. This could solve concerns and uncertainties around price setting and addresses the paradox that 'giving something away may be non-exploitative but being paid for the same thing may be exploitative.'[135]

Although Erin and Harris' proposal seems plausible, there are concerns that once a price tag is attached to an object of social value, such as blood or organs, 'the consequences are likely

130 Feinberg (n 122) 206.
131 Harris (n 6) 138.
132 ibid.
133 Nuffield (n 2) 153.
134 ibid 125.
135 Erin and Harris (n 114) 137.

to be socially pervasive.'[136] This is why this thesis adopts the Erin and Harris' monopsony but proposes to reward individuals for their organ donation *services* rather than the organ itself. This is done for four reasons. First, it is the only defensible form of payment as paying for the organ itself will allow the recipient or the NHS to cancel or reduce payment if the materials are defective. Secondly, it will prevent the explicit assignment of a price tag on the materials and thus avoiding any socially pervasive consequences. Doing this will also avoid violating the Kantian dogma as it emphasises that donors are not perceived as mere means to the recipients' ends. This has already been done with regards to gametes as the donation of eggs and sperms are still phrased as donations, even though donors are rewarded in lump sum payments. Thirdly, a focus on the services increases the persuasiveness of the argument as we can draw analogies to occupational hazard pay and payment for clinical trials. It is common practice to provide increased payment to individuals who undertake risky professions, such as a boxer or a stuntperson. In such scenarios, they are not being paid for the outcome of their professions, but rather for undertaking the risk itself. This is also the case with clinical trials.[137] Often, the riskier the trials are, the more participants are being paid. Fourthly, it allows a proper valuation as it is not the organ itself but the service that is being valued. This circumvents the problematic task of valuing something for which there is no market value. Unlike an organ, we do know how much these services cost which is the cost of an equivalent service. If someone receives a kidney transplant, then the opportunity cost would be the cost of the remaining life that would have been dependant on a kidney dialysis machine. This is calculable.

The current system regulating living organ donations provides compensation for expenses and any inconveniences, such as travel expenses, employment costs, child care, accommodation.[138] This thesis' proposed framework would increase the compensation for inconveniences so, instead of only covering loss of earnings, it must also consider opportunity costs and additional benefits to incentivise donations. This is different from the current NHS England guidelines, which states that reimbursement should not include financial incentives or disincentives.[139] The opportunity cost is the cost that is incurred by not choosing the alternative

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136 Titmuss (n 1) 167.

137 SD Pattinson, 'The Value of Bodily Material: Acquiring and Allocating Human Gametes' (2012) 24(4) *Medical Law Review* 576, 589-591. See also: SD Pattinson 'Organ Trading, Tourism, and Trafficking within Europe' (2008) 27(1) *Medicine and Law* 191; SD Pattinson, 'Paying Living Organ Providers' (2003) 3 Web Journal of Current Legal Issues

138 NHS England Specialised Commissioning Team, 'A06/P/a: Reimbursement of Expenses for Living Donors' (3 August 2018) <https://www.england.nhs.uk/wp-content/uploads/2018/08/comm-pol-reimbursement-expenses-living-donors-v2.pdf> accessed 14 October 2020.

139 ibid 6.

option. In the case of a kidney transplant, it will be the cost of kidney dialysis treatments. This would vary depending on the material concerned. Within this, one should also factor in the probability that the organ does not work. A "faulty" organ, however, would not affect the donor as they have performed their service. Benefits to encourage donations should also be added, these can be in the form of priority allocations, exemptions from prescription payments, discounts from certain services, or even a lump sum. These would vary depending on the material concerned. An explicit recognition of property rights is not required to justify payment for donation services,[140] but it allows us to provide greater rewards to donors.

Although a framework for payment for donation services does not require it, the explicit recognition of property rights alleviates an overreliance on the "gift" value and allows more scope to recognise the commercial value of the organ itself and, consequently, greater recompense for the donor. This proposal is workable and, as we have seen through cases such as *Yearworth*, likely to be implemented with regards to certain materials. As Nuffield remarked, it is entirely possible to have an altruistic donation framework which provides financial rewards to donors.[141] It is crucial, however, that this framework only operates in a stable state where the basic needs of these donors would have already been met. Taking care of the poor will minimise their possibility of being exploited as it ensures that receiving compensation for organ donation is never their only choice. As Harris noted, we 'are in danger here of wrongly assuming that if we prevent the poor from being exploited, this is the same as helping or caring for the poor. Or, equally, that if we block their exploitation this discharges an obligation to the poor.'[142] Increasing the "cooling off" period between when a donation is agreed and when the operation will take place could be implemented as additional safeguards.[143] However, there is still fear that allowing profit to be derived from organ donations could decrease altruistic donations and diminish the value of altruism itself. One study shows that 41% donors would stop donating if profits were made from selling blood products.[144] However, no similar studies have been found for organ

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140 Pattinson also argued for a framework without arguing for the explicit recognition of property rights. See SD Pattinson, 'Directed donation and ownership of human organs' (2011) 31(3) *Legal Studies* 392.

141 Nuffield (n 2) 147.

142 Harris (n 6) 131.

143 This has already been implemented with regards to altruistic living organ donations. For more on this, see: Linda Wright and others, 'Ethical guidelines for the evaluation of living organ donors' (2004) 47(6) *Canadian Journal of Surgery* 408; Rhonda Shaw and Lara Bell, '"Because you can't live on love": living kidney donors' perspectives on compensation and payment for organ donation' (2014) 18(6) *Health Expectations* 3201; Rhonda Shaw, 'Expanding the conceptual toolkit of organ gifting' (2015) 37(6) *Sociology of Health and Illness* 952.

144 A survey of the attitudes of blood donors in New Zealand. The study also found that 71% of donors are concerned about the quality of blood in commercialised services. See: Phillipa Howden-

donation and most of the studies on blood products concern a general commercialised market where there are multiple buyers and sellers, not in the proposed monopsony.

Deceased Organ Donations

Opt-Out and Its Compatibility with Property Rights

The adoption of an opt-out system seems *prima facie* incompatible with the explicit recognition of property rights. An opt-out system seeks to restrict the rights of the source of those materials whereas, logically, a proprietary framework would adopt an opt-in system which would give individuals the most control over their property. After all, there are no other opt-out systems applied to any other kinds of properties. This thesis, however, argues that the current opt-out system is compatible with this thesis' proposed property framework.

First, the current opt-out system is very soft. Its hierarchical list greatly considers the deceased's intentions: even when asking the deceased's family and loved ones, the question centres on the deceased and whether there is any reason to believe that the deceased would not have wanted their organs to be donated. This is consistent and compatible with this thesis' definition of ownership and property rights. As previously argued, consideration given to intention is the indirect consideration given to the source's rule-preclusionary ownership over their materials. Secondly, this thesis' proposed proprietary regime is not one that views property rights as an absolute right. As previously discussed in Chapter 2, the source's rule-preclusionary ownership over an object can be overridden—but not negated—by other sufficiently serious justifications. In the case of an opt-out, the ability for the deceased's organs to save lives is a sufficiently serious justification for the overriding of any property rights. This is why this thesis' property framework can still be compatible with a very strict opt-out which would not have consulted the deceased's family members. Furthermore, this requirement explains why the opt-out system is not applicable to non-life saving organs such as arms, faces or mouths.[145]

Chapman, John Carter, Nicholas Woods, 'Blood money: blood donors' attitudes to changes in the New Zealand blood transfusion service' (1996) 312 *British Medical Journal* 1131.

[145] For the full list, see The Human Tissue (Permitted Material: Exceptions) (England) Regulations 2020 (subject to Parliamentary approval), Regulation 2.

Reforming the Organ Donation Infrastructure

There has been widespread criticism against the new opt-out regime. Fabre argued that the opt-out system will not only bring zero change but will instead harm medicine and politics.[146] Bramhall echoed this, arguing that the opt-out system will compromise trust between the health authorities and patients' family members.[147] To an extent, this thesis agrees with these comments. However, the blame should not be placed on the legal change itself but rather the lack of attention paid to the practical aspect of deceased organ donation. These legal changes have not been adequately supplemented with policy-based efforts to improve the infrastructure and framework of England and Wales' organ donation infrastructure. It is the latter that would ultimately increase family consent rates thus increasing deceased organ donation rates.[148] Family consent rates are the rates by which the deceased's family members do not object to having their loved one's organs donated, following the two-fold question that hospitals would have to ask. In jurisdictions like Spain and USA, investments have been made into their organ transplantation infrastructure and efforts have been made by transplant coordinators to build trusting and personal relationships with the potential donor's family members.

Studies show that investment must be made into other factors such as infrastructure for transplantation, health care, and public awareness.[149] In particular, 'trust is a crucial issue because of the unique circumstances surrounding deceased organ donation.'[150] England and Wales can draw inspiration from Spain's success where deceased organ donation rates in 2009 comprised almost a third of deceased donors.[151] Spain's opt-out system has always been cited, but it is rarely pointed out that it, like England and Wales, is only a very soft opt-out system as individuals are

146 See John Fabre, 'Presumed consent for organ donation: a clinically unnecessary and corrupting influence in medicine and politics' (2014) 14(6) *Clinical Medicine* 567; Simon Bramhall, 'Presumed consent for organ donation: a case against' (2011) 93(4) *Annals of The Royal College Surgeons of England* 270.

147 Bramhall (ibid).

148 Family consent rate is the rate by which the deceased's family members do not object to having their loved one's organs donated, following the two-fold question that hospitals would have to ask. In jurisdictions like Spain and USA, much investment has been made into their organ transplantation infrastructure and efforts have been made by transplant coordinators to build trusting and personal relationships with the potential donor's family members.

149 Amber Rithalia and others, 'Impact of presumed consent for organ donation on donation rates: a systematic review' (2009) 338 *British Medical Journal* <https://doi:10.1136/bmj.a3162>.

150 See Fabre (n 146).

151 Organización Nacional de Trasplantes, 'Actividad de Donación y Trasplante España 2019' <http://www.ont.es/infesp/Memorias/ACTIVIDAD%20DE%20DONACI%C3%93N%20Y%20TRASPLANTE%20ESPA%C3%91A%202019.pdf> accessed 10 September 2020; Organización Nacional de Trasplantes, 'Actividad de Donación y Trasplante España 2009' <http://www.ont.es/infesp/Memorias/Memoria_Donantes_2009v2.pdf> accessed 10 September 2020.

permitted to opt-out informally and because familial wishes are greatly considered. Much of Spain's success is instead owed to their 'comprehensive, nationally organised organ donation system that included many innovations'.[152] First introduced in 1989, the system focusses on the presence of a transplant coordinator for every hospital in Spain. They coordinate all aspects of organ donation processes and are particularly important for deceased donations as they approach potential donor's families. They are impartial and do not receive monetary rewards for successful donations. Ultimately, the family of the deceased plays an important role. As Fabre noted, there is a misconception that opt-out automatically equals deceased donations. However, in reality, 'the actual decision to donate rests with the potential donor's family.'[153] Brazil had to change their hard opt-out which negates family consent following public unease.[154]

Familial consent is a factor that often seems overlooked by the NHS. Fostering relationships of trust with the public and potential donors' families show that donors are viewed as *people* and not just donors, that besides 'their autonomous will, they are endowed with attitudes toward social values and benefits.'[155] It is important that the public has trust in the capabilities and motivations behind the NHSBT, and investment into building these relationships with the public will be beneficial for both living and deceased organ donations. Individuals who trust the system will be more likely to consider donating whereas family members or representatives of the deceased will be more likely to allow organ donations from the deceased if they trust the system.[156] Working on these relationships is particularly important for BIPOCs as donation rates for BIPOCs remain low.[157] BIPOCs form 74.3% of deceased donation opt-outs, although this has decreased from 79% in 2018/19.[158] 51% of organ donation register opt-outs in 2019/20 are of Asian ethnicity, in particular those of Indian, Pakistani, Bangladeshi ethnicities.[159] As a result of a lack of BIPOC organ donors, BIPOC recipients have to wait longer for an organ. Out of 1,144 BIPOC patients, 67% are still waiting for a transplant after one year – compared to 50% of 4,186

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152 John Fabre, Paul Murphy, Rafael Matesanz, 'Presumed consent: a distraction in the quest for increasing rates of organ donation' (2010) 341 *British Medical Journal* <https://doi.org/10.1136/bmj.c4973>.

153 ibid.

154 Claudio Csillag, 'Brazil abolishes "presumed consent" in organ donation' (1998) 352 *The Lancet* 1367.

155 Michael Steinmann, 'Duties Towards our Bodies' in Steinmann (n 80) 71, 75.

156 Nuffield (n 2) 153.

157 NHSBT, 'Report for 2019/20: Organ Donation and Transplantation data for Black, Asian and Minority Ethnic (BAME) Communities' <https://nhsbtdbe.blob.core.windows.net/umbraco-assets-corp/19692/bame-report-201920.pdf> accessed 10 September 2020.

158 ibid 13.

159 ibid 16.

white patients. Although religious, ethnic, and cultural may hinder deceased organ donations,[160] past and current injustices and inequalities suffered by BIPOCs in healthcare also contribute to this issue.[161] However, compared to 2015/16, there has been a 67% increase in BIPOC deceased organ donors from 67 to 112 in 2019/20 which shows that perhaps some progress is being made.

Conclusion

This third substantive chapter has explored three main arguments supporting the explicit recognition of property rights, namely property for reality, property for protection, and property for the future. In property for reality, it has been argued that a commodified reality exists alongside an altruistic one. Currently, however, the public's awareness of solely the altruistic reality has been capitalised to fuel commodification. This thesis has shown how it is possible and important to maintain both realities, but to increase awareness on the commodified reality. In property for protection, the existing structural inequity which exploits participants and their materials in research has been shown. This thesis has argued that an explicit recognition of property rights allows a "safety net" approach as well as a partnership approach for consent in researches. Ultimately, the well-established proprietary regime, which is the legal recognition of rule-preclusionary ownership coupled with the bundle of rights model, will give individuals control over their excised bodily and genetic materials.

Finally, in property for the future, the prominent organ scarcity issue in England and Wales was addressed. It was argued that recognising property rights over bodily materials could technically allow for an ethical market in organs. This, however, seems far-reaching due to concerns on exploitation. Instead, this thesis has proposed a system with increased compensation to living organ donors and an overhaul of the organ donation infrastructure in England and Wales to encourage deceased organ donations. The former is done through a reliance on non-altruist-

160 Anantharaman Vathsala, 'Improving cadaveric organ donation rates in kidney and liver transplantation in Asia' (2004) 36(7) *Transplantation Proceedings* 1873. See also SD Mokotedi, MCM Modiba, SR Ndlovu, 'Attitudes of Black South Africans to Living Related Kidney Transplantation' (2004) 36(7) *Transplantation Proceedings* 1896 which also discusses any cultural objections to deceased donations.

161 For more racial discrimination towards patient care, see: Leah Cave and others, 'Racial discrimination and child and adolescent health in longitudinal studies: A systematic review' (2020) 27 *Social Science and Medicine* 250; Ismaeli de Sousa, 'Let us tackle race inequality together' (*Imperial College Healthcare Trust Blog,* 2 April 2019) < https://www.imperial.nhs.uk/about-us/blog/let-us-tackle-race-inequality-at-imperial-together> accessed 20 September 2020. For further discussion on racial discrimination impacting NHS staff, see: Denis Campbell, 'Racial discrimination widespread in NHS job offers, says report' (*The Guardian,* 21 October 2020) <https://www.theguardian.com/society/2020/oct/21/racial-discrimination-widespread-in-nhs-job-offers-says-report> accessed 25 October 2020.

focused interventions whereas the latter is done by ensuring that the system fosters trusting relationships between the public and the NHS. Ultimately, this chapter has sought to show that 'all the societal pressures which a century ago pointed away from lawfully possessing and using human tissue now point towards it. The non-property solutions of yesterday are inadequate to the task of today.'[162] An explicit recognition of property rights is thus required and encouraged.

[162] Paul Matthews, 'A man of property' (1995) 3 *Medical Law Review* 251, 256.

Chapter 5

Conclusions

This thesis first started by outlining the incompatibility between the law's apparent efforts to preserve the "no property" rule and the increased recognition for self-ownership and autonomy. This thesis has shown that the two are not necessarily incompatible. This is because much attention must be given to how the legal and academic spheres have defined key concepts such as "ownership" and "property". The property framework argued for in this thesis—rooted in the rule-preclusionary framework—provides a persuasive and practicable basis for such concepts. Furthermore, it permits a series of strong solutions to long-standing retrospective and prospective issues in the discourse. Retrospectively, rule-preclusionary ownership elucidated the current legal framework and illuminated hard cases such as *Bentham* and *Yearworth.* Furthermore, it has been argued that much benefit can be derived from an explicit recognition of a property regime.

Chapter 2 has argued for the importance of defining the key terms in the discourse, namely that of ownership, personal rights, and property rights. This thesis has applied Beyleveld and Brownsword's rule-preclusionary conception to the term "ownership" to reflect the fundamental and rudimentary control one has over one's body, separated bodily materials, and bodily auxiliaries. Rule-preclusionary ownership, in turn, may give rise to bodily and property rights. This thesis has argued that the rule-preclusionary conception is an attractive solution as it can then be used with more common conceptions of property, such as the bundle of rights theory.

Chapter 3 and 4 provided a two-fold argument in support of the fundamental concepts argued for in Chapter 2. Chapter 3—the retrospective argument—has shown how the current legal framework regulating the removal, storage, and use of bodily materials already implicitly recognises an individual's rule-preclusionary control. By exploring the consent-based framework, it was argued that the control granted to individuals over their materials exceeds what would have been given under personal or privacy rights. It, however, can be explained by rule-preclusionary ownership. As recent cases such as *Yearworth* has shown, common law has not stood still; it is moving towards increased recognition for property rights by providing greater consideration to the source's intentions. Furthermore, this shift is not incompatible with the law's previous approach and nor is it incompatible with the rule-preclusionary conception.

Chapter 4—the prospective argument—first presented three major perspectives on the explicit recognition of property rights, namely the "property objectors", "property supporters" and the "property apologists". These camps were presented in hopes of clarifying the ethical landscape. The chapter then argued that a prospective recognition of property rights could bring considerable benefits to three

prominent problems. First, a property framework could bridge the seemingly irreconcilable realities of altruism and commodification. Secondly, property rights can be used to encourage living organ donations and, more importantly, it would not hinder an opt-out framework for deceased donations. Thirdly, the chapter showed how property would permit donors to be viewed as partners and not mere participants in research. Ultimately, it is hoped that this thesis has provided some contribution which will then lead to further research and debate on this issue.

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