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**Property in the Human Body & Its Parts
Reflections on Self-Determination in Liberal Society**

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By Alexandra George

1. INTRODUCTION	5
1.1 Synopsis	11
1.2 Methodology	16
2. LEGAL APPROACHES TO OWNERSHIP OF THE HUMAN BODY.....	17
2.1 The ‘No Property’ Principle.....	20
2.2 The ‘Lockean Exception’ to the No Property Principle	22
2.3 The No Property Principle and New Technologies.....	31
2.4 The ‘Human Autonomy’ Argument	35
3. ‘PROPERTY’ IN THE HUMAN BODY	38
3.1 Property in the Body as ‘Decision-Making Authority’	39
3.2 Justifying Decision-Making Authority in the Body	46
4. AUTONOMY & THE LIMITS OF DECISION-MAKING AUTHORITY ..	60
4.1 Paternalism.....	63
4.2 Coercion & Consent	66
5. CONCLUSION: PROPERTY IS AUTONOMY, AND UNNECESSARY ...	74
<i>Bibliography</i>	80
<i>List of Cases</i>	87
<i>List of Legislation and Conventions</i>	88

FOREWARD

*This paper was presented as the Honours dissertation for a
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PROPERTY IN THE HUMAN BODY & ITS PARTS*

Reflections on Self-Determination in Liberal Society

1. Introduction

*“Kidneys? I have 2 excellent ones! Long-term lease available.”*¹

For Bob Loturco, 60 years old and barely surviving on a pension, selling or leasing one of his kidneys (price negotiable) represents a way to escape from welfare. But the law stands in his way: a Federal statute in the United States makes it illegal to “knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation.”²

This raises interesting questions. In a country like the United States of America, with its social and political foundations grounded so strongly in liberal democratic philosophy, and with its emphasis on the protection of liberty and property,³ why should Bob Loturco be prevented from selling or leasing one of his kidneys? Surely such a restriction interferes with his liberty? What about his property rights? Doesn't he own his own kidneys? And why should Loturco be prevented from raising money in a way which would seem to harm nobody else and which might dramatically improve the organ recipient's quality of life?

* Honours thesis for the degree of Master of Jurisprudence, Faculty of Law, University of Sydney. Submitted August 2000.

¹ “Florida Man Offers Lease on his Kidney” *Reuters* (2 April 1997).

² *National Organ Transplantation Act* 1984, §301; 42 USC §274e(a) (1994). See discussion of jurisdictional considerations in Douglass, Lisa E, “Organ Donation, procurement and transplantation: the process, the problems, the law” (1996) 65 *UMKC Law Review* 201 at 217-218. See also the *Uniform Anatomical Gift Act* 1987 §10(a) which makes it illegal for a “*person [to] knowingly, for valuable consideration, purchase or sell a [body] part for transplantation ... to occur after the death of the decedent.*”

³ See, eg, Article XIV(1) of the *Bill of Rights* (Amendment to the Constitution 1868): “*Nor shall any state deprive any person of life, liberty or property...*”

These are quite literally questions of life and death, and they will remain urgent for as long as there remains a strong demand for organ transplantation.⁴ Long waiting lists for transplants vividly reflect the shortfall of available organs. From both cadavers and living donors, demand outstrips supply.

One option that might increase the numbers of organs available for transplantation would be to relax restrictions on the compensated trade of human body parts. Yet this is a course that has been resisted by legislators throughout the world. The grounds for this resistance – moral and practical, stated and implied — form the framework of this paper. And as new technologies develop (for example, the cloning of humans and other animals, and their body parts),⁵ the implications of this resistance provide a timely impetus for rethinking the laws relating to the transfer of human body parts.

The possible answers to questions about whether someone like Bob Loturco should be permitted to sell or lease one of his kidneys lead, as Ian Kennedy comments:

⁴ For example, 65,733 people are waiting for organ transplants in the United States: National Transplant Assistance Fund, USA: <http://www.transplantfund.org/waiting.html>. In 1998, 20,045 organ transplants were performed in the United States: National Transplant Assistance Fund, USA: <http://www.transplantfund.org/success.html>. And a 1993 report of the United Network for Organ Sharing showed that between 8.5 to 15.2 percent of potential transplant recipients in the United States die while waiting for an organ, an average of seven patients per day: United Network for Organ Sharing, “Financial Incentives for Organ Donation: A Report of the UNOS Ethics Committee, Payment Subcommittee” (30 June 1993) at http://www.unos.org/Resources/bioethics_whitepapers_finance.htm.

⁵ Even though the technology to ‘manufacture’ organs for transplant (either genetically or as transplants from other species) might soon be available, this will raise new questions. The answers to many of these questions will draw on some of the same philosophical and legal foundations as the current debate.

There are indications that the cloning of humans might already be possible. See, eg., “Human embryo cloned claim scientists”, *BBC News* (16 December 1998).

The possibility that ‘spare’ body parts could be created through cloning technology is generating much scientific and public interest. See, eg., Cohen, Philip, “Organs without donors”, *New Scientist* (11 April 1998); Klotzko, Arlene Judith, “We can rebuild...: Cloning is back on the agenda but the focus is now on spare parts”, *New Scientist* (27 February 1999); “Grow your own”, *New Scientist* (15 May 1999); “Organ recital: stem cells and therapeutic cloning”, *Wellcome Trust Cloning and Stem Cells Seminar* (29 November 1999) <http://www.wellcome.ac.uk/en/1/awtpre1199n170.html>; Coghlan, Andy, “Cloning without embryos: An ethical obstacle to cloned human tissue may be about to disappear”,

*to deeper philosophical issues, such as whether we as a society think it right to condone a traffic in human parts or regard it as fundamentally degrading; or, put another way, whether a society acting paternalistically should deny an individual his right to self-determination, to do with himself as he pleases, to engage in unorthodox, but perhaps profitable, commerce, when the exercise of such a right involves a mutilating operation.*⁶

These issues can be traced to certain social assumptions about human rights, and interpretations of the concepts of ‘liberty’ and ‘property’ are particularly relevant to an understanding of the ways in which the law has developed in this area.

This paper thus demonstrates how the interplay of the rhetoric and philosophy of the liberty and property discourses have led to prohibitions on the sale of human body parts while simultaneously seeking to encourage the uncompensated donation of those parts. They have also led to denials that people possess property rights over their bodies, while simultaneously allowing some people rights over the body parts of others. The nature of, and reasons for, these philosophically contradictory and inconsistent outcomes form the core of the investigation that follows.

The dominant approach adopted throughout this paper is an analysis of the law from the perspective of liberal philosophy.⁷ This could be described as an internal analysis or an examination from ‘within the law’.⁸ That is, it is an analysis of a body of law

New Scientist (29 January 2000); Cohen, Philip, “Designer Donors: Five little pigs could herald the end of organ shortages”, *New Scientist* (25 March 2000).

⁶Kennedy, Ian, *Treat Me Right: Essays in Medical Law and Ethics* (Oxford: Clarendon Press, 1988) at 250.

⁷ For the purposes of this paper, a conception of ‘liberalism’ has been adopted that accords generally with the following definition of ‘deontological liberalism’ by Sandel: “[*Liberalism*] is above all a theory about justice, and in particular about the primacy of justice among moral and political ideals. Its core thesis can be stated as follows: society, being composed of a plurality of persons, each with his own aims, interests, and conceptions of the good, is best arranged when it is governed by principles that do not *themselves* presuppose any particular conception of the good.” Sandel, Michael J., *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1998) at 1.

⁸ For an explanation of the notion of an ‘internal analysis’ see Bercusson, Brian, “Juridification and Disorder” in Teubner, Gunther (ed.), *Juridification of Social Spheres: A Comparative Analysis in the Areas of Labor, Corporate, Antitrust and Social Welfare Law* (Berlin/New York: Walter de Gruyter,

grounded in liberal thought (though which does not necessarily reflect that doctrine) that uses the subjective spotlight of liberal philosophy to explain the development of that law. It is not critical of the premises of liberalism itself; rather it assesses whether or not particular decisions by law-makers accord with those tenets.

The ‘liberal’ analysis is used first to demonstrate inconsistencies in laws relating to the trade in human body parts that have developed in various ‘liberal’ societies. It then explains how use of the notion of ‘property’ can result in such inconsistencies and why it has been so influential and compelling in considerations about the use of human body parts for transplantation. This analysis concludes that ‘property’ – a central concept of liberal theory⁹ – has been used as a tool to justify laws that in fact infringe personal liberties and individual self-determination. This is strikingly ironic as such ‘rights’ are customarily considered to be the prime domain of liberalism.

If it is indeed the case that ‘property’ has been used to mask the illiberal traits of some laws affecting the trade in human body parts, it would surely be more intellectually honest to explicitly acknowledge the influence of the illiberal elements, rather than hiding them behind quintessentially liberal notions of property. For this reason, this paper concludes that the law’s focus on a property analysis in relation to the use of human body parts is misplaced, and it is therefore neither a necessary nor sufficient reason for allowing or denying individuals the legal right to use their body parts as they wish.

To supplement this (‘liberal’) analysis, this paper also employs the more objective or scientific tool of sociological jurisprudence to point to the subjectivity of the liberal analysis and to help explain the sway of illiberal influences within liberal societies. In

1987) 49 at 63: “The **legal** (“normative”) structure of society is said to be distinguished by a “critical reflective attitude” – this is the famous “internal aspect” of rules. Such an attitude presupposes the existence of rules; and these rules are used as standards for the evaluation and justification of social conduct. The idea of a **rule** is required to explain any legal structure of authority and obligation. The meaning of either of these terms entails that those participating in such a structure (of authority or obligation) not only do certain things, but seek to justify what they do as well.”

⁹ For an indication of the centrality of ‘property’ within liberal societies, see Ely, James W, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992).

order to avoid distraction from the primary ‘liberal’ theme, this approach is used in a subtle and hopefully unobtrusive way, helping to explain from an ‘external’ perspective why laws that contradict or are inconsistent with liberal tenets can be tolerated by a fundamentally liberal society. Michael Sandel talks of the ‘limits’ of liberalism;¹⁰ the sociological aspect of this paper portrays the illiberal elements of laws relating to the trade in human body parts not as *limits* of liberalism, but rather as *digressions* from liberalism.

Sociological jurists might agree that, by clothing illiberal laws in the liberal mantle of property, law-makers cover the laws in a veneer of liberal legitimacy (the laws appear to protect the very liberties they deny). Laws that appear to reflect the prevailing philosophy within society are less likely to attract criticism or dissent; social acceptance of and respect for laws leads to their internal reproduction within that society and, from this perspective, the use of ‘property’ helps to maintain the social control that sociological jurisprudence identifies as one of the central roles of law.¹¹

The legitimacy that the property mantle gives to illiberal laws also indicates that these laws do, in fact, reflect the philosophy of the society in which they appear. So if liberalism is the dominant philosophy in a society and property rights in the body actually deny individuals liberal rights in their bodies, it is suggested that those property rights reflect other influential philosophies within that society that (at least implicitly) justify the denial of liberal rights such as an individual’s self-determination. Thus, the fact that law-makers (on behalf of their societies) do not follow a road of pure liberalism is a legitimate social choice and it serves the legitimate sociological purpose of maintaining social control.

The risk that such social control rests on a legal fiction is not surprising to sociological jurists who might interpret such reasoning as an attempt to justify illiberal elements of the law with liberal doctrine; that is, a justification from within the law and an attempt to explain non-liberal influences with the legal terminology of liberalism. The resulting internal inconsistency is the price the legal system and

¹⁰ Ibid.

¹¹ See, eg., Ziegert, Klaus A, “A Sociologist’s View” in Kamenka, Eugene and Erh-Soon Tay, Alice, *Law and Social Control* (London: Edward Arnold, 1980) at 60.

society generally pay for failing or refusing to acknowledge that laws falling outside the boundaries of liberal philosophy might nevertheless have a legitimate socio-legal role that can be justified on legitimate non-liberal grounds even within a basically liberal polity.¹² But in lieu of such candour, internal consistency is sacrificed and this leads to contradictory outcomes whereby – even in societies that place great importance on ‘rights’ such as liberty and self-determination – individuals cannot always exercise legal control over their own body parts although their body parts might be able to be controlled by others. The inconsistencies are covered by the thinly reasoned veil of a ‘property’ analysis and, in this context, the ‘property’ analysis does little more than play the archetypal role of a legal fiction.¹³

The purpose of this paper is therefore to expose that legal fiction. Once it has been elucidated, societies that consider themselves ‘liberal’ and that govern the use of human body parts by reference to a property analysis have a number of choices. They could decide to ignore the fiction and the inconsistencies, and continue as before. Or, they could decide to revise the law and adopt internally consistent reasoning by which to justify that law; if the effect of the law remains the same as the effect of earlier laws justified by the ‘property fiction’, this would require an explicit acknowledgement that the approach is not fully consistent with the liberal principles of personal freedom and self-determination. Or, they could decide to revise the law and adopt internally consistent reasoning that, in order to adhere to the premises of liberalism, requires a shift in policy to allow individuals to trade in their body parts if they so desire.¹⁴ The purpose of this paper is not to propose that one of these outcomes would be better or worse than any other. Rather, it is to expose and explain the

¹² For a more detailed description of such ‘internal inconsistency’ in a different context, see Teubner, Gunther, *Law as an Autopoietic System* (Oxford: Blackwell, 1993) at 105-106.

¹³ Lon Fuller describes the notion of a ‘legal fiction’ in the following way: “*A fiction is either (1) a statement propounded with a complete or partial consciousness of its falsity, or (2) a false statement recognized as having utility.*” Fuller, Lon L, *Legal Fictions* (Stanford: Stanford University Press, 1967) at 9. See also Olivier, Pierre J J, *Legal Fictions in Practice and Legal Science* (Rotterdam: Rotterdam University Press, 1975), especially at 32-35.

¹⁴ As will become apparent in Part 4 of this paper (“Autonomy and the Limits of Decision-Making Authority”), in order to be fully consistent with liberalism, such a policy would require a social environment in which an individual could make such a decision free from coercive pressures. It is questionable whether such a purely liberal society exists or is indeed possible.

inconsistencies existing in laws that govern the trade in human body parts in many ‘liberal’ societies. This is an important undertaking because it is arguably only by recognising these inconsistencies that societies, through their courts and legislatures, can make educated decisions as to whether or not individuals such as Bob Loturco should be able to buy, sell, lease or otherwise control their personal body parts.

1.1 Synopsis

This paper approaches the problem of understanding why someone like Bob Loturco should be prevented from selling or leasing one of his kidneys by exploring the philosophy and other social intuitions that influence this area of the law.

The analysis in this paper moves from the empirical to the philosophical, first discussing representative laws that govern the use of human body parts for transplantation, before explaining the reasons for inconsistencies in those laws (reasons that are argued to be largely social influences that have distorted the coherence of their legal counterparts). It concludes with an examination of what the law should be according to a strictly liberal viewpoint, and how this compares with the empirical laws described earlier.

This synopsis briefly outlines the course followed by the argument in this paper.

(a) Trends in the Law

The aim of the first section of this paper – “Legal approaches to ownership of the human body” – is to build a picture of the various ways in which ‘property’ has been used in the debate about the trade in human body parts. It also identifies some alternative approaches to ‘property’ and their practical effects, and through a brief survey of the legal treatment of human bodies and their parts it provides an empirical context for the following discussion.

In surveying legal principles across various jurisdictions, this paper finds that many societies with liberal philosophical foundations – and particularly those with English legal traditions – do not grant individuals property rights in their own bodies, and bodies and their parts cannot be objects of commercial exchange. It also identifies exceptions to this rule that create inconsistencies. The practical effect of these

exceptions is that people can acquire ownership of parts or derivatives of other people's bodies, and some body parts (particularly regenerative, removable parts such as blood or semen) can be owned in some 'liberal' jurisdictions, even though people cannot own or trade their own bodies or body parts.

In examining the rule and its exceptions, the empirical survey identifies three main principles that guide the law in this area. First, there is a general principle that there is no property in the human body. Second, there is a principle that an abandoned body or body part (or its derivative) can become the property of someone who has mixed his or her labour with that body or body part. This is dubbed "the Lockean Exception" for the purposes of this paper. The third principle suggests that a person can possess property in his or her own body if it would promote that person's individual human autonomy. These principles are clearly inconsistent with each other and the first part of this paper therefore sets out the problem that the rest of the paper seeks to explain; that is, the problem of laws that prevent individuals from determining the use of their body parts and that therefore contradict the liberal philosophical principles on which they are based.

This section also identifies one common theme that runs through almost all laws relating to the use and transfer of the human body and its parts. The question of the 'body as property' has repeatedly been addressed by law-makers. This paper suggests that questions about the existence of property rights provide a distraction from the central issue of whether or not individuals should be permitted to buy, sell or otherwise trade their body parts, and the first part of the paper sets out empirical examples on which the later discussion relies.

(b) 'Property in the Body': Its meanings and its justifications

The second section of the paper – "'Property' in the human body" – demonstrates that, unless the notion of 'property' is exactly defined, the approach of applying a property analysis to the trade in human body parts is probably flawed. The problem is that the property analysis asks and answers the wrong question and, while 'property' is a recurrent theme, it is one with little substance and its force is mainly rhetorical.

But, precisely because of its rhetorical force, the 'property' analysis is important; to the extent that this paper is about the language that is used to describe the social and

legal relationships that people have with their bodies and body parts, it can be seen that the language of ‘property’ has repeatedly influenced and shaped the debate.¹⁵ Courts and legislatures talk about ‘property’ and ‘ownership’ in the human body and its parts – though they generally do so without explaining what these terms imply – and thereby sustain an impression that the property analysis is relevant, appropriate and even necessary. Perhaps this is one of the reasons that discussion of this issue is often so confused and contradictory.

Thus this section of the paper seeks to provide a workable definition of ‘property’ in the human body and to demonstrate that – while such terms have socially determined meanings that are then translated into legal dicta – the substantive effect of the terms ‘property’ and ‘ownership’ is to imply the idea of legally enforceable decision-making authority or control over the human body and its parts. So, when the law identifies property in the human body, it means only that a law-maker has decided to bestow an authority to determine what happens to one’s own body and its parts, or the body or body parts of another person. It is useful to note the positivism of such legal decision-making. From a sociological perspective, it seems clear that law-makers are influenced by the attitudes of the societies in which they operate, and the existence of laws that do not fully reflect liberal values simply indicates that a society places more importance on some illiberal value(s) than it does on creating a purely liberal polity.

Some of these il/liberal influences are then explained (“Justifying Decision-Making Authority in the Body”). Many such influences are of considerable rhetorical importance and, in fact, their rhetorical social influence might be considerably greater than their appeal to intellectual and legal argument. Influences that fall into this category include powerful political images involving issues such as slavery, exploitation and the degradation of humanity. These are ideas that percolate through

¹⁵ See Andre, Judith, “Blocked Exchanges: a Taxonomy” in Miller, David and Walzer, Michel, *Pluralism, Justice, and Equality* (Oxford: Oxford University Press, 1995) 171 at 174 ft 9.

Acknowledging this as a difficulty interfering with understanding about this issue, Andre notes: “*There is a different set of questions about ownership, having to do with language... I have an exclusive right to the use of my kidney, and the law will keep away anyone who wants to take it without my consent. Whether we should call that relationship ownership, whether we should call our bodies property, is a question I do not address here. I will use the language of ownership for convenience but I mean the words only to refer to legal states of affairs.*”

discussions of property in the human body in an ad hoc and inconsistent manner, and it seems likely that their rhetorical force is at least partly responsible for driving the confused and inconsistent principles that govern this area of the law. They are also inextricably entwined with the various moral values that have intruded into the debate. These are important issues and their importance should not be underestimated, even though the discussion offered here in relation to these topics is clearly somewhat cursory. A detailed analysis of these issues would be outside the scope of the current paper and the intention here is to indicate the existence of some of the main social influences on the law, rather than to engage in a detailed analysis or seek any particular conclusion about the relative weight or credibility of these arguments. Their persuasive influence gives these arguments rhetorical credibility even if they are perhaps sometimes less than intellectually compelling, and it is therefore more important at this point to acknowledge their influence than to debate whether or not they deserve that influence.

The conclusion from this analysis is that – while the arguments might not always be coherent or convincing – the rhetorical force of the images raised by notions of self-determination and self-ownership are of continuing political and philosophical importance; they continue to reproduce the prevailing ‘property’ analysis and have greatly influenced the law relating to the trade of human body parts.

(c) A ‘Pure’ Liberal Analysis

Returning to the established principles of liberal democracy (and providing a contrast with some of the not-so-liberal arguments summarised in the previous part), the third main section of this paper – “Autonomy and the Limits of Decision-Making Authority” – focuses on some of the more coherent philosophical arguments that comprise liberal thought. These form a significant part of the hegemonic framework of norms in liberal societies and underpin legal ‘rights’, and they represent the philosophical ‘ideal’ or ‘stereotype’ of a liberal society against which actual societies can be measured.

This part of the paper elucidates the jurisprudential reasons why a liberal society might limit personal autonomy and decide not to bestow decision-making authority over the human body and its parts. These reasons center on some of the basic tenets of

liberal autonomy, such as the Millian “Harm Principle” and arguments about paternalism, coercion and consent. They are also ideas about personal autonomy and they hold that a society should not abridge the liberty of any inhabitant unless it does so either to prevent harm to others or to prevent unconsented harm to the person concerned. These are the underlying philosophical justifications that allow limitations on personal autonomy, and it is concluded that the only legitimate reasons that pure liberalism would allow the law to limit decision-making authority in one’s own body would be to prevent harm to other members of society or unconsented harm to oneself.

The only harms to others identified in the case of the sale of human body parts are the *sadness of onlookers* (who are upset to see one selling oneself, or parts of oneself) and the potential *welfare costs* to society as a result of donors later suffering from medical problems as a consequence of their donations (a cost that would also apply to uncompensated donors). Although these are questions for each particular society to assess, it seems unlikely that either of these grounds are likely to be considered so weighty that they would justify prohibitions on the trade of human body parts.

The summation of this section of the paper is therefore that a purely liberal society would allow individuals total decision-making authority over their bodies to the extent that this did not interfere with other people. The degree to which a society deviates from such ‘pure liberalism’ – and particularly in relation to an area as inextricably linked to notions of self-determination and individual rights as the law regarding control over one’s own body – arguably indicates the extent to which other (illiberal) influences guide the development of the law in that society.

(d) Conclusion

In conclusion, this paper suggests that the property analysis of human body parts is possibly misplaced and almost certainly unnecessary as a starting point from which to determine whether individuals should be able to trade their body parts. ‘Property’ might have a role in organising the law if it is determined that individuals should have decision-making authority with respect to their bodies and body parts. However, in the discussion about the degree to which human bodies and their parts should in fact be subject to the decision-making authority of their inhabitants, its use to date has

served to confuse the issues and mask the illiberal philosophical principles that have entered law-makers' reasoning (that is, decision-making) in this area.

It is suggested that the reason for the appearance of illiberal principles is simply that law-makers – on behalf of society – find them useful and effective ways of organising how society determines whether human bodies and their parts should be objects of trade. But the result has been a confused development of the law and outcomes that are inconsistent with the liberal philosophy by which they are ultimately justified. The liberal rhetoric of 'property' has been used to mask this effect, resulting in further confusion. 'Property' is arguably a legal consequence of a social resolve to bestow decision-making authority over the body; Baker suggests that property rules are "a cultural creation and a legal conclusion."¹⁶ Thus treating property in the human body as the *cause* rather than a *consequence* of law, has had the effect of diverting attention from a far more significant question that in fact needs to be addressed first. That is: does this society (the society in which the question is being asked) want to give individuals a legally enforceable right to make decisions about whether or not to trade their body parts?

Only after that fundamental question has been addressed should 'property' be permitted to re-enter the equation. At that point it might have a role in helping to determine how – in the context of considering various methods of enforcement and legal remedies (such as tort, contract and/or criminal law) – to translate society's verdict into law. Before that time, however, 'property' seems to be getting in the way of developing a body of intellectually consistent pronouncements in this area of the law.

1.2 Methodology

It is immediately obvious that the topic of this paper invokes discussion of many major issues of political and legal philosophy: what is 'property'? Should individuals be granted private property? What is the nature or essence of human existence? What is 'the body'? What is 'the self'? What are 'autonomy' and 'liberty'? And what are the limits of human liberty? Each of these issues has already filled volumes and a detailed analysis of any one of these topics would be outside the scope of this paper.

The current discussion therefore focuses on one very specific philosophical issue: that is, whether a category of laws determining that individuals cannot buy, sell or lease their body parts is intellectually coherent in the fundamentally liberal societies in which it exists. As summarized in the synopsis above, the paper addresses this question through an analysis of the ‘property’ reasoning that typically underpins such laws.

In order to examine this issue without becoming side-tracked by too much discussion of the broader philosophical issues on which it draws, argument in this paper relies upon certain generalisations that have been extracted from the broader debates, references to which can be found in the footnotes.

Generalisations are also made about the nature of laws concerning human bodies and their parts. The research for this paper has drawn mainly on the laws of countries with legal systems that grew out of liberal political philosophy and the English common law system (namely, England, Australia and the United States of America), and this bias is reflected throughout the paper. Reference is made to the laws of the European Union and it is noted that the abovementioned generalisations will frequently apply also within the countries comprising the European Union, though not without exception.

As a final word on this point, it is suggested that the general line of reasoning used in this paper is likely to be capable of transfer to any society that boasts liberal philosophical foundations and which bases its law regarding the trade of human body parts on a property analysis.

2. Legal Approaches to Ownership of the Human Body

The concept of property, the way in which it is legally defined and the extent to which it is legally, socially and politically protected, raise immediately the most fundamental problems of political philosophy and social life.¹⁷

¹⁶ Baker, C Edwin, op cit. at 744.

¹⁷Tay, Alice Ehr-Soon & Kamenka, Eugene, “Introduction: Some theses on property” (1988) 11 *UNSW Law Journal* 1 at 8.

Courts and parliaments have traditionally addressed the trade in human body parts from a property perspective. In deciding whether a person should have control over his or her body, or the body of another person, the question they have asked is whether the body is the property of the person seeking to control it. The responses have been characterised by contradictions. Dead bodies are treated differently to live bodies, and live bodies are treated differently to live body parts. Live body parts are treated like dead body parts, but not always. British law historically afforded no formal recognition of property rights over the human body,¹⁸ and it is an established principle that there is no property in a dead body in either the English or United States' legal traditions.¹⁹ Yet there might be “quasi-property” in a dead body, or property in a body which has been altered to become ‘more than a body’. The law in this area is inconsistent and confused. The purpose of the following survey is therefore to demonstrate ways in which the empirical development of the law has been affected by, and has itself possibly affected in turn, the application of the liberal philosophical concepts of liberty and property.

Legislative provisions affecting organ transplantation have tended to appear as reactions to a failure of law, either because existing legal principles (or the lack thereof) seemed ill-equipped to respond to emerging issues or because of contradictions in the application of the existing principles. Such reactions could be viewed as attempts by the legal system to compensate for its own failures to provide timely responses to social attitudes and medical developments. For example, when Italian legislators inserted an article into the Civil Code in 1940 to forbid the transplantation of organs or body parts from living donors, it was as a response to public outcries about the purchase for transplantation of a testicle by a wealthy citizen from a poor Neapolitan.²⁰

¹⁸See, eg., *Hayne's Case* (1614) 12 Co Rep 113; 77 ER 1389 and *Exelby v Handyside* (1749) 2 East PC 652; 1 Hawk PC (8th Ed, 1824) 148. See also Churchill, I J, “Patenting Humanity: The Development of Property Rights in the Human Body and the Subsequent Evolution of Patentability of Living Things” (July 1994) 8 *Intellectual Property Journal* 249 at 251.

¹⁹ See, eg., Scott, Russell, *The Body as Property* (London: Allen Lane, Penguin Books, 1981), Chapter 1.

²⁰ *Id* at 68.

Statutes flourished from the mid-twentieth century. In 1947, Californian and French legislatures passed laws allowing body parts to be transplanted. The Californian law authorised people to give their bodies to hospitals, universities and similar institutions, with no limitation on the purposes for which bodies could be donated.²¹ The French law permitted specific hospitals to perform autopsies and remove tissues from cadavers “in the interest of science or therapeutics”.²² Legislation followed throughout the world, with notable examples being the *Human Tissue Act* 1961 in England and the *Uniform Anatomical Gift Act* 1968 that codified the law in the United States. Italy relaxed its laws to allow the removal of tissues from cadavers in a series of presidential decrees in 1957, 1961, 1965 and 1970. Syria and South Africa introduced laws regulating the harvesting of corneas from cadavers in 1952, and in 1975 the Council of Europe produced a model legal code regulating tissue removal from both dead and living bodies.²³ As scientific advancements have made it ever more possible to transfer body parts from one person to another, the law has increasingly regulated the ways in which individuals are permitted to use their bodies and body parts for the purposes of transplantation.

The most recent issue in this area to receive concentrated legislative attention is that of bioethics and the cloning of humans and other animals.²⁴ And, as will become

²¹ Id at 66-67.

²² Id at 67.

²³ For a general history of the legal regulation of the removal of body parts, see Chapter 3 – “The History of Legal Regulation” – in id at 58-81.

²⁴ Examples of recent legislation addressing these issues include: the *Human Fertilisation and Embryology Act* 1990 (UK), the *Federal Embryo Protection Act* 1990 (Germany), *Law No 35/1988* (Spain), *Act No. 503 on a Scientific Ethical Committee System and the Handling of Biomedical Research Projects* 1992 (Denmark), and 1997 *Council of Europe Treaty* governing the use of biotechnology in relation to human rights (initially signed by 13 of 40 members of the Council of Europe).

For a survey of recent policy discussions in various jurisdictions, see: Coghlan, Andy, “Cloning Report Leaves Loophole”, *New Scientist* (14 June 1997); “Government Condemns Human Cloning”, *BBC News* (19 December 1997); Boyce, Nell, “You want to clone? Go ahead”, *New Scientist* (9 May 1998); “Human spare-part cloning set for approval”, *BBC News* (8 December 1998); “California Considers Human Cloning”, *BBC News* (27 January 1999); Kondro, Wayne, “Canadian Government will Revisit Human-Cloning Legislation”, *Lancet* (8 May 1999); UK Department of Health / Department of Trade and Industry, Office of Science and Technology, *Government Response to the Report by the Human*

clearer below, it again seems that the legal system is running to keep up as existing laws prove disappointingly inadequate to deal with scientific and medical developments, and social attitudes thereto.

As statutes have become more sophisticated, a common legislative approach has been to allow living people to make decisions about how their body parts will be treated, although financial incentives that might sway these decisions are generally prohibited. While subject to exceptions, the following general observations can be made: people can generally decide to bequeath their body parts for the purposes of transplantation, and next-of-kin can often make equivalent decisions about their deceased relatives. Living people can also make decisions to donate certain non-essential body parts while they are still alive but, as a general rule, no body parts can be legally donated in response to financial incentives. Herein lie some basic inconsistencies that seem to be intertwined with a reluctance to allow too great a commodification of the human body, and this is a reluctance that has commonly translated into an aversion to the legal treatment of the human body as property and a concomitant insistence on examining use of the human body from a ‘property’ perspective.

2.1 The ‘No Property’ Principle

Despite the flurry of legislative activity around the world, a confused common law approach has prevailed in some areas. In jurisdictions deriving their law from England, the next of kin held a possessory interest in a corpse for burial purposes, but no clear property rights existed in a dead body until the late 19th century.²⁵ The general rule was that a corpse was an “abandoned” object and was therefore not owned;²⁶ dead bodies were instead protected by non-property laws such as criminal

Genetics Advisory Commission and the Human Fertilisation and Embryology Authority on Cloning Issues in Reproduction, Science and Medicine (June 1999) <http://www.doh.gov.uk/cloning.htm>; Smith, Deborah, “Ban on designer babies ‘may be lifted’”, *Sydney Morning Herald* (16 February 2000); Smith, Deborah, & agencies, “Approving ‘GM’ people was a ‘patent mistake’”, *Sydney Morning Herald* (23 February 2000); and Smith, Deborah, “Biotech firm rules out work on humans”, *Sydney Morning Herald* (28 February 2000).

²⁵ Churchill, I J, op cit., at 253.

²⁶ *Williams v Williams* (1882) ChD 659.

sanctions on mistreating a corpse.²⁷ This principle prevailed throughout the twentieth century – though not in a consistent fashion – and it could be dubbed the “no property principle”.

The notion of property rights emerged as courts reacted to inadequate legal principles in this area. Canadian law, for example, recognised only a limited “pseudo-property right” in the human body in the form of a common law duty to bury a corpse. The Supreme Court of Alberta’s Appellate Division found that the executor of an estate held a common law right to bury a corpse. This right continued after the burial of the body, “otherwise it would be an empty right and ... those who oppose the executor could disinter the body as soon as it was buried.”²⁸ It was not formally a property right, but even such negative forms of property law have arguably helped to entrench a conceptual connection between use of the human body and property in the body.

A similar “quasi-property right” of possession for the purposes of burial was recognised in the United States, though again no formal property rights were acknowledged.²⁹ Throughout the twentieth century American courts moved away from the notion of property rights in a dead body,³⁰ instead favouring the awarding of damages to next-of-kin who had suffered emotional distress as a result of the treatment of their relative’s corpse. In doing so the courts opened the door, if only a fraction, to a commercial form of compensation arising out of the treatment of body parts over which one has legal control. Though such a claim did not take the form of a property right, it was not dissimilar in substance. Nevertheless, in *State v Powell* the Supreme Court of Florida surveyed case law throughout the United States and concluded that “[t]he view that the next of kin has no property right but merely a limited right to possess the body for burial purposes is universally accepted by courts

²⁷ See, eg., *Crimes Act* 1900 (NSW), s81C: “Any person who: (a) indecently interferes with any dead human body; or (b) improperly interferes with, or offers any indignity to, any dead human body or human remains (whether buried or not), shall be liable to imprisonment for two years.” See also Harris, J W, *Property and Justice* (Oxford: Clarendon Press, 1996) at 351.

²⁸ *Waldman v Melville (City)* [1990] 2 W.W.R. 54 at 57, per Macleod J. Also 65 D.L.R. (4th) 154.

²⁹ *Pierce v Proprietors of Swan Point Cemetery*, 10 R.I. 227 (1872). Cited *ibid* at 253.

³⁰ *Carney v Knollwood Cemetery Association* 514 N.E.2d 430 (1986), in which the court refused to recognise a quasi-property right in a deceased body.

and commentators.”³¹ The plaintiffs’ rights were therefore said to be grounded in tort law rather than in the “ancient and discredited quasi-property fiction”.³²

It is an interesting postscript to note that in 1986 an appellate judge suggested an action should have succeeded on the property offence pleaded in the plaintiffs’ original claim, rather than on the lesser approach adopted to circumvent the property problem.³³ Perhaps the law was turning back towards its roots? Perhaps it was just another contradiction? Perhaps it was recognition that the idea of property in the body had never really been suppressed? Or perhaps the obscurity stemmed from implicit confusion about what is meant by application of the ‘property’ tag?³⁴

2.2 *The ‘Lockean Exception’ to the No Property Principle*

The lack of clarity is pervasive. Beyond a finding that there is no property in a dead body, the common law has failed to identify consistent principles governing ownership interests in the human body. Even the central ‘no property’ principle is subject to one important exception, and it is this exception (contradiction) that creates the fundamental conceptual discrepancy that permeates thought in this area and arguably undermines the legal framework on which the traditionally prevailing principles have been based.

The exception finds its genesis in the 1906 case of *Doodeward v Spence*, in which the High Court of Australia found that “a human body, or a portion of a human body, is capable in law of becoming the subject of property”.³⁵ This was a case that arose after a doctor had preserved the bodies of a pair of stillborn Siamese twins. After the doctor’s death the preserved bodies were sold to Doodeward but then confiscated by Spence (a police inspector) on the grounds that Doodeward was exhibiting the bodies in public. Doodeward sued for the return of his property and the High Court upheld his claim. The Court stated:

³¹ *State v Powell* 497 So.2d 1188 (Fla. 1986) at 1192.

³² *Carney v Knollwood Cemetery Association* 514 N.E.2d 430 (1986) at 435, per Jackson J.

³³ *Id* at 437-438.

³⁴ This is an issue that will be given more attention in Part 3 of this paper: “‘Property’ in the human body”.

³⁵ *Doodeward v Spence* (1908) 6 C.L.R. 406 at 414.

*[When] a person has by the lawful exercise of work or skill so dealt with a human body or part of a human body in his lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial, he acquires a right to retain possession of it.*³⁶

In effect, the Court upheld Doodeward's claim by applying Lockean-style reasoning that a person has property in a thing with which that individual has mixed his or her labour.³⁷

Locke's fundamental premise is that "every man has a 'property' in his own 'person'".³⁸ That is, we own ourselves.³⁹ It is a conception of property that derives from natural law principles and concludes that property arises when a person mixes his or her labour with something found in the state of nature; that is, when labour is mixed with something that is not owned already by someone else, the object of the labour becomes the property of the subject of the labour. It is as though the application of labour is sufficient to alter the legal nature of the object. It is plausible to deduce that a body part is therefore considered to be in a state of nature at the point when it is detached from its body, and it could then be considered to have acquired the legal status of an abandoned object. So a body part effectively changes into a 'body part *plus*' after the application of labour by another person, and it is thereafter

³⁶ Ibid.

³⁷ Locke, John, *Two Treatises of Government* (London: Everyman's Library, 1986) at 130: "*Though the earth and all inferior creatures be common to all men, yet every man has a 'property' in his own 'person'.* This nobody has any right to but himself. The "labour" of his body and the "work" of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property."

³⁸ Ibid.

³⁹ Ibid. It should be noted that Locke's notion of self-ownership derived from a belief that God had supplied each person with a body and no other person could deprive any individual of his or her God-given gift. See, eg., discussion in Harris at 190; and Arneson, Richard J, "Lockean Self-Ownership: Towards a Demolition" (1991) 39 *Political Studies* 36-44 at 50.

As an interesting aside, it has been argued that Locke probably believed that God retained rights in the bodies that He gave to humans, and thus had partial 'ownership' of those bodies. See Christman, John, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (New York: Oxford University Press, 1994) at 149.

categorised as ‘property’. In applying this theory, the High Court of Australia effectively allowed a definition of property as an object of human effort or skill which is lawfully possessed by the subject of that effort or skill to be applied to the human body. It thereby created an exception to the ‘no property’ principle that, for the purposes of this analysis, will be dubbed the ‘Lockean Exception’.

It should be emphasised that the Lockean Exception – so named here because it replicates reasoning most famously elucidated by Locke – in fact allows conclusions that deviate from Locke’s theory. The peculiarity is that reasoning along the lines of the Lockean Exception (as followed, for example, in *Doodeward v Spence*) permits property to be acquired when labour is mixed with the body parts of others, and in doing so it ignores Locke’s initial premise that all humans own themselves.

Despite this antithetical trait, the English Court of Appeal preserved this line of reasoning in its May 1997 decision in the criminal appeals of *R v Kelly and R v Lindsay*.⁴⁰ The question for the court was whether 35 human body parts taken by Kelly and Lindsay from the Royal College of Surgeons were property that was capable of being owned and stolen under the *Theft Act 1968*.⁴¹ The body parts in question had not been the subject of skill or effort by the College and the Court held that, as there is no property in a human body at common law, the body parts were not property. Thus the ratio of the case, that there was no property in the body parts because they had not been altered by the labour of someone who would therefore become their owner, demonstrated the continuing influence and application of the Lockean Exception applied 91 years earlier in *Doodeward v Spence*.

The *R v Kelly and R v Lindsay* Court noted that it was a matter for Parliament to change the law if appropriate. However, in giving the judgment of the Court, Rose LJ pointed to the flexible nature of the common law and suggested that a future court might find property in unaltered body parts in different circumstances. He thereby

⁴⁰“Process turns parts of corpse into property” (21 May 1998) *Times Law Report*, per Rose LJ, Ognall & Sullivan JJ. See discussion in Brahams, Diana, “Editorial: Body Parts as Property” (1998) 66 *Medico-Legal Journal* 45 at 46-47.

⁴¹The Act defines “theft” as the dishonest appropriation of ‘property’ belonging to another with the intention of permanently depriving the other of it. ‘Property’ includes real and personal property including choses in action and other intangible property: see ss 4 & 5.

acknowledged the unsettled and wavering nature of the law in this area, perpetuated the notion that ‘property’ is an appropriate concept to apply to human body parts, implicitly encouraged change in favour a property analysis of human body parts, and perhaps also opened the way for further inconsistency.

The extension of the common law of the dead to the realms of the living — the application of the Lockean Exception to live bodies — creates a further contradiction. One must surely question the logic of not allowing a person to hold property rights in his or her own body while allowing other people to obtain property rights in that person’s body. Yet that is the result of applying *Doodeward v Spence* type reasoning to living bodies, their parts and derivatives. This effect is perhaps most apparent in the area of patent law and its impact upon notions of ownership of the human body.

The patent system personifies the Lockean Exception by awarding monopoly ownership of creations to inventors;⁴² in effect, it gives statutory recognition to the Lockean Exception. In Australia, for example, a patent may be awarded over a “manner of new manufacture” which is novel and inventive, useful, and has not been the subject of secret use.⁴³ Discoveries, mental processes and information are not patentable,⁴⁴ but a person can obtain a patent over an invention (a thing to which she or he has applied effort or skill). That the law has tended to exclude certain inventions from patentability on policy grounds — for example, that the invention is immoral, or that it would provide a monopoly over something that parliament (presumably reacting to social norms) believes should be free to everyone in society — does not

⁴² See, eg., Australian *Patent Act* 1990 (Cth), s.13(2): “*The exclusive rights are private property and are capable of assignment and of devolution by law.*”

Note, however, Drahos’ comments that: “*The desire to link a theory of intellectual property back to Locke probably has much to do with reasons of ideological legitimacy. Locke remains a powerful totem... Theories which claim to be Lockean usually do so because of the use they make of the mixing metaphor and the fact that the property rights they establish are not dependent for their existence upon positive law. By concentrating on Locke’s mixing metaphor and at the same time ignoring the religious metaphysical scheme which Locke uses to give the metaphor a more precise meaning, one can derive a strong justificatory theory of intellectual property.*” Drahos, Peter, *A Philosophy of Intellectual Property* (Aldershot: Dartmouth, 1996) at 48.

⁴³ *Patent Act* 1990 (Cth), s18(1).

⁴⁴ See McKeough, Jill & Stewart, Andrew, *Intellectual Property in Australia* (Sydney: Butterworths, 1991) at 219.

detract from the observation that patent law embodies an approach of rewarding creative effort with property rights.

Although patent legislation typically provides that human beings are not patentable,⁴⁵ it has tended to accept that property rights in the form of patents can exist in living things whose ‘creation’ embody a degree of human effort or skill.⁴⁶ The United States’ Supreme Court first allowed a patent over an invention that consisted of living matter in the 1980 decision of *Diamond v Chakrabarty*,⁴⁷ and the extension of this principle allows property rights in the form of patents to be awarded over bodily products (though not human life) in accordance with the Lockean Exception. It could even be suggested that patent law proffers a surreptitious method of awarding property rights over aspects of human bodies or their parts.

A similar line of reasoning to that adopted in *Doodeward v Spence* was followed in the patent-related United States’ case of *Moore v Regents of University of California*.⁴⁸ In Moore’s case, a majority of the Supreme Court ultimately rejected a right of property in the human body, finding no precedent or policy to support the recognition of such a right. However, those who had applied effort and skill to Moore’s body were held to be entitled to the property that resulted from their exertions; that is, the patent and derivative financial rewards. Thus Moore could not own his body, but others could own derivatives from body parts that they had appropriated from his body. The case therefore provides an example of the effects of applying the Lockean Exception to the body parts of a living person.

The facts of Moore’s case make the conclusion that he could not own his body parts while others could seem particularly unfair in a society that purports to value life and

⁴⁵ See, eg., *Patent Act 1990* (Cth), s18(2): “Human beings, and the biological processes for their generation, are not patentable inventions.” The European Patent Convention (10th edition, January 2000) similarly states: “Under Article 53(a), European patents shall not be granted in respect of biotechnological inventions which, in particular, concern the following: (a) processes for cloning human beings; (b) processes for modifying the germ line genetic identity of human beings;...”

⁴⁶ See, eg., *Rank Hovis McDougall’s Application* (1976) 46 Australian Official Journal of Patents, Trade Marks and Designs 3915.

⁴⁷ *Diamond v Chakrabarty* 447 U.S. 303 (1980).

⁴⁸ *Moore v Regents of University of California* 215 Cal.App.3d 709 (1988); aff’d in part, rev’d in part, 51 Cal.3d 120, 793 P.2d 479 (1990). Hereafter “Moore’s case”.

liberty, as well as property. John Moore suffered from hairy cell leukaemia, a rare form of cancer. He underwent treatment that involved the removal of his spleen and, at some financial cost to himself, he received follow up treatments over the next seven years. Doctors and researchers treating Moore developed and patented a T-cell line using cells from his spleen. Although the 'Mo cell line' was a great commercial and medical success, Moore was unaware of the use that had been made of his bodily products. When he later discovered the appropriation of his cells, and the profits that the expropriators had derived as a result of this, he sued for conversion of his spleen.⁴⁹

Moore's action for conversion was dismissed at first instance, was successful on appeal,⁵⁰ and unsuccessful on subsequent appeal before the Supreme Court. The California Court of Appeals had recognised the existence of property rights in the human body⁵¹ and declared that the possessor had an absolute right of dominion over his body;⁵² Moore owned his body and its parts. The case then went before the California Supreme Court which reversed the Court of Appeals' finding of conversion of Moore's spleen, but which did not find conclusively that Moore either did or did not possess property rights in his body. The indecision indicates a confused application of the various philosophical principles operating in this area. It effectively demonstrates the central problem that laws based on the philosophical premise that a person may not own his or her body sit uncomfortably with the consequences of nevertheless allowing – whether intentionally or not – property in a body or its derivatives to be awarded to another person. In particular, the problem seems to lie in the focus on whether or not 'property' exists, whereas the issue at stake is ultimately one of human liberty and self-determination.

⁴⁹ This only occurred when Moore said he could no longer afford to travel from Seattle to San Francisco for the treatment and the doctors offered to pay his fares, and after he became suspicious because the doctors were upset that he refused to sign consent forms authorising them to develop (further) cell lines from his body fluids and tissues.

⁵⁰ An interesting question addressed at length by Rothman J for the Court of Appeals was whether Moore had abandoned his spleen (by not seeking to repossess it after its surgical removal) and could therefore not claim ownership of it. Could he have abandoned something if he did not own it in the first place? See *Moore v Regents of University of California* 215 Cal.App.3d 709 (1988).

⁵¹ Moore's Case, op cit. at 728.

⁵² Id at 725-726.

In particular, the Supreme Court's pro-property decision in Moore's case appears to be based on the combination of a reluctance to allow an opening to a commercial trade in body parts⁵³ and a concern not to chill research using human biological materials. But by allowing the doctors and researchers to profit from their patent over the derivatives of Moore's body, the Court effectively applied the Lockean Exception and bestowed property rights on those who had applied skill and effort to a body: Moore's body part (akin to Locke's "state of nature") *plus* the scientists' labour effectively transformed Moore's body part from 'non property' into 'property', despite Moore's lack of consent and his protests. The logical and practical effect contradicts the policy reflected in the word of the patent law and clashes with liberal principles of individual human autonomy; the Court's decision denied bodily property to the inhabitant of the body while simultaneously allowing other people to derive property rights in that body.

Moore's case can therefore be seen as a metaphor for the conceptual dilemma addressed by this paper, and it provides a concise summary of the issue: the problem inherent in the California Supreme Court's application of the Lockean Exception is its inconsistent treatment of Moore and of those who provided his treatment.⁵⁴ If Moore had been dead, there would have been no potential for him to apply skill and effort to his own body (and, incidentally, his body would presumably have lost its value to the doctors). But he was alive and, if the application of skill and effort is truly the justification for awarding property rights, surely Moore should also have been entitled to ownership of the body — his own body — in which he had obviously invested effort and skill (for example, feeding and caring for himself, and seeking and paying for the medical treatment which led to the appropriation of his spleen cells).

A logical extension of this line of reasoning is illuminating. One wonders if a surgeon could – in accordance with the Lockean Exception – obtain property rights in any body or body part she had operated on? If so, does it follow that a surgeon could obtain property in her own body by operating on herself? Must a person therefore

⁵³ See, eg., Churchill I J, *op cit* at 275-277.

⁵⁴ Gold, E Richard, *Body Parts: Property Rights and Ownership of Human Biological Materials* (Washington DC: Georgetown University Press, 1996) at 177: "*The status quo, in which researchers*

perform surgery on herself in order to obtain property rights in her body? Would a tattoo artist own a body on which he had etched a design?⁵⁵ Would a make-up artist obtain ownership of a body on which he had worked? Would it matter that the result of the make-up artist's skill and effort would have only a temporary existence? Does every person who applies make-up to her face obtain property in her body as a result? What about a person who shaves his chin each day — does his skilful application of effort earn him property in his body? Surely, according to the reasoning inherent in the Lockean Exception, every sportsperson who trains and exercises should own the body into which he has invested so much skill and effort? And every person who has studied and applied skill and effort to train her mind should surely own the associated body into which the effort has been invested? The logical consequences of adopting this line of reasoning seem farcical. Obviously any person who has applied any effort in altering, or perhaps merely maintaining, his or her body would acquire property rights in that body. At a social level it is clear that the very acts of caring for, educating, exercising and just residing in a human body necessarily involve skill and effort, and involve the exercise of decision-making authority over that body. Following the approach taken in Lockean Exception cases, almost all human life would therefore give rise to ownership of one's own body. To find otherwise is to create an inconsistency, yet that is the logical conclusion when the Lockean Exception is applied to live bodies but when the beneficiaries of the resulting property (usually patent) rights are not the residents of the bodies.

A pending patent application in the United Kingdom is expected to test exactly this principle.⁵⁶ On 5 January 2000, Donna Rawlinson MacLean lodged a patent

and pharmaceutical companies are likely to be able to apply for and receive patent rights in human tissues while the sources of these tissues are left without compensation, is not acceptable."

⁵⁵ Under internationally accepted copyright principles, a tattoo artist would obtain copyright ownership of an original design applied to a body, but this ownership would not extend to bestow rights in the underlying body (copyright traditionally protects an author's rights in the design, rather than in the object to which the design is applied).

⁵⁶ Another test case to challenge the notion of life as intellectual property was recently filed in the US Patent and Trademark Office. The application was for a patent over creatures created from a combination of human and animal cells; the Office rejected the application because it "embraces a human being". See Cohen, Philip, "What makes a human?", *New Scientist* (26 June 1999).

application entitled “myself”.⁵⁷ In her application, MacLean claims she is both novel and useful (and thereby meets the requirements for patentability):

*It has taken 30 years of hard labour for me to discover and invent myself, and now I wish to protect my invention from unauthorised exploitation, genetic or otherwise ... I am new: I have led a private existence and I have not made the invention of myself public. I am not obvious.*⁵⁸

And she describes her utility in terms of the following industrial applications:

*For example, my genes can be used in medical research to extremely profitable ends ... I therefore wish to have sole control of my own genetic material.*⁵⁹

This application will test the principle that human life cannot be patented. MacLean told reporters: “There’s a kind of unpleasant, grasping, greedy atmosphere at the moment around the mapping of the human genome ... I wanted to see if a human being could protect their own genes in law.”⁶⁰

MacLean’s application provides a practical demonstration of the logical disparities between laws that forbid the patenting of (and therefore the acquisition of property rights in) the human body, but allow the patenting of (and therefore the acquisition of property rights in) *other people’s* human bodies which fall within the Lockean Exception. The problem is arguably not that a policy against ownership of bodies exists; it is rather that the policy has been weakened by allowing ownership over aspects of humanity for some people while denying it to others. This is a problem of inconsistency that suggests an absence of a clear policy formulation as to whether or not property should exist in the human body. The reason that laws applying the Lockean Exception have contradicted the liberal principle of protecting human liberty

⁵⁷ UK patent application GB0000180.0. This application is not expected to be examined by the Patent Office until mid 2001: correspondence between Louise Taylor of the Patent Office and Alexandra George (22 May 2000).

⁵⁸ “Don’t copy me; I’m unique”, *The Guardian* (Reprinted in the *Sydney Morning Herald*, 1 March 2000). See also, “Briton applies to patent her own genes”, *Reuters* (4 March 2000) and “I’m Pat Pending”, *Scottish Daily Record* (4 March 2000).

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

and autonomy would therefore appear to be that the legal focus has been on a formal finding of ‘property’ (or not), while a preliminary decision about whether or not individuals should be able to determine for themselves the ways in which their bodies and body parts will be used has been neglected. This conclusion supports the proposition that the property analysis is a misplaced and unnecessary tool when trying to determine whether or not individuals are able (should be able) to exercise decision-making authority over their bodies in relation to the transfer of human body parts.

2.3 *The No Property Principle and New Technologies*

The same problems of inconsistency and the focus on ‘property’ that have been identified above in legal responses to the use of dead or existing bodies or body parts are also reflected in relation to new technologies that could be used to engineer new human bodies or body parts. However the discussions in this domain arguably acknowledge more of the social influences that bear upon the issue of the use of human bodies and their parts for transplantation purposes and they are therefore less inconsistent than the laws surveyed above.

Like the Californian Supreme Court in Moore’s case, the European Patent Office (“EPO”) has avoided commenting directly on whether or not there are property rights in the human body. However a recent incident has made the EPO’s position clear: patents are not directly being granted over processes that could create human bodies. A declaration of the EPO with regard to Patent EPO695351 (granted on 8 December 1999) emphasises that a patent granted for “a method of preparing a transgenic animal...”, for which the application did not specify whether the term “animal” was intended to encompass humans, “does *not* extend to human cloning.”⁶¹

In an earlier decision the EPO addressed the question of ownership of human bodies and considered a variety of issues, thus exploring more usefully the philosophical foundations of its policy concerning the patenting (and, therefore, the ownership) of human bodies and their parts. In this context, the EPO approached the issue from a

⁶¹ The EPO emphasises: “*The English wording of the claim should have included the qualification “(non-human)” because in English scientific usage the term “animal” also includes “human”.*” See EPO Press Release 1/2000 (available at

http://www.european-patent-office.org/news/pressrel/2000_02_22_e.htm)

different perspective to those surveyed above and, although patent law does embody the approach of the Lockean Exception, the EPO's reasoning provides a useful contrast to the Lockean approach. The application of any alternative approach obviously provides scope for further confusion, inconsistency and contradiction. But it is also arguable that this alternative perspective helps to identify some important and influential issues that have contributed to the confusion and contradiction in this area, and therefore a way of understanding (and perhaps resolving) the existing conceptual problems.

In its December 1994 decision in *Howard Florey/Relaxin*,⁶² the EPO Opposition Division considered an opposition to an application to patent the DNA encoding human H2-Relaxin, a DNA fragment which encodes a particular amino acid sequence and which is not found in the human genome.⁶³ The gene can be extracted from certain human tissue found in pregnant women.

European patents are not granted in respect of inventions that offend morality⁶⁴ and, in arguing that it would be contrary to morality to grant a patent over Relaxin, the opponents put three arguments.⁶⁵ First, they claimed that isolating the DNA Relaxin gene from tissue taken from a pregnant woman is immoral because it offends against human dignity to use pregnancy (and they emphasised that pregnancy is a particularly female condition) for a technical process oriented towards profit. Second, they claimed that:

[t]he patenting of human genes ... amounts to a form of modern slavery since it involves the dismemberment of women and their piecemeal sale to

⁶² *Howard Florey/Relaxin* [1995] EPOR 451. A discussion of this case can be found in Deyleveld, Deryck and Brownsword, Roger, "Patenting Human Genes: Legality, Morality, and Human Rights" in Harris, J W, *Property Problems: From Genes to Pension Funds* (London: Kluwer Law International, 1997) 9.

⁶³ *Howard Florey/Relaxin*, op cit. at 546.

⁶⁴ Id at 549: European patents are not granted "in respect of inventions the publication or exploitation of which would be contrary to 'ordre public' or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States."

⁶⁵ Ibid.

*commercial enterprises throughout the world. This infringes the human right to self-determination.*⁶⁶

And third, they objected that patenting human genes is immoral because it involves patenting human life.

The EPO Opposition Division rejected all three arguments. It concluded, first, that it is not immoral to isolate the Relaxin gene from tissue donors who have consented to the procedure, especially as other human biological products (such as blood, bone and tissue) have been widely used as sources for popular, patented life-saving substances (such as blood-clotting factors).⁶⁷ As for the second argument, the Opposition Division found that the process does not give rise to the slavery or dismemberment of women. It stated:

*It cannot be overemphasised that patents covering DNA encoding human H2-Relaxin, or any other human gene do not confer on their proprietors any rights whatever to human beings... No woman is affected in any way by the present patent — she is free to live her life as she wishes and has exactly the same right to self-determination as she had before the patent was granted.*⁶⁸

It is timely to note that the same argument could be used to explain why the decision in Moore's case should not be considered to amount to slavery or ownership of the body – the ownership in that case was also of a derivative of Moore's body which, once removed, arguably had no further impact upon the functioning of his body. This raises a different question of bodily integrity that will be explored below but that can be summarised by the following question: where do we draw the line between body parts and/or derivatives that can be divorced from the body with no future effects, and those that somehow imply a lasting link to their parent body?⁶⁹

In answering the third objection, the Opposition Division found that patenting one gene is different to patenting human life and that, even if clones of all genes in the

⁶⁶ Ibid.

⁶⁷ *Howard Florey/Relaxin*, op cit., at 550.

⁶⁸ Id at 550-551.

⁶⁹ See discussion below in Part 3.2: “Justifying Decision-Making Authority in the Body: Self-Ownership as an Expression of Autonomy and Personhood.”

human body were combined, it would not be possible for scientists to reconstitute human life.⁷⁰ In fact science has since overtaken the decision in *Howard Florey/Relaxin* with respect to this finding. In February 1997 it was announced that a lamb had been cloned using a cell nucleus taken from another sheep;⁷¹ so less than two and a half years after the EPO noted that it would not be possible to reconstitute a human being from the sum of its genes,⁷² the technology to do just that had become available.⁷³ As Michael Lupton notes, the scientific consensus is now that “each cell in a human body contains in it the blueprint to produce an exact replica of that person.”⁷⁴ The world’s first cloned pigs were born in the United States on 5 March 2000,⁷⁵ and scientists in Texas are working to clone “Missie the dog” (the “Missiplicity project”).⁷⁶ And, in what has been called a “significant advance” towards ‘the production’ (rather than ‘reproduction’) of human life, scientists in Maryland have identified the minimum number of genes required to keep an organism alive.⁷⁷ Although the state of technology has made that described in *Howard Florey/Relaxin* seem somewhat outdated, a central legal principle discussed in that case remains particularly apposite. That is, that it is not intrinsically immoral to patent processes that involve the use (and possible creation) of human body parts. It would

⁷⁰ *Howard Florey/Relaxin*, op cit. at 551: “*The patenting of a single human gene has nothing to do with the patenting of human life. Even if every gene in the human genome were cloned (and possibly patented), it would be impossible to reconstitute a human being from the sum of its genes.*”

⁷¹ Wilmut I, et al, “Viable offspring derived from foetal and adult mammalian cells” (1997) 385 *Nature* 810. This was known as “Dolly the Lamb” or “Dolly the Sheep”.

⁷² *Howard Florey/Relaxin*, op cit. at 551.

⁷³ Lupton notes: “*The accepted wisdom had been that cells from adult animals could not be reprogrammed to make a whole new body*” and “*There is therefore no reason why and adult human could not be cloned using Wilmut’s technique*” in Lupton, Michael, “Human Cloning — The Law’s Response” (1997) 9 *Bond Law Review* 123 at 123 & 124 respectively.

⁷⁴ *Id* at 125.

⁷⁵ Smith, Deborah, “Pig-tissue transplant given the green light; Billion-dollar Babes ... the world’s first cloned pigs, born on March 5. Analysts say the market for pig organs could be worth \$US6 billion (\$9.8 billion)”, *Sydney Morning Herald* (16 March 2000). The pigs are known as Millie, Christa, Alexis, Carrel and Dotcom.

⁷⁶ Deutsche Press-Agentur, “Dolly the Sheep to Missy the Mongrel”, *Sydney Morning Herald* (15 January 2000).

⁷⁷ Smith, Deborah, “Life made in the lab prompts ethics call”, *Sydney Morning Herald* (11 December 1999).

therefore seem to open the way even further for the creation of property rights in human bodies and their parts.

Indeed, the legal development in *Howard Florey/Relaxin* prompts significant new questions about attitudes towards property in the human body. Not only is the technology to clone whole human bodies becoming available, but cloning techniques also create the potential for the ‘artificial’ production of body parts such as human proteins, skin and bone marrow, therapeutic tissue and tissue for human organ replacement.⁷⁸ This brings a new context and new urgency to questions about whether the donors of human body parts own their bodies. Can they sell their cells or DNA? And who, if anyone, will own the cloned parts or people?⁷⁹

The decision in *Howard Florey/Relaxin* therefore remains jurisprudentially very important as it shifts the focus of discussion from a principle of ownership in the body as a reward for useful effort (identifying the *if* and *who* of owning human body parts; incidentally, this principle was unexplored and unchallenged in *Howard Florey/Relaxin*) to questions about *whether* it is appropriate to award property rights over the human body and its parts at all. In doing so, it identifies the protection of human autonomy as the main philosophical and political objection to awarding property in the human body.

2.4 *The ‘Human Autonomy’ Argument*

Contrary to suggestions in *Howard Florey/Relaxin*, the protection of human autonomy need not be an objection to a finding of property in the human body and its parts.⁸⁰ Indeed, the need to protect human autonomy can be used explicitly to support

⁷⁸ Lupton, Michael, op cit. at 130. See also, Deborah Smith, “Pig-tissue transplant given the green light...” op cit. See also the ‘Introduction’ to this paper (Part 1) and references given in the accompanying footnotes.

⁷⁹ For a discussion of some of these questions see Robertson, John A, “Liberty, Identity, and Human Cloning” (1998) 76 *Texas Law Review* 1371, esp. 1380-1381. See also Cohen, Philip, “Who Owns the Clones?” *New Scientist* (19 September 1998).

⁸⁰ Cf. the argument along ‘slavery lines’ of the Opposition in the *Howard Florey/Relaxin* case, op cit. See also Cohen, Philip, “What makes a human?”, op cit.: “*The patent office rejected the application because it ‘embraces a human being’. Ownership of such a patent could be seen as violating the 13th amendment to the US Constitution, which prohibits slavery.*”

a finding that the human body and its parts *are* property; a desire to protect an individual's autonomous decision-making ability supports a finding that each human body is the property of its inhabitant.

Following such reasoning, some United States courts have discovered property rights in body parts such as sperm and blood. For example, the Californian case of *Hecht v Superior Court (Kane)*⁸¹ held that sperm is “a unique type of ‘property’” over which a probate court had jurisdiction.⁸² William Kane had stored specimens of his sperm with a sperm bank. When he committed suicide, he left a will that bequeathed the sperm to his girlfriend, Deborah Hecht. The court found that, to the extent to which Kane had possessed decision-making authority as to the use of his sperm for reproduction, he had a property interest in that sperm.⁸³ Furthermore, as L Griggs notes, “[t]he sale of blood in American jurisdictions, the recognition of property in hair, urine and bone marrow, and the existence of sperm banks all indicate that the individual can exercise proprietary rights over the human body.”⁸⁴

Such applications of property rights indicate an emphasis on the will of the autonomous individual and therefore reflect the “autonomy” arguments identified by the Opposition in the *Howard Florey/Relaxin* case. However, in contrast to the *Howard Florey/Relaxin* Opponent's argument that people cannot be self-determining if their bodies are ‘sold piecemeal to commercial enterprises’, this is an argument that autonomy demands that people *can* exercise decision-making authority over their bodies.

Perhaps it is this duality (the use of ‘personal autonomy’ to both support and undercut an argument for property rights in the human body) that accounts for much of the modern confusion in the law relating to ownership of human bodies and body parts.⁸⁵

⁸¹ *Hecht v Superior Court (Kane)* 20 Cal.Rptr.2d 275 (Cal.App. 2 Dist. 1993).

⁸² *Id* at 283.

⁸³ *Ibid*: “*We conclude that at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision-making authority as to the use of his sperm for reproduction. Such interest is sufficient to constitute ‘property’ within the meaning of Probate Code section 62. Accordingly, the probate court had jurisdiction with respect to the vials of sperm.*”

⁸⁴ Griggs, L, “The Ownership of Excised Body Parts: Does an Individual Have the Right to Sell?” (1994) 1 *Journal of Law and Medicine* 223 at 226.

⁸⁵ Churchill, I J, *op cit* at 262. These principles are summarised in Brahams, Diana, *op cit.* at 47.

And perhaps it also accounts for the side-stepping of the issue by the law-makers who identified the quasi- or pseudo- property rights – (non-)property that is little more than a token response to demands for rights in this area and that effectively eludes any serious consideration of the issues – described earlier.

Like the Lockean Exception, the *Howard Florey/Relaxin* principle that allows ownership of parts of another person's body or its derivatives while preventing ownership of one's own body, seems logically incongruous and morally suspicious. As alluded to earlier, it seems inconsistent to allow ownership of one's body by another person if the reason for preventing ownership of one's own body is to protect individuals from the harm caused by alienating part of one's body or from being exploited by another who wishes to use one's body or its parts. After all, ownership of one's body by another person seems to directly contradict a principle promoting personal autonomy.

From this mess of law and jurisprudential principles, various aspects of one issue keep reappearing: what the law treats as a property issue, it in fact justifies on a framework of human rights philosophy. It applies a property approach while using a justification of autonomy that is inevitably explained by the philosophy of liberal rights. And while this is not necessarily a recipe for inconsistency (property itself is often cast as an intrinsic human right),⁸⁶ nor is it instinctive that respect for principles of liberal autonomy necessarily leads to a property approach nor, indeed, a finding of 'property' or 'no property' in the human body. But perhaps this is the key to solving the existing jurisprudential confusion in this area: if the nature of property rights in the human body can be precisely identified and defined, and the link with principles of human autonomy can then be resolved, it is possible that the intellectual haze surrounding this area of the law will dissipate. The way would then be clear for legislatures and courts to resolve the ambiguities in the law relating to property in, and control of, the human body and its parts.

⁸⁶ See, eg, Article XIV(1) of the *Bill of Rights* (Amendment to the Constitution 1868): “Nor shall any state deprive any person of life, liberty or property...”

3. ‘Property’ in the human body

It quickly becomes evident from a review of the law and literature in this area that law-makers frequently refer to ‘property’ and ‘no property’ in the human body and its parts without explaining what they mean by these terms.⁸⁷

The definition of ‘property’ might be assumed knowledge, but relying on such an assumption involves a degree of intellectual sloppiness that renders discussion of ‘property in the body’ unacceptably imprecise. This imprecision probably lies at the very centre of the confusion and contradiction that surrounds questions about whether property exists in the human body and its parts. Leaving a generic term such as ‘property’ undefined in a particular context allows for myriad interpretations and exceptions as judges and legislators search for implicit definitions that allow them to frame outcomes that are optimal for the case at hand, in accordance with social norms and contemporary policy directions (such as reward for scientific advancement or a desire to implement measures upholding a philosophical belief in respect for the self-determination of individuals). The ensuing inconsistencies make it difficult to predict how the law will respond to future situations emerging in this area, thereby perpetuating the confusion. This is illustrated, for example, by questions about the legal status of cloned people.⁸⁸

Property is an imprecise term, capable of various interpretations and various shades of meaning within those interpretations. If the nature of the legal status under discussion were clearer, the quality of the discussion would immediately improve. The discussion could then focus on policy issues (for example, whether or not individuals should be able to trade their body parts), referring back to ‘property’ only as a defined term in order to discuss whether property or some other legal classification is the most appropriate way of translating the policy into practice. It is therefore important to explore exactly what implicit meaning lies behind the ephemeral uses of the term ‘property’ that are the norm in this area.

⁸⁷ As identified by the discussion of legislation and case law in Part 1 above: “Legal Approaches to Ownership of the Human Body”.

⁸⁸ See, eg., Cohen, Philip, “Who Owns the Clones?” op cit.; “Human Cloning: Yes or No?”, *CARE Parliamentary and Campaigns Update* (February 1998)
http://www.care.org.uk/resource/parl_upd/pcu04_06.htm

3.1 *Property in the Body as ‘Decision-Making Authority’*

At a generic level, and in the context of the current analysis, it could be suggested that the term ‘property’ is often used in a way that implies meaning but that lacks the precision needed to make the term legally effective. It seems as though legislators and judges, by using the term ‘property’, have tried to register their approval of a general type of relationship between the body or body part and the person they wish to identify as the owner of that object, but they have been unable to define exactly what that relationship entails.

This imprecision is initially reminiscent of the pseudo- or quasi- property rights relating to burial of a body, but it is perhaps less intellectually honest. By identifying rights as pseudo- or quasi- property, judges acknowledged that they were bestowing particular and unusual rights, and they therefore detailed the limited scopes of those rights. Patents have a similar advantage – they specifically elucidate the scope of a patent proprietor’s rights over the owned body or part, and this conveniently gives substance to what might otherwise be regarded as just a collection of somewhat empty rights created by application of the Lockean Exception. By contrast, the rights bestowed by simply acknowledging ‘property’ in hair, urine, sperm or bone marrow seem more or less empty: beyond the warm and/or powerful feeling of ownership, it is difficult to determine exactly what practical rights they bestow.

(a) **What is ‘property’ in the human body?**

Perhaps the nature of the relationship commonly remains undefined because it is apparently so self-evident what the notion of ‘property’ implies. This is the approach of Tony Honoré who claims that all legal systems that admit the existence of ‘interests in things’ have a concept of ‘ownership’. He suggests that it is these common legal incidents that cumulatively form the concept of ‘property’:⁸⁹

⁸⁹ Honoré, Anthony M, “Ownership” in Guest, Anthony Gordon (ed), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107 at 108. Honoré describes eleven legal incidents of ownership: the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to security, the power to transmit, devise or bequeath, the absence of a term to one’s ownership rights, responsibility for harmful use, liability to execution and rules governing the

If it were not so, ‘He owns that umbrella’, said in a purely English context, would mean something different from ‘He owns that umbrella’, proffered as a translation of ‘Ce parapluie est à lui’. Yet, as we know, they mean the same. There is indeed, a substantial similarity in the position of one who ‘owns’ an umbrella in England, France, Russia, China, and any other modern country one may care to mention. Everywhere the ‘owner’ can, in the simple uncomplicated case, in which no other person has an interest in the thing, use it, stop others using it, lend it, sell it or leave it by will.⁹⁰

But it is equally evident that ‘property’ – if taken to describe a *relationship* between an object and its owner, rather than an intrinsically observable or tangible *object* itself – is capable of different interpretations. Therefore, as Craig Rotherham argues:

Property cannot be meaningfully conceived of as some universal and immutable concept, but only in terms of historically contingent conceptions that are more or less prevalent in a particular legal culture at a specific point in time.⁹¹

It is important that the terms of the debate are meaningful if the law relating to ‘property’ issues such as ownership of the human body and its parts is to be intellectually compelling and empirically useful. So if the term ‘property’ is to be meaningful as a legal descriptor, rather than just operating as a superficially appealing but substantively meaningless legal noise that inertly serves to fill a linguistic and conceptual void, it is necessary to examine its use in the context of the historically contingent conception in which it is used.

H L A Hart uses an approach of this type to try to resolve the dilemma of meaning with respect to obscure legal concepts. He applies contextual definitions to explain legal notions that seem meaningful in the linguistic circumstances in which they are used but that “baffle the initial attempt to extract any principle behind the application.”⁹² Thus Hart would ask, not: what is meant when we say we have

reversion of lapsed ownership rights. See also Munzer, Stephen R, *A Theory of Property* (Cambridge: Cambridge University Press, 1990) at 24.

⁹⁰ Honoré, A M, op cit. at 108.

⁹¹ Rotherham, Craig, “Conceptions of Property in Common Law Discourse” (1998) 18 *Legal Studies* 41 at 43.

⁹² Hart, H L A, “Definition and Theory in Jurisprudence” (1954) 70 *Law Quarterly Review* 37 at 38.

property in our body parts? Rather, he would ask: under what types of conditions does the law ascribe property rights in the human body and its parts?⁹³ In effect, this approach blends those of Honoré and Rotherham, reformulates the question in terms of conceptions of property and invites extrapolation of general or common characteristics from the various ‘conceptions’ to identify the essential features that constitute the ‘concept’.⁹⁴

Following Hart’s approach in the context of the current investigation, the first issue is thus: does the law ascribe property rights to human bodies and their parts? If so, the logical and obvious conclusion is that – at least at a formal legal level — property does indeed exist in the human body and/or its parts. If not, property does not exist. Then, if property is identified in the first step, the next question is: when does such property arise? At a pragmatic, empirical level (as opposed to the formal legal level), such property arises only when it is enforceable. And, by identifying the situations in which it is enforceable and the practical effects of that enforcement, it is possible to work backwards to identify the nature of the so-called ‘property’ in human body parts. Similarly, by identifying when property is specifically held not to arise, the contextual definition of property in the human body can be refined.

(b) Types of Property in the Human Body

It is clear from the earlier discussion that the law does ascribe some property rights to human bodies and their parts.⁹⁵ Extrapolating from these cases and examples, several generalisations can be made about the sorts of circumstances in which this has occurred, thus illuminating the nature of the rights that the property label implies:

1. ***Property in a dead body:*** The law seems to have been less concerned about allowing property rights over dead bodies than over live ones.

⁹³ Id at 43. A similar approach is discussed in relation to the definition of the human “body” in Long, Douglas C, “The philosophical concept of a human body” (1964) 73 *Philosophical Review* 321 at 327.

⁹⁴ The “concept/conception” dichotomy is succinctly explained in Campbell, Tom, *Justice* (Basingstoke: Macmillan Education, 1988), chapter 1. It could be summarised as a concept being comprised of various conceptions or viewpoints as to the meaning of the concept.

⁹⁵ See Part Two of this paper: “Legal Approaches to Ownership of the Human Body”.

Recognising quasi- or pseudo- property in a dead body for the purposes of organising burial amounts to recognising a right (obviously held by someone other than the occupant of the body) to exercise limited decision-making authority over the body in specific circumstances. The existence of identical practical rights – even when the existence of property is explicitly denied – supports the conclusion that possession of a body for the purposes of burial amounts to a very narrowly defined right of decision-making authority. Whether the formal legal term ‘property’ is applied to this right is merely an academic question of little (if any) practical consequence, though it is perhaps of significant rhetorical consequence.

It is notable that dead bodies can be considered to be bodies that have been abandoned by their inhabitants, so it does not infringe an inhabitant’s liberty or autonomy to make his or her body the object of another person’s possession.

2. ***Property in detachable, regenerative body parts:*** It is interesting to engage in conjecture about why sperm, blood, hair, urine and bone marrow have been called the ‘property’ of the occupants, while other body parts have been denied this status. The characteristics that body parts such as blood, hair, urine and bone marrow have in common, that are not shared by parts such as kidneys and corneas, are that they are detachable and also regenerative. They can be removed from the body without causing significant or long-term detrimental effects to that body⁹⁶ and, because they regenerate, they will continue to be available to the occupant of the body for future use. They are therefore of a different nature to kidneys and corneas.

Kidneys are detachable but do not regenerate if removed. Most people are born with two kidneys and it is necessary for a human to have at least one functioning kidney (or a machine that performs the role of a kidney)⁹⁷ in order

⁹⁶ Cf. other parts that are detachable (eg. a hand or a leg, or both kidneys) but that will not regenerate and will have a significant impact upon the donor.

⁹⁷ Only external machines are currently available, often imposing significant practical restrictions on a person who needs to dialyse several times per week, and therefore limiting the range of choices available to that person. The issue of choices is examined below in Part 4.2: “Coercion and Consent”.

to survive. As a result, it could be said that possessing a functioning kidney is an intrinsic part of being human, although it would perhaps be more accurate to propose that possessing kidney function (whether or not one actually has a kidney) is an intrinsic part of being a living human.

Corneas are detachable in that both corneas can be removed without affecting a person's ability to survive. However, an eye does not see without a cornea, and a cornea does not regenerate if removed or destroyed. Like most body parts, eyes have a particular and important function. If a cornea does not work, the 'normal' functioning of the eye is obviously diminished. The effect might not be fatal like the possible effect of the failure of both kidneys, but it is nonetheless significant. Body parts such as corneas are therefore distinguished from those which, because they regenerate, can be said to have only a negligible effect on the body if lost or removed.

By contrast, derivatives of body parts do fall within the second category because, by definition, they are detached *and* regenerative *and* have no physical effect on the future ability of the body to function.

In summary, therefore, this second category describes only body parts whose removal has no physical effect on the future function of the human body and thus no effect on the future decision-making ability of the occupant of that body.

The Lockean Exception and patent laws might initially seem to comprise a third candidate for an additional category of bodily property; that encompassing property derived from reward useful effort. However, on closer reflection it seems that both the Lockean Exception and patent laws award property rights only in bodies, body parts or their derivatives that fall within the two categories described above (that is, dead bodies or detachable, regenerative body parts).

The Lockean Exception and patent laws imply specific rights that are granted over bodies on a case-by-case basis and they are therefore of limited value for generalising about the substantive rights that 'property' in the human body implies. The Lockean Exception requires a specific judgement concerning the scope of the rights that will be awarded in any particular case; patent laws bestow on the patentee "exclusive rights

during the term of the patent, to exploit the invention and to authorise another person to exploit the invention.”⁹⁸ Because the scope of the ‘invention’ is defined in each case, and the substance of the resultant property rights over a human body depends on this definition, each application of patent law should be examined in isolation. It is therefore more useful to examine the instances in which property has been granted as a ‘reward for effort’ on a case-by-case basis. The conclusion that can then be drawn is that it is then possible to classify these cases within the two categories described above. Thus the preserved Siamese twins in *Doodeward v Spence* and the expropriated body parts in *R v Kelly* and *R v Lindsay*, to use examples given above,⁹⁹ would fall into the first category (that is, dead bodies). The derivatives of John Moore’s spleen¹⁰⁰ and body parts such as William Kane’s sperm,¹⁰¹ fall into the second category (that of detachable, regenerative body parts).

Furthermore, statutory prohibitions on patents over human life, coupled with the recent EPO statement referred to above,¹⁰² indicate a clear aversion to opening a third category encompassing property in living human bodies.¹⁰³ It will be interesting to see whether Donna McLean’s application to patent herself prompts a policy shift from this position.¹⁰⁴ For the time being, however, it is arguable that there remain just two categories of property in the human body and its parts that need be examined in an attempt to understand why a focus on ‘property’ has displaced a focus on the question of whether individuals should or should not be permitted to determine for themselves the use of their own bodies and body parts.

(c) A Contextual Definition of Property in the Human Body

⁹⁸ Australian *Patent Act* 1990 (Cth), s.13(1). The rights are similar in other jurisdictions.

⁹⁹ See Part 2.2 above: “The Lockean Exception to the ‘no property’ principle”.

¹⁰⁰ *Ibid.*

¹⁰¹ See Part 2.4 above: “The ‘human autonomy’ argument”. It is interesting to note that William Kane was deceased, so his sperm could presumably have been classified also in the “dead body” category. Indeed, in these circumstances it was not actually regenerable. However as the court assessed the question of whether or not his sperm was property by examining his decision-making authority over it at the time of his death, it was not necessary for the court to explore this alternative line of reasoning.

¹⁰² See Part 2.3 above: “The No Property Principle and New Technologies”.

¹⁰³ *Ibid.*

These conclusions form a simplified contextual definition along the lines suggested by Hart. To summarise, the law recognises property in the human body and/or its parts only when:

1. The body is dead. The human occupier of the body has therefore already expired and will not be affected by the recognition of decision-making authority over his or her body; or
2. The body parts are detachable and regenerative, and are not intrinsic to the survival of the body as they will be reproduced once they are removed. Thus their removal will not physically affect the body in a way that will limit the decision-making authority of the occupier of the body.

Thus ‘property’ in the human body can be defined as ‘legally enforceable decision-making authority’ over the human body.

In addition to these legally recognised property rights in the body, there are arguably also social norms that replicate legal property rights even though they do not give rise to legally enforceable claims over one’s body or its parts. If it is accepted that ‘property’ is a synonym for ‘decision-making authority’ and it is possible to possess decision-making authority about a human body and/or its parts, then a form of social ‘property’ can exist in the human body at a factual or social level, even if no corresponding legal right is recognised. Such non-legal (unofficial) property is recorded in social institutions – rather than legal texts – about the degree to which a person can, or ought to be able to, exercise control over his or her body and its parts. Examples of this phenomenon might include some personal ‘human rights’ (such as a ‘right to be left alone’), or the intuitive feeling that Moore should not have had his spleen appropriated by scientists who profited from their actions although Moore received no compensation. This again raises a question about why the factual existence of property in the body – a socially recognised decision-making authority – is not always reflected by the law.

¹⁰⁴ See discussion at the end of Part 2.2 above: “The ‘Lockean Exception’ to the No Property Principle”.

One possible answer lies in the recurring pattern that property rights over the body are only recognised in cases where they do not accord the recipients of the right the legal decision-making authority to act in a way that will limit the future decision-making authority of the occupant of the body. Viewed from another perspective (though relevant only in the case of live bodies), it could be said that legal property rights are awarded only when allowing removal of the body parts in question would not affect the intrinsic human existence of the occupier of the body.¹⁰⁵

It is therefore useful to explore the notion of the intrinsic nature of human beings in order to discover why this factor is so determinative when society is deciding whether or not property should be awarded in the human body in any particular circumstance. Indeed, this factor possibly forms the missing link that helps to explain the inconsistencies in the law relating to the transfer and ownership of human bodies and their parts; it helps to link the arguably misplaced ‘property’ analysis with the more fundamental question of whether individuals should be permitted to trade their body parts if they so desire.

3.2 *Justifying Decision-Making Authority in the Body*

In exploring the intrinsic nature of human beings – ‘*humanness*’ – in this context, it is immediately apparent that there are at least two bodies of thought that powerfully influence the way in which the law has developed in this area. These could be classified as a rhetoric of liberal conceptions (for example, theories of autonomy and personhood) and a rhetoric of property (for example, ideas such as slavery and the empowerment of women). Having identified some of these pressures and their interplay, it becomes increasingly evident how laws have been affected by social influences that have weakened the liberal credentials of the law governing the trade in human body parts.

¹⁰⁵ This comment implies assumptions that will be tested in Part 4 of this paper: “Autonomy and the limits of decision-making authority”. Notably, it assumes that allowing property rights over human body parts is tantamount to granting rights to transfer those parts. However it does not distinguish between cases of sale and unremunerated donation, even though those cases are treated quite differently by the law.

(a) A Theory of ‘Humanness’: Self-Ownership as an Expression of Personhood and Autonomy

It would be simple to argue that a body part is ‘intrinsic’ if it is essential to the continuing existence of human life. But this argument is clearly superficial and it immediately raises questions about exactly which body parts are indeed essential to the continued existence of human life. People without corneas, for example, are no less human than those with their corneas intact. And people without kidneys, who instead survive with the aid of artificial dialysis machines, are surely as human as those with two fully functioning kidneys. So, if the removal of corneas or kidneys or other body parts does not make a person less human, what is it that stands in the way of treating human body parts as property? That is, what is it that stops the law from awarding individuals complete decision-making authority over their own bodies?

The answer arguably lies in much deeper intuitions about what it means to be human. People who are missing an arm or leg, eyes or kidneys, tonsils or the appendix, are considered by society to be just as human as anybody else. They are certainly not considered to be ‘inhuman’ simply because they lack a body part. Rather, something or someone is considered to be *inhuman(e)* if it is “not worthy of or conforming to the needs of human beings.”¹⁰⁶ So what are these needs? What is it to be human? And what is it about humans that would make it inhuman to regard them as property?

The very difficulty of constructing a definition for ‘a human’ suggests that we are concerned with something more than the physical characteristics and composition of a ‘person’.¹⁰⁷ Like trying to define ‘property’, it seems that trying to define ‘being human’ (that is, ‘humanness’) involves trying to define a concept; it seems that being human is about more than just existing in the physical form of a ‘human being’. And from the above review of cases in this area and the reasoning on which courts have based their findings of ‘property’ or ‘not property’, it seems that this additional

¹⁰⁶ The etymology of ‘inhuman’ is the Latin *inhumanus*, from in- + *humanus* (human). Its original meaning therefore, is literally “not human”. See *Webster Dictionary* (Merriam-Webster, Incorporated, 2000): <http://www.m-w.com/cgi-bin/dictionary?inhuman>

¹⁰⁷ Comparisons could be drawn with Lord Wedderburn’s ‘elephant test’: “an animal too difficult to define but easy to recognise when you see it.” See Lord Wedderburn, *The Worker and the Law* (London: Sweet & Maxwell, 1986) at 116.

conceptual factor is that of being sentient and able to make autonomous decisions about one's own actions and behaviour. A dead body – which has by definition lost these characteristics¹⁰⁸ – is a candidate for property rights. A live body without these characteristics is said to be 'brain dead' and becomes a prime candidate for the harvesting of its tissues and organs;¹⁰⁹ not property or fungible commodities, but nevertheless legally transferable. Body parts that are detachable are independent of the characteristics that make a human a sentient being who is capable of autonomous decision-making, and these are the body parts that are typically permitted to be donated for transplantation (especially if they are also regenerable).

What is the significance of this categorisation of body parts as 'intrinsic' or 'nonessential' to humanness that has led to the categorisation of certain types of body parts as property or not (that is, subject to personal decision-making authority or not) and has perhaps been responsible for the contradictions that are apparent in the property analysis applied by the courts?

The answer perhaps lies in a social (rather than legal) intuition that it is the capacity for autonomous decision-making that constitutes the humanness of a person. The law reflects this by only countenancing the removal of a body part if that operation would not affect the donor's capacity for autonomous decision-making. This is the theme

¹⁰⁸ A conventional definition for 'dead' is "(1) deprived of life: having died; (2) having the appearance of death; (3) lacking power to move, feel, or respond; (4) incapable of being stirred emotionally or intellectually..." *Webster Dictionary*, op cit., <http://www.m-w.com/cgi-bin/dictionary?dead>

¹⁰⁹ The definition of brain-dead" has been a topic of much debate within the medical literature. The Australian Red Cross has adopted the following guidelines for use in transplantation cases: "*A person who has died, according to brain death criteria, will not demonstrate any brain stem reflexes, nor will they make any spontaneous effort to breathe when disconnected from the ventilator for a prescribed amount of time ... Additional testing such as an x-ray angiography may be required to show that all blood supply to the brain has ceased. The time of death is documented as being the time when the second set of tests confirm brain death. The diagnosis of brain death must be confirmed by two specialist doctors who must not be involved with transplantation in any way... Death has occurred if the person has no response to tests which assess the essential functions of the brain. All the functions listed below must be absent to establish the diagnosis of brain death. no pupil reaction to light; no response to pain; no blinking when the cornea is touched; no eye movement when the head is turned; no eye movement when ice cold water is put into the ear; no gagging response to a stimulus at the back of the throat; no breathing when disconnected from the mechanical ventilation machine.*" <http://www.organ.redcross.org.au/where.html>

reflected in the ‘human autonomy’ argument for decision-making authority in the human body (that is, justifications for property in the body based on notions about self-determination) considered in the *Howard Florey/Relaxin* and *Hecht* cases,¹¹⁰ and it also seems to be the idea that most strongly underpins calls for ‘self-ownership’ of the human body.

What might be described as the personhood thesis – which defines self-ownership as an inherent characteristic of personhood – draws on theories of ‘the person’, such as Kant’s view of the person as a rational and free being, or Locke’s view of the person as a thinking, intelligent being.¹¹¹ From such conceptions it follows that a person with the psychological capacity for autonomous thought is a self-owner as he or she has decision-making authority about his or her own body. It is therefore the ability to think that makes a human being ‘a person’. The body part that is connected with thought is the brain, however it is perhaps not the tangible physical body part known as ‘the brain’, but rather the intangible psychological ‘body part’ of ‘the mind’ that is the fundamental characteristic of personhood.

This suggests that there is something more than the physical incidents of humanness – such as having a cornea or a kidney – that makes a human being ‘a person’, and this provokes considerations of the mind/body distinction.

It is apparent that when body parts are treated as property, or are even just allowed to be transferred, they are examples of ‘bodies’ that have been separated from ‘mind’. They are regenerative parts or parts that are unnecessary for the continued survival of the cognisant person (for example, blood, sperm, bone marrow, a single kidney or genetic material that is not missed by the donor). Furthermore, where a cadaveric donor is to donate his or her heart, corneas or kidneys, for example, it must be first established that the donor has in fact died,¹¹² an implication of which is the conclusion

¹¹⁰ See discussion in Parts 2.3 and 2.4 above: respectively, “The No Property Principle and New Technologies” and “The ‘Human Autonomy’ Argument”.

¹¹¹ Radin, Margaret Jane, “Property and Personhood” (1982) 34 *Stanford Law Review* 957 at 962-963.

¹¹² See, eg., the information sheet prepared for potential donors by the Australian Red Cross: “*WHEN do I donate my organs? After you die. Every effort will be made by the health care team in intensive care to save your life. Specialist medical staff working in intensive care are not part of transplant*”

that his or her mind has been separated from the body. Thus the decision to donate (or sell) the cadaveric body and/or its parts may be made by the embodied mind of another body, but the decision can only relate to the period after the object (dead) body becomes devoid of its mind. Similarly, if the decision-making authority is held by the body's next-of-kin or by doctors, the authority only arises at the point that the body is disembodied from its own mind and its own autonomous 'will'.

The definition of 'death' in terms of 'brain death' is a legal construct resulting from a policy decision of law-makers (though based on medical norms). It can similarly be argued that the definition of the body as something removed from, but subject to the mental direction of a conscious person is similarly a political construct applied through legal discourse, rather than a biological truth.¹¹³ On this view, the body is the vessel that represents the person "as constructed as a legal subject in civil society".¹¹⁴ As people can currently only be known through the medium of their bodies,¹¹⁵ the legal system defines these bodies as humans and people, even though human bodies are perhaps only visualisations with no inherent rights.¹¹⁶ Rights are social and legal norms determined by a society, even if a society does declare them to be 'self-evident'.¹¹⁷ It follows that *if* property rights are attributed to the body by society, they are really rights attributed to the intangible embodied person – the mind – even though the tangible object to which they attach is the associated human body.

surgical teams. If their best efforts to save you are not successful, it is only after death has been declared that organ donation can be considered." <http://www.organ.redcross.org.au/when.html>

¹¹³ Hyde, Alan, op cit. at 258-259 and 262.

¹¹⁴ Id at 258.

¹¹⁵ One can imagine a society in which scientific discovery had progressed to the point where humans could survive as minds totally disembodied from their original physical forms. In such a society, one could presumably be a self-owner of the type implied by those who argue for self-ownership, although the need for discussion about ownership of the body and its parts would obviously be obsolete.

On a different note: to say someone can only be known through the medium of their bodies is not to deny the possibility of a person being known by a reputation for qualities such as kindness, honesty or nastiness, though it is only through bodily expression that such characteristics can be conveyed.

¹¹⁶ Hyde, Alan, op cit. at 264.

¹¹⁷ See, eg., *The Declaration of Independence of the Thirteen Colonies* (4 July 1776): "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." Note that such rights are certainly not considered self-evident or unalienable in all societies.

The mind/body distinction therefore provides a window through which we can identify a link between the liberal conception of property and typical applications of the concept of ‘property’ to the human body and its parts in liberal democratic societies. It could be argued in conclusion that the reason for the exclusion of the body from the definition of property, and legal bans on payment for body parts, is intimately connected with the philosophical distinction between the body and the mind. The difference between the legal treatment of live bodies and corpses could be explained by the difference between bodies with a mind and those without, and so the debate over when a body dies — and the definition of ‘brain dead’ that is so central to the law relating to organ transplantation — could be interpreted as a debate over the point of disembodiment of the mind. Similarly, the debate over whether anencephalic babies should be used as sources of body tissue could also be reduced to a discussion about whether bodies without minds should be treated differently to those who can think and act as autonomous individuals.¹¹⁸ This is a crucial distinction because it means that, not only does the mind/body distinction functionally determine what is and what is not treated as property, it also serves as a philosophical key to the reasons for this treatment. It does not explain why someone with a mind is not considered to be property,¹¹⁹ but it does serve to indicate one of the conceptual social influences on the law in this area. Whether or not the reasons for the conclusion that a person with a mind cannot be property are logical and compelling is largely irrelevant at this point;

¹¹⁸ Anencephalic babies are born with a congenital absence of all or a major part of the brain. They consequently lack the potential to function as autonomous human beings. For examples of medical literature relating to the use of anencephalic babies as organ donors, see: DuBois, J M, “Ethical assessments of brain death and organ procurement policies: a survey of transplant personnel in the United States” (1999) 9 *Journal of Transplant Coordination* 210-218; Sytsma, S E, “Anencephalics as organ sources” (1996) 17 *Theoretical Medicine* 19-32; Berndt, J, “Harvesting organs from anencephalic infants for transplantation, are these donors dead or alive?” (1995) 28 *Journal of Health and Hospital Law* 208-30, 242; “The use of anencephalic neonates as organ donors. Council on Ethical and Judicial Affairs, American Medical Association”, (1995) 273:20 *Journal of the American Medical Association* 1614-1618; Holzgreve, W, Beller, F K, “Anencephalic infants as organ donors” (1992) 35 *Clinical Obstetrics and Gynecology* 821-36; Taylor, B J, Chadduck, W M, Kletzel, M, Rush, J E, Moore B, “Anencephalic infants as organ donors: the medical, legal, moral and economic issues. The Bioethics Committee of Arkansas Children’s Hospital” (1990) 87 *Journal of the Arkansas Medical Society* 184-7.

¹¹⁹ This is discussed below at Part 3.2(b): “The Rhetoric of Self-Ownership: Enslaving or Empowering?”

what is important is that this influence does exist in society, and recognising this helps to provide a more coherent foundation on which the autonomy thesis for self-ownership can be built.

It could therefore be said that the importance of the mind/body distinction lies in its rhetorical force and the influences that this has had on the development of social and legal norms.¹²⁰

A similar effect can be observed in relation to the notion of self-ownership as an expression of autonomy. This thesis suggests:

*that those rights, liberties, and powers associated with the ownership of property comprise the rightful sovereignty that each person has over herself. In short, people own themselves.*¹²¹

This theory – generally justified on ‘natural law’ or ‘human rights’ grounds – accords with the Lockean principles from which courts have ironically derived the style of reasoning referred to in this paper as the ‘Lockean Exception’.¹²² Placed within the spectrum of the contextual definition of property in the human body outlined above,¹²³ this is an argument that each human being should have decision-making authority over his or her own body in order to express the personal autonomy that is the essence of liberalism. Individuals express their liberty through decisions and actions that they are independently responsible for. The actions are expressions of the human self and are evinced in the decisions that each individual takes about how she or he will behave. As described by Costas Douzinas and Shaun McVeigh, “it is the power of

¹²⁰ See, eg., Hegel, G W F, *Elements of the Philosophy of Right* (Cambridge: Cambridge University Press, 1991); Kant, Immanuel, *The Metaphysical Elements of Justice* (Indianapolis: Library of Liberal Arts, 1965).

¹²¹ Christman, John, op cit. at 148.

¹²² See, eg., Ryan, Alan, “Self-ownership, autonomy, and property rights” in Frankel Paul, Ellen, Miller Jr, Fred D, and Paul, Jeffrey (eds), *Property Rights* (Cambridge: Cambridge University Press, 1994) 241 at 242-247; Ely Jr, James W, op cit. at 17; and Harris, J W, op cit. at 189-190.

¹²³ See Part 3.1: “Property in the Body as ‘Decision-Making Authority’”.

choice, of choice between yes and no, an indivisible sovereignty of the self. This power finds its perfect manifestation in decision.”¹²⁴

In the context of control over human body parts (and their derivatives), the self-ownership thesis is manifest in the following reasoning:

1. *If I am not a slave, nobody else owns my body. Therefore*
2. *I must own my own body and each and every part of it. Therefore*
3. *If any part of my body is separated from me, I continue to own that separated bodily part.*¹²⁵

To some extent, this social intuition is reflected in laws that regulate the transplantation of human body parts. For example, it is common practice for governments to ask inhabitants to state whether or not they are prepared to donate their bodily organs when they die;¹²⁶ body parts are not just appropriated by the state upon death. However even if a person indicates that she wishes to donate her body parts upon her death and it would be socially beneficial for her to do so, the state will not necessarily accede to this desire.¹²⁷ The decision-making authority of the

¹²⁴ Douzinas, Costas and McVeigh, Shaun, “The Tragic Body: The Inscription of Autonomy in Medical Ethics and Law” in Wheeler, Sally and McVeigh, Shaun (eds), *Law, Health and Medical Regulation* (Aldershot: Dartmouth, 1992) at 3.

¹²⁵ Harris, J W, op cit. at 357.

¹²⁶ In New South Wales, for example, there is provision for motorists to specify on their drivers’ licenses whether or not they are prepared to become organ donors. The information provided by the Roads and Traffic Authority, the government department that administers this scheme, states: “*Organ Donation Saves Lives: Successful organ and tissue donation has meant the possibility of life and health to many people in our community. Organ transplantation is possible only through people generously deciding that in the event of their death they would like to donate their organs to help others. There is provision on your drivers licence to record your intention to become an organ donor.*” It is therefore a clear, if implied, expectation that whether or not to become an organ donor is a decision within the jurisdiction of each autonomous individual. Source:

[http://www.rta.nsw.gov.au/frames/licensing/a_f.htm?/frames/licensing/a6&/licensing/a66_c.htm&Organ Donation&6.t](http://www.rta.nsw.gov.au/frames/licensing/a_f.htm?/frames/licensing/a6&/licensing/a66_c.htm&Organ%20Donation&6.t)

¹²⁷ For example, in New South Wales the wishes of relatives override contradictory desires that had been stated by the deceased prior to her death. See, eg., the information sheet provided by the New South Wales Coordination Centre for Organ and Tissue Donation (the body that oversees organ

individual with regard to his or her body can therefore be trumped by the decision-making authority of others. There might of course be good reasons for such a policy, such as consideration of the sentiments of bereaved relatives, or as a final safeguard against organ retrieval teams removing the organs of a person who might otherwise still have an opportunity to live (the reasoning being that relatives will care more about preserving the life of their loved-one than might a pressured organ retrieval team). These reasons are illiberal in their nature as they deny the individual ultimate decision-making authority about the use of his or her body and its parts, but they arguably exist only because society is less than perfectly liberal in a broader sense. So while, from a purely formal analysis of an individual's decision-making authority regarding his or her body, such provisions suggest that the individual is less than sovereign (particularly when the mind/body distinction is applied and the mind is absent); the rhetoric in which the appeal for organs is framed tends to reinforce the socially acceptable liberal norms of autonomy and self-determination in order to promote the social objective of acquiring cadaveric organs for transplant. In effect, the law reflects a variety of social pressures – rhetorical pressures – and overrides the strict letter of liberalism (with its emphasis on human autonomy) in an attempt to make the program of organ donation more socially acceptable and popular.

'Property' is a rhetorically-charged concept, particularly in the context of ownership of the human body, so using it in this context serves to complicate a discussion that could be more coherently approached by a liberal society through the sort of 'external' analysis just outlined. Whether or not the 'reasoning' about whether to recognise decision-making authority in the human body should include reference to issues such as 'humanness', the mind/body distinction, slavery or empowerment are for law-makers to determine on behalf of their constituents.

In any case, it should be recognised that such a choice is a legal policy decision that reflects social (non-legal) norms operating in society. And the degree to which the law

donation in that jurisdiction). This sheet states: "*Can my family override my decision? The current practice in NSW/ACT is to discuss and obtain consent for organ donation from the next-of-kin. The deceased's wishes, if known, would be discussed with the relatives, and organ donation would not proceed if the relatives had any objections.*" Source: <http://www.organ.redcross.org.au/how.html>

deviates from a purely liberal approach indicates the strength of other social influences within that society.

(b) The Rhetoric of Self-Ownership: Enslaving or Empowering?

Perhaps the most powerful rhetorical objection to self-ownership that has contributed to a ‘no property’ principle with respect to the human body (but which does not explain, and could perhaps also be said to be tempered by, the legal applications to date of the Lockean Exception) is the view that “it is morally objectionable to treat body parts as commodities.”¹²⁸ And perhaps the most powerful political image that accompanies this view is the spectre of slavery.

It is not difficult to distinguish the notion of slavery from the notion of self-ownership on the grounds that the identification of the owner is different in the two cases (as discussed below). However, bearing in mind the pervasive historical impact of slavery in the United States of America and the important influence of US jurisprudence throughout the English-speaking world (particularly in the area of human rights), it is perhaps unsurprising that the problem of slavery is frequently raised in discussions about self-ownership.

During the eighteenth century, slaves were legally defined as property by legislatures in various American jurisdictions. For example, in 1740 the South Carolina legislature pronounced slaves to be “chattels personal, in the hands of their owners and possessors.”¹²⁹ They could be bought, sold, taxed and inherited¹³⁰ — all characteristics commonly associated with notions of property rights, and all characteristics that seem incompatible with notions of liberal autonomy and the self-determination of individuals. Thus Honoré suggests that the reason that individuals are not regarded as owners of their bodies in most legal systems is because:

it has been thought undesirable that a person should alienate his body, skill or reputation, as this would be to interfere with human freedom. When human

¹²⁸ Munzer, Stephen R, “An Uneasy Case Against Property Rights in Body Parts” in Frankel Paul, Ellen, Miller Jr, Fred D, and Paul, Jeffrey (eds), op cit. at 259.

¹²⁹ See Ely, James W., op cit. at 15.

¹³⁰ Ibid.

*beings were regarded as alienable and ownable they were, of course, also regarded as being legally things.*¹³¹

This fear of being regarded as a ‘thing’ or ‘commodity’ – the object rather than the subject of ownership – frequently appears as an objection to ‘commodification’ of the body.¹³² This is the argument that if the body is property it will have the typical attributes of property, including the feature of being able to be bought and/or sold.

This is almost certainly an erroneous assumption. As Guido Calabresi and Douglas Melamed note, property need not be transferable; whether it is or is not, is a question for the law to determine, and this is a decision that is based on social intuitions about the status of individual objects (‘property’) within a society.¹³³ But regardless of whether or not such intuitions are legally correct, they have obvious rhetorical implications for a debate about whether body parts should be property.

Just as self-ownership does not automatically imply commodification of the self, self-ownership is clearly different to ownership by another person. Self-ownership allows scope for autonomous decision-making about one’s own body; ownership by another person does not. Just as it is problematic to argue that if one is not a slave, one must own oneself (because it leaves no room for the possibility that some things are the property of no one),¹³⁴ it does not follow that a person who is considered to be ‘property’ is considered to be the property of somebody else. It is equally possible that she or he could be a self-owner, just as it is possible that the body could be

¹³¹ Honoré, A M, op cit. at 130.

¹³² See generally, Munzer, S R, “An Uneasy Case Against Property Rights in Body Parts”, op cit. This conflict is specifically addressed at 262.

¹³³ See, eg., Calabresi, Guido and Melamed, A Douglas, “Property Rules, Liability Rules, and Inalienability: One View of the Cathedral” (1972) 85 *Harvard Law Review* 1089 at 1111: “[T]he law not only decides who is to own something and what price is to be paid for it if it is taken or destroyed, but also regulates its sale by, for example, prescribing preconditions for a valid sale or forbidding a sale altogether.” Calabresi and Melamed describe such ‘entitlements’ as inalienable and say that while the rules are substantially different to property rules, they can be analysed “in terms of the same efficiencies and distributional goods that underlie use of the other two rules.”

¹³⁴ Harris describes this sort of argument as the “spectacular non sequitur”: Harris, J W, “Who Owns My Body?” (1996) 16 *Oxford Journal of Legal Studies* 55 at 196.

property that can not be bought and/or sold. These are all factors that depend on social norms and the legal incidents attributed to any particular creation of property rights.

Nevertheless, the rhetorical force of the slavery argument is pervasive and important.¹³⁵ Furthermore, renditions of virtually identical arguments to the slavery argument in other contexts demonstrate its influence. For example, Alexandra Wald submits that feminist theorists are reluctant to argue for a view of rape as violation of a woman's property in her body because women have traditionally been dispossessed in relation to property.¹³⁶ Moreover, women were considered to be property interests of men as recently as the eighteenth century,¹³⁷ so a "[w]oman's lack of bodily integrity ... was equivalent to a lack of property" in herself.¹³⁸ A woman did not possess legal decision-making authority over her body; she was treated as property. For those interested in promoting the interests of women, history thus acts as a powerful rhetorical force against the suggestion that people should be considered to be property. This is a strong social pressure that, like the slavery argument, undoubtedly influences the development of the law.

Indeed, it could be concluded that objections along the lines of the slavery argument regard human autonomy to be of such importance that they prefer to use 'human autonomy' to trump claims for property than to concede property rights in one's body. It is as though they fear that recognising a compatibility between self-ownership and autonomy, and permitting property rights in the human body in response, will reactivate perceptions of humans as commodities and precipitate a regression down the slippery slope to slavery, the re-commodification of women and the 'degradation of humanity'. Again, it is arguably an objection based on rhetoric and politics rather than one based on the philosophy of liberalism, but it is nonetheless an objection that appears to have been exceedingly influential in this area of the legal reasoning.

Interestingly, however, the rhetoric of 'property' is also used by those who argue for self-ownership, and it is perhaps even more effective in this context. This has been

¹³⁵ Note, for example, references to slavery in the case of *Howard Florey/Relaxin*, op cit.

¹³⁶ Wald, Alexandra, "What's Rightfully Ours: Toward a Property Theory of Rape" (1997) 30 *Columbia Journal of Law and Social Problems* 459.

¹³⁷ Id. at 470, 488-489. But see a contrary argument in Harris, J W, op cit. at 187.

¹³⁸ Id at 470-471.

well illustrated in the context of the legal treatment of rape and sexuality referred to above.

In a demonstration of the inconsistencies between a social philosophy based on individual autonomy and a social policy of non-sovereignty over the body (reflected, for example, by the no property principle and use of the Lockean Exception in a way that sometimes awards people rights over the bodies of others but not over their own), Alexandra Wald suggests that by denying people property rights in their own bodies, the law effectively denies each person sovereignty over his or her destiny. In the example of rape, an individual is denied decision-making authority over his or her body by the unwanted intrusion of another person.¹³⁹ Of course this is not condoned in a liberal society. However, Wald proposes that by altering the conceptual, legal position of ‘the body’, society could discourage rape more effectively than it does at present. Her assertion is that if society were to make a policy decision that sexuality is property, the effect might be both legal and rhetorical (social), with the consequence of “progress for women, because property is valued and protected in ways that women’s sexuality is not.”¹⁴⁰

Wald’s suggestion highlights the power of the rhetorical forces at play in discussions about property in the human body. She argues that it is not just the *fact* of decision-making authority over the body that is important, but also the *rhetoric*. In many respects humans already have practical decision-making authority over their bodies, such as a legal right to resist rape that is supported by criminal sanctions against rapists. But, Wald proposes, in addition to the practical rights it is the language and accompanying rhetoric that is used to describe these practical rights that is of important instrumental value in giving people autonomy over their bodies. Thus:

¹³⁹ This notion is described by John Gardner and Stephen Shute in the following terms: “The wrongfulness of rape [according to the ‘property’ argument] comes from the fact that the victim of rape has a proprietary interest in, and derived from that a proprietary right over, her own body. It is her body, she owns it, nobody else may use it without her say-so.” Gardner, John, and Shute, Stephen, “The Wrongness of Rape” in Horder, Jeremy (ed.), *Oxford Essays in Jurisprudence (Fourth Series)* (Oxford: Oxford University Press, 2000) 193 at 199.

¹⁴⁰ Id. at 498.

*if my body is my property, this may reinforce my freedom and autonomy, and not just in the freedom to make contracts, but equally in the freedom not to. My body may be property to emphasize my power not to submit to others' demands on it.*¹⁴¹

There might indeed be force to this argument.

The very fact that the body is not described as 'property' would tend to suggest that a society does not wish to grant individuals the additional level of decision-making authority over their bodies that the rhetoric of 'property' would imply. A society's property rules are arguably determined by culture, history and politics,¹⁴² and a property rule therefore indicates the positive conclusions drawn by a society about the nature of a particular object and the way in which it will be treated. On this view, the body is not property for the simple reason that society does not want it to be so; it is part of the social hegemony that the degree of autonomy – decision-making authority – that an individual is accorded by the law is limited. In such a society the rhetoric of self-ownership is not politically or socially appropriate, even if it is philosophically consistent with the central liberal principle of personal autonomy.

Although these arguments help to explain the importance of autonomy and/or self-ownership in liberal thought and how these can be linked to notions of property in the human body, each of the arguments sketched above also fails to answer another very important question that it invokes. That is – regardless of whether we choose to describe 'decision-making authority' as 'property' – why is it that autonomous people with the mental ability to make decisions do not have concomitant, legally enforceable decision-making rights to decide how their bodies and body parts will be used? Why do liberal societies limit autonomy in this way?

¹⁴¹ Hyde, Alan, *Bodies of Law* (Princeton, NJ: Princeton University Press, 1997) at 56.

¹⁴² Baker, C Edwin, "Property and its Relation to Constitutionally Protected Liberty" (1986) 134 *University of Pennsylvania Law Review* 741 at 743: "[c]ulture, history, and politics (broadly defined) necessarily determine both the content of the specific property rules accepted in a given society and the resulting property allocations."

4. Autonomy and the Limits of Decision-Making Authority

Perhaps it is only by finding the reasons for legal limitations on personal autonomy that it is possible to understand why, in apparent contradiction of the importance that liberal philosophical tenets place on personal autonomy, the law generally continues to deny individuals property in their own bodies and body parts.

This inquiry reflects the traditional politico-philosophical concern about the nature and limits of the power which society can legitimately exercise over the individual. As so famously stated by John Stuart Mill in his dissertation *On Liberty*,¹⁴³ that is, the concern with the individual liberty which is the most fundamental foundation of liberal discourse:

*As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question of whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.*¹⁴⁴

This passage summarises the basic liberal approach to the degrees and limits of autonomous action, the implications of which have constantly appeared and reappeared in varying forms in discussions about property in the context of human bodies and the use of their parts.¹⁴⁵ In effect, therefore, notions of personal autonomy

¹⁴³ Mill, John Stuart, *Utilitarianism, On Liberty, Considerations on Representative Government*, [Acton, H B (ed)], (London: Everyman's Library, 1991), at 143ff.

¹⁴⁴ Id at 144.

¹⁴⁵ See, eg., Stychin, Carl F, "Body talk: rethinking autonomy, commodification and the embodied legal self" in Sheldon, Sally, & Thomson, Michael (eds), *Feminist Perspectives on Health Care Law* (London: Cavendish Publishing Limited, 1998) 211 at 219: "Like property, there is no essential feature of human autonomy; rather, 'there are different versions of what autonomy consists in and what will promote it'." [Quoting Nedelsky J, "Property in potential life: a relational approach to choosing legal categories" (1993) 6 *Canadian Journal of Law and Jurisprudence* 343 at 356.]

and self-ownership rhetorically reflect a sense that individuals should be free to do with their bodies as they please. It means they should have complete decision-making authority over their bodies, limited only by the *harm principle* that constrains an individual's decision-making authority to that which will not harm other people. On this view, people should be able to do what they desire with their bodies and body parts, so long as their actions do not cause harm to other people. That is, they should have almost unlimited decision-making authority over their bodies, and the limits should be strictly defined.

At this level of analysis, the coupling of personal autonomy with 'property' in the human body introduces complications, appears to contribute little or nothing positive to the analysis, and seems simply unnecessary. Alan Hyde, for example, finds a conception of personal autonomy through ownership of the human body unhelpful. He argues that it is an illusion that property rights in their bodies free individuals from social demands as the rhetoric of property simply shifts the location of those demands (that is, 'property' is used just as a synonym for 'autonomous' or 'decision-making authority'). So, as property in the human body and its parts can only arise when authoritative legal institutions recognise it as such, the question remains one of "which social demands, and who decides."¹⁴⁶ These decisions are made by:

*legal and political institutions, which deploy various competing discourses to construct bodies that are either open or closed to others, and are not required as institutions or individuals to reconcile these discordant constructions. Moreover, these problematic cases of body definition may at times be shaped by social needs and concerns, which seem to have real weight in the decisions, and hardly at all by strong conceptions of the psychological or ethical needs of individuals, about which we are strongly divided and which do not figure in the opinions except as makeweight slogans.*¹⁴⁷

Hyde's objection effectively restates the conclusion reached earlier that 'property' in the human body is a means of giving formal legal recognition of a degree of authority in, or decision-making authority over, the body. But constraints on property rights

¹⁴⁶ Hyde, Alan, op cit. at 93.

¹⁴⁷ Ibid.

merely indicate less than full decision-making authority – that we have less than complete autonomy – not that decision-making authority (autonomy) does not exist.

Even Millian liberalism demands only abridged autonomy as decision-making authority in the human body is limited by the Harm Principle. It should therefore be emphasised that the degree of autonomy granted by a society in the form of decision-making authority over the body – whether absolute or limited – is separate to the question of whether the body should or should not be regarded as property; whether ‘property’ is the appropriate form of legal regulation and remedy of the human body is a different, and arguably subsequent question to whether or not individuals should have any decision-making authority over the use of their bodies and body parts, and what the limits of that authority should be. As Carl Stychin notes: “claims that we do not ‘own’ our bodies rely upon a very specific and particular conception of ownership, absolute dominion, which is something of a legal fiction, and always subject to exceptions.”¹⁴⁸ Thus it would be misleading to argue that if decision-making authority is limited by laws, humans are not autonomous and/or human bodies are not capable of being property. It is obvious that most property ownership is limited in some way or other. Land ownership, for example, is frequently tempered by restrictions about what can or cannot be done on the land. Common examples include restrictions on the sorts of buildings that can be constructed on particular land or limitations on the sorts of activities that can occur on the land, such as prohibitions on the harbouring of criminals or the growing of certain plants, on the making of noise or other pollution, or on the manufacture of chemicals in land zoned ‘residential’. The fact that decision-making rights are abridged and there is not absolute control over property does not mean that there is no decision-making authority over the objects. Rather, the decision-making authority is bounded by legal limits based on socially determined norms and, within those limits, the decision-making authority is absolute.

The same can be said for ‘autonomy’. This supports the hypothesis that the degree of personal autonomy that is held by an individual reflects the degree of decision-making authority over the human body that his or her society deems appropriate. And where this decision-making authority is represented by ‘property’ rights in the human body,

¹⁴⁸ Stychin, Carl F, op cit. at 216.

it merely indicates that ‘property’ is the particular legal structure that the legal system (on behalf of society) has adopted to protect – and limit – personal autonomy.

Nevertheless, any limitations on personal autonomy should not be taken lightly in a liberal society that values autonomy. So it remains to be examined how the limits of liberal conceptions of autonomy affect decisions about how people like Bob Loturco and John Moore can exercise decision-making authority over their bodies and body parts.

4.1 *Paternalism*

John Stuart Mill explains the moral problem of paternalism in the following way:

His own good, either physical or moral is not a sufficient warrant. He cannot be rightfully compelled to do or forbear because it will be better for him to do so, because it will make him happier, because in the opinion of others, to do so would be wise... These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise.¹⁴⁹

Yet despite such arguments that the liberal state should play a minimal role and avoid interfering with personal liberties, the prevention of self-inflicted harm remains a traditional area of state interest in liberal societies. Thus criminal law generally affords individuals no legal right to consent to being assaulted, with the possible of exception of contact sports such as boxing. Similarly, an individual has no legal right to consent to a surgical operation unless the procedure is being performed for his or her own benefit.¹⁵⁰ In the case of a patient who is undergoing an operation in order to donate a kidney to another person, it is questionable whether the operation could be said to be conducted for the benefit of the patient.¹⁵¹ As a kidney illness is likely to be far more serious for a person with only one kidney, the donation of a kidney for

¹⁴⁹ Mill J S, op cit at 13. See also, generally, Feinberg J, *The Moral Limits of the Criminal Law: Harm to Self*, Volume 3 (New York: Oxford University Press, 1986).

¹⁵⁰ Plueckhahn V D & Cordner S M, *Ethics, Legal Medicine and Forensic Pathology* (Melbourne: Melbourne University Press, 1991) at 126. [Chapter 9: “Human Tissue Transplantation and the Law”]

¹⁵¹ Ibid; Dworkin G, “The Law Relating to Organ Transplantation in England” (1970) 33 *Modern Law Review* 353 at 357.

transplant can probably be of no therapeutic value to most donors, although this conclusion is perhaps weakened if the donation is psychologically therapeutic to the donor.¹⁵²

Gerald Dworkin argues that although the line between legally permissible and impermissible assault and battery is hazy, “the courts have accepted and still accept the burden of safeguarding individuals even against themselves.”¹⁵³ This reflects assumptions and prompts queries about the sort of harm that the state seeks to protect individuals against by precluding the sale of body parts. And it is interesting to note that a clear aim of state intervention in the form of laws regulating the trade in human body parts is the protection of individuals from harm; both harm to self (the inhabitant of the body) and harm to others (society). On this view, a person might be prevented from trading her kidney if her action is likely to bring harm to herself or harm to society. But questions should be asked about the extent to which such protection is justified in a liberal society and the extent to which it is consistent with laws that allow the uncompensated donation of body parts such as kidneys and corneas.

Hard paternalism describes state action that prevents self-regarding dangerous behaviour, even when the behaviour is voluntary. This would encompass the voluntary donation of a body part by a person who fully understands the immediate health risks involved and who is aware of the potential health repercussions that could result from his or her decision. In such a case, one obvious reason for preventing the person from donating the body part would be the possibility that the donor might later suffer medical difficulties as direct consequences of the donation, or difficulties whose effects were exacerbated by the donation. Even if the donor was aware of the potential that these health problems could follow the operation, a state with a hard paternalistic mindset might intervene to prevent an individual making the decision to adopt this risk of suffering harm.

From a liberal perspective, this is an unacceptable reason for state intervention with a person’s self-regarding behaviour as it abridges individual autonomy and is not

¹⁵² Dworkin G, id at 358. For the purposes of this paper the term *donor* is used to refer to a person who gives his or her body part(s) away, either in return for compensation or as a complimentary gift. The term *trade* likewise refers to either commercial or non-commercial exchange of human body parts.

¹⁵³ Id at 355.

relevant to the implementation of the fundamental *harm principle* that acts as a guiding test for liberal society.¹⁵⁴ Joel Feinberg explains the harm principle in the following way:

*It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.*¹⁵⁵

Thus some other justification must be adopted if a liberal society is to vindicate intervention in decisions to engage in the transfer of human body parts.

Soft paternalism provides an alternative. Soft paternalism allows state interference with dangerous self-regarding behaviour if the behaviour is substantially non-voluntary or if intervention is temporarily needed in order to determine whether the behaviour is voluntary or not.¹⁵⁶ This is justifiable state behaviour from the perspective of liberal philosophy as it seeks to protect the donor from becoming the victim of *unconsented harm*. Lack of consent implies lack of autonomy. For this reason, the question of consent is vital. If consent is present, autonomy can be assumed and state intervention is inappropriate. But in the context of the sale of body parts, lack of consent implies coercion, and thus provides a legitimate justification for state intervention in an individual's decision about whether or not to engage in the trade of his or her body parts.

John Moore's plight can only be rationalised in this context if it is concluded that he did not suffer harm from the appropriation of his spleen. Bob Loturco's position is easier to explain: the state has interfered with what it considers to be dangerous self-regarding behaviour on the assumption that his behaviour must be substantially non-voluntary and that his consent is therefore invalid.

¹⁵⁴ Feinberg J, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, Volume 4 (New York: Oxford University Press, 1988) at xix.

¹⁵⁵ Ibid.

¹⁵⁶ Id at 15.

4.2 *Coercion & Consent*

The type of coercive harm that can be used to justify state participation in regulation of the trade of body parts can be divided into at least two categories of pressure which could lead to a lack of true consent to an operation to donate a part of one's body: namely, moral pressure and commercial pressure. A third category of pressure is *strong coercion*, when a person is physically forced to donate a body part (such as where a person is kidnapped and sedated and, while unconscious, undergoes an operation in which a kidney is removed without the victim's express or implied consent).¹⁵⁷ Such behaviour is criminal assault and battery; its denial of autonomous decision-making authority over the body might even constitute slavery. Strong coercion is clearly incompatible with any semblance of liberalism and it is therefore mentioned here only in passing (though it could be suggested that the plight of John Moore, whose body parts were taken and used without his consent, approaches one of strong coercion).

Cases of *moral pressure* perhaps involve the most pervasive form of coercion. In particular, the conditions for coercive moral pressure are likely to occur when a donor experiences pressure from his or her family to donate an organ to save a relative's life. The emotional strain of having a terminally ill relative would conceivably exacerbate the social and psychological pressures¹⁵⁸ placed on the donor by the knowledge that he or she possesses the means (and perhaps the only known means) to potentially save the relative's life.¹⁵⁹ In such cases, the chances of obtaining truly voluntary consent are weakened.¹⁶⁰

Hence a clear distinction should be drawn between the quality of consent given by immediate family members of the sick person, and strangers or others. As noted by

¹⁵⁷ See, eg., "*Myth: The tourist in the bathtub and other black market myths: If you heard the story about the traveller who blacks out after having drinks with a stranger and wakes up in a bathtub full of ice with staples in his back from having his kidneys surgically removed, then you have heard one of the untrue urban myths about organ transplantation*" at: <http://www.organ.redcross.org.au/how.html>

¹⁵⁸ Davies I, "Live Donation of Human Body Parts: A Case for Negotiability?" (1991) 5 *Medico-Legal Journal* 100 at 103.

¹⁵⁹ Dworkin G, op cit at 359.

¹⁶⁰ *Ibid.*

John Mason and Alexander McCall Smith, generosity towards a brother or sister might be encouraged and might even be regarded as a social duty. But altruistic generosity should be distinguished from coerced generosity. Even if moral or emotional coercion is described as *weak coercion* – to distinguish it from the abovementioned category of strong coercion – the effect of any coercion is mutual. In every case, the fact of coercion affects the quality of the donor’s consent.¹⁶¹

The United States’ case of *McFall v Shrimp*¹⁶² demonstrates the sort of covert social and psychological pressures that can be imposed on an individual who represents a possible saviour to an ill relative. It illustrates the problem of lack of consent, and it also highlights the social imperatives that drive jurisprudence in this area. In that case, the Allegheny County Court declined to order that Shrimp donate bone marrow to his cousin McFall. McFall was dying of a rare disease and Shrimp was the only known compatible potential donor, but he refused to donate his bone marrow. The Court gave priority to the autonomy of the individual and the importance of the individual’s actual consent. It held that the decision rested with Shrimp but – in what appeared to be a blatant attempt to shame Shrimp into changing his mind – the court described his refusal to donate the marrow as “morally indefensible”. Flaherty J stated:

*Our society, contrary to many others, has as its first principle, the respect for the individual, and that society and government exist to protect the individual from being invaded and hurt by another... In preserving such a society as we have it is bound to happen that great moral conflicts will arise, and will appear harsh in a given instance... For our law to **compel** the defendant to submit to an intrusion of his body would change every concept and principle upon which our society is founded. To do so would defeat the sanctity of the individual, and would impose a rule which would know no limits, and one could not imagine where the line would be drawn... For a society, which respects the rights of **one** individual, to sink its teeth into the jugular vein or*

¹⁶¹ Mason J K & McCall Smith R A, *Law and Medical Ethics* (London: Butterworths, 1991) at 304.

[Chapter 14: “The Donation of Organs and Transplantation”]

¹⁶² *McFall v Shrimp*, 10 Pa D&C (3d) (1978) at 90. For discussion of this case see Meisel & Roth, “Must a Man be His Cousin’s Keeper?” (1978) 8 *Hastings Center Reports* 5.

*neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence.*¹⁶³

A clear theme may be drawn from this dicta: the protection of individual liberty is promoted as a primary duty of the law, and the law protects the notion of free consent by a donor (refusing to apply strong coercion to compel donation). Nonetheless, the legal system also reflects other (illiberal) social values and can be used to apply psychological moral pressure to donate body parts. So although the law defends free consent, the implication is that while no legal duty exists to donate a body part, an unenforceable moral duty may persist in the form of a social policy. Thus the legal system demonstrated its lack of internal objectivity by itself applying weak coercive pressure to try to persuade Shrimp to donate his body part.

A similar type of legal decision-making occurs in the judicial application of *rescuers' duties*.¹⁶⁴ The general concept of the rescuer's duty suggests that, while a capable bystander has no legal duty to rescue a person in danger or difficulty, it might be considered that there is a moral duty to act. The moral duty may be legally unenforceable, but it does have legal consequences: the rescuer who acts reasonably is not condemned and his or her actions are not necessarily treated as illegal, even if they do infringe the law.¹⁶⁵

For this reason, Dworkin has argued that the court should treat a donor like a rescuer: someone who puts his or her own life in danger to help others.¹⁶⁶ And, in effect, this is the legal position represented by cases such as *McFall v Shrimp*. Although there was no legal obligation on the donor, and although it would have been considered an assault if the operation were performed without the donor's consent, the law itself placed considerable pressure on Shrimp to forsake his bodily integrity to assist his relative.

¹⁶³ Ibid.

¹⁶⁴ Rescuers' duties are often discussed in terms of the 'Good Samaritan'. For a discussion of this area of law, see the collection of essays in Ratcliffe, James M (ed.), *The Good Samaritan and the Law* (Gloucester, Mass.: Peter Smith, 1981).

¹⁶⁵ Ibid.

¹⁶⁶ See generally, Dworkin G, op cit.

It would thus seem that modern liberal jurisprudence regards donor-rescuers benevolently and their submission to surgical operations that are likely to be of no personal benefit to them but potentially of enormous benefit to the recipient of the body part do not, in practice, seem to be treated as illegal.¹⁶⁷ In a sense, they are *extra-legal*, and their status often rests on the discretionary powers of decision-makers to overlook strict breaches of the law in certain circumstances.

A certain irony arises when the treatment of donor-rescuers is compared to that of people considered to be seduced into donation by the promise of payment. Indeed, cases involving the transfer of body parts for reasons of *commercial pressure* — in which the donor's motivation is dominated by the lure of financial gain — receive very different legal treatment to those of moral pressure. While the courts can themselves exert weak coercive pressure, legal prohibitions on the sale of human body parts amount to a social ban on weak coercion when the coercive impetus to donation is a financial incentive, rather than a moral obligation.

A preliminary, and frequently unstated, assumption made in discussions about commercially motivated transfers of body parts tends to be that only those in serious or desperate need of money would enter into such a contract. Such commercially motivated donors are characterised by G P Smith as *forced donors*. By definition, forced donors are financially vulnerable, needy people who are “forced as such by their own circumstances and coerced by enticement of affluent buyers” to sell (or ‘lease’) a body part.¹⁶⁸ The suggestion is that they lack true autonomy due to their social circumstances;¹⁶⁹ the possibility of a wealthy person who wishes to donate a body part in return for monetary compensation is not considered; nor is the person

¹⁶⁷ Dworkin G, op cit at 358-359. It is likely that the extent to which a moral duty to assist others by donating a body part exists would vary according to the nature of that body part. Bone marrow is a regenerative body part which can be transplanted with little danger to the donor. By contrast, the loss of a kidney presents substantially greater risks to the donor, and it seems likely that less moral pressure would be brought to bear by the legal system in the case of a sick relative in need of a kidney. In a sense, therefore, the law strikes a balance between protection of individuals from harm, whether this be self-inflicted (willing donor) or inflicted by others in the sense that consent was not real (coerced donor), and encouraging individuals to take steps to assist others.

¹⁶⁸ Smith G P, op cit at 25.

¹⁶⁹ Due, for example, to economic circumstances.

who is prepared to donate free-of-charge but would prefer to be paid for his or her body part. In effect, therefore, the motivation for the donation – considered socially important in the case of rescuers’ duties – becomes irrelevant the moment money enters the equation. Sales of human body parts are therefore considered to be *exchanges of desperation*,¹⁷⁰ and society paternalistically blocks them through the use of legal prohibitions. Michael Walzer suggests that the reason and/or effect of this is to “set limits on the dominance of wealth”.¹⁷¹

Arguing along similar lines, Joel Feinberg describes transactions involving forced donors as *coercive* because the projected consequence of entering into the contract to sell a body part offers the donor a result (money) that is favoured over what he or she would have expected but for the offer (lack of money).¹⁷² The opportunity to enter the contract enlarges the range of options available to the potential donor and simultaneously places the potential donor in a position in which the quality of her consent must be placed under suspicion. This can be more clearly illustrated by a hypothetical example. Before the offer to buy her kidney, Maria had one option: poverty. She now has two options: (a) poverty, or (b) income from sale of the body part. Where the context of the decision is desperate, the long-term risks associated with donation of a body part seem low and the immediate gain seems high, it can be queried how problematic a choice this is. Is it really an exchange of desperation? Indeed, when a fully informed donor takes empirical long-term health risks into account, the strength of that autonomous donor’s resolve is emphasised, even when this resolve driven by a need or desire for money.

Again, this can be illustrated by a hypothetical example. Suppose Mark is poor and unemployed, and his son needs an operation that Mark cannot afford.¹⁷³ Without the

¹⁷⁰ For an explanation of “exchanges born of desperation” see Walzer, Michael, *Spheres of Justice: A Defense of Pluralism and Equality* (USA: Basic Books, 1983) at 100. See also Okun, Arthur, *Equality and Efficiency: The Big Tradeoff* (Washington DC: The Brookings Institute, 1975) at 6ff and referred to by Walzer.

¹⁷¹ Ibid.

¹⁷² Feinberg J, *The Moral Limits of the Criminal Law: Harm to Self*, op cit., Chapter 23 at 189ff.

¹⁷³ This example is not dissimilar to that of Herbert Gibboney who offered to sell one of his eyes for \$35,000 to pay for an operation for his wife: “Man Desperate for Funds: Eye for Sale at \$35,000” (1 Feb 1975) *LA Times*, page 1 (UPI).

operation, his son is expected to die. The operation and related expenses will cost \$50,000, and Mark has exhausted all other legal options for raising the money. Then Mark is offered \$50,000 in return for the donation of one of his kidneys. If he were financially comfortable, he would not accept the offer. But his realistic choice is between his son's life and one of his two kidneys, Mark chooses to accept the offer and donate the body part. It is arguable that Mark has not been coerced into donating anything; it was an autonomous decision. But it was a decision that responded to a choice between two unappealing options where one alternative was too costly to be considered seriously when there was an alternative. One option was unacceptable and the other was unfavourable. Mark autonomously chose the unfavourable preference over the unacceptable one.¹⁷⁴

This is an extreme example. It also represents the very real condition of many organ donors in countries such as India and Brazil where financial necessity has given rise to the remunerated donation of body parts such as kidneys and corneas.¹⁷⁵ How real is the consent in such situations?

This question is explored by asking what effect the exploitativeness of a non-coercive offer has on the voluntariness of the responsive consent.¹⁷⁶ In other words, can exploitation be reconciled with principles of liberty? Feinberg replies that the sort of offer accepted by Mark is a *freedom-enhancing coercive offer* because “one person can effectively force another person to do what he wants by manipulating his options

¹⁷⁴ See, eg., Feinberg J, *The Moral Limits of the Criminal Law: Harm to Self*, op cit. at 230-231. A comparison could be drawn with the situation of people who are desperate to earn a living and who therefore accept dangerous and/or demeaning jobs that they would not accept if they were in a better position to bargain or choose their work.

¹⁷⁵ See, eg, articles headed “Kidneys for sale” and “Losers all” on the website of the Indian “Multi Organ Harvesting Aid Network”, an NGO seeking to encourage safe organ donation in India. It states: “*The Indian Medical Association (IMA) ... said that it was an open secret that commercial transactions had been regularly taking place between patients suffering from chronic renal failure who needed kidney transplantation and the poor who were willing to sell their kidneys. All such transactions are illegal and punishable under the Transplantation of Human Organs Act (THOA), 1994, but the buying and selling continues. In the process, the donor gets taken for a ride, gets paid a pittance and by the time he wakes up, it is too late...*” http://www.vish.com/html/body_mohan.html

¹⁷⁶ See, eg., Zimmerman D, “Coercive Wage Offers” (1981) 10 *Philosophy & Public Affairs* 132 (Part II).

in such a way as to render alternative choices ineligible.”¹⁷⁷ From the perspective of liberal jurisprudence, this situation is problematic. The consent is real and, even though he or she is also coerced, the donor does act autonomously: the donor truly prefers the option of donating a body part to the other available alternatives, and she or he behaves accordingly. Although this might raise intuitive concerns, liberal philosophy would not support state interference on that ground alone. Beyond intervention to ascertain whether consent is actual (intervention that constitutes acceptable ‘soft paternalism’), adherence to the liberal harm principle would not countenance interference with self-regarding autonomous action unless it caused derivative harm to others. To do so would entail behaviour amounting to unacceptable hard paternalism.

In the case of transplantation of a body part, it is likely that any derivative harm to others would be tangential and uncertain. For example, a parent *might* be less able to look after his children *if* he became ill after donating a body part. A donor *might* become an expensive drain on the medical resources of society *if* she falls sick as a result of the donation. Other people *might* feel upset *if* they find it disturbing to see a person confronted with such a choice. Would such harm to others be significant enough to justify state interference with the individual’s self-determined actions?

The answer given by statutes such as the *National Organ Transplant Act* 1984 is “yes”. By prohibiting the trade in human body parts, the legislators clearly assume that prevention of harm arising from commercial trade in body parts requires state action. As hard paternalism is deemed to be unacceptable and if the state does indeed act in accordance with liberal principles, it could be assumed that society must have acted to prevent people from causing harm to others by the decision to donate organs or tissue for compensation. While it could be the psychological trauma suffered by observers who watch with concern as others donate body parts that is being avoided, this is arguably not a compelling enough argument to prevent the trade.¹⁷⁸

¹⁷⁷ Feinberg J, *The Moral Limits of the Criminal Law: Harm to Self*, op cit. at 233.

¹⁷⁸ Id at 56. Feinberg uses the example that colleagues who know that a workmate ‘drinks himself into a stupor’ each night might be saddened by this behaviour, but this is not sufficient reason to interfere with his behaviour.

It therefore seems more probable that the harm to others to be avoided is the welfare burden that is caused if a donor becomes ill as a result of the operation. If this fear of allowing a medical welfare burden to develop is the underlying reason for preventing the sale of human body parts,¹⁷⁹ it is for law-makers to determine on behalf of the populace whether the social norms in a particular society give priority to personal freedom to determine how one's body will be used, or to avoidance of a social welfare burden (in the case of Bob Loturco, the conclusion to this question is somewhat ironic as it is precisely because he wants to stop being a welfare burden that Loturco is advertising to transfer his kidney for profit). And it is also difficult to justify the discrepancy between the regulation of compensated and uncompensated donations on these grounds, especially as a person who is compensated is perhaps more likely to be able to pay for his or her own future medical care than is a person who is uncompensated for the donation.

However, if the fundamental reason for prohibiting the compensated transfer cannot be justified on liberal grounds, the law would be well advised to say so. If, for example, such decisions are based on a paternalistic desire to prevent people in dire economic circumstances from falling to the temptation to cannibalise their bodies for money, or to prevent people from selling parts of themselves because to allow such behaviour seems immoral, so be it. Liberal democracy is premised upon constructing a society that reflects the beliefs and desires of its inhabitants. If legitimacy is measured from an objective external perspective rather than from a subjective internal (in this case, 'liberal') viewpoint, and if paternalism is found to be a social norm from which the legal system derives certain principles, then the resulting laws are arguably as legitimate as any other. But if such illiberal policy decisions are put into force by law in an ostensibly liberal polity, it would be more intellectually honest to acknowledge this, rather than hiding it behind the mask of a property analysis that does no more than internally distort considerations about whether or not people

¹⁷⁹ Cf. Forcing people to wear bicycle or motorbike helmets, or seatbelts in cars. See *id* at 138-139, and Feinberg, Joel, *Social Philosophy* (New Jersey: Prentice-Hall, 1973) at 31-32. See also Kleinig, John, *Paternalism* (Totowa, New Jersey: Rowman and Allenheld, 1984) at 82; "Note", (1968) 67 *Michigan Law Review* 372; and Royalty, Kenneth M, "Motorcycle Helmets and the Constitution of Self-Protective Legislation" (1968) 30 *Ohio State Law Journal* 371-393. Guido Calabresi and Douglas Melamed describe this in terms of 'moralisms': *op cit.* at 1111-1112.

should be able to control their bodies and body parts. Even if it is ultimately decided that people should wield autonomous control over their bodies and body parts, and that the most appropriate method of giving legal force to this decision-making authority is by use of a conception of ‘property’, it is argued that this should be a consideration for later. First it is necessary to decide at a social level (be it on moral grounds or practical considerations, etc) to what extent, if any, a particular society wishes to grant individuals decision-making authority over their bodies and body parts.

5. Conclusion: Property is Autonomy, and Unnecessary

What then is property in the human body? This paper suggests that it is merely a legal form in which society can choose to limit and protect decision-making authority or autonomy over the human body and its parts.

It is therefore concluded that the legal principle of ‘no property’ in the human body and its parts exists because – rhetorically, though not necessarily in a legal sense – ‘property’ implies certain incidents in the form of rights to buy and sell, rights to bequeath and perhaps also rights to destroy. These amount to a degree of philosophical ‘autonomy’ that translates into practical decision-making authority, and when ‘property is denied, it is because society does not wish to grant individuals a right to legally enforce this degree of bodily sovereignty. This is regardless of the moral right to self-ownership that would seem to be a logical consequence of the principles of autonomy and liberty that are so rhetorically important to liberal societies. And it seems even more contradictory when the law does recognise property rights in the human body, but these rights are held by people other than the occupants of the body in question. Such ‘property’ in the body seems hard to justify by reference to liberal autonomy but can be explained – from an external perspective – as the result of legal decision-making that takes into account more than just liberal influences.

Thus law-makers can grant absolute or abridged property rights in human bodies and their parts, or they bestow absolute or abridged decision-making authority that does not take the form of property rights. Either way, they can usually be expected to be acting on behalf of their constituents in accordance with the prevailing norms within their societies. It is therefore suggested that when a society is reluctant to grant the

level of personal sovereignty or autonomy that is suggested by the term ‘property’, it is because such legally enforceable decision-making authority would conflict with moral norms that require social interference with free-will, such as an aversion to body part donations that result from commercial incentives. The fact that liberalism is said to be ‘morally neutral’,¹⁸⁰ or that autonomy accords with liberalism but it is not wholly reflected by the law, does not necessarily make the law wrong or undesirable if it reflects some moral viewpoint. It might weaken the liberal pedigree of society, but it does not automatically suggest that the society is less concerned about the welfare of its people than if it followed purely liberal norms. Indeed, if illiberal norms are produced within society and survive the battle with liberalism’s hegemony, they are perhaps more appropriate to the needs and desires of that society than are the standard norms of liberal philosophy. At least, this is a conclusion that could be formed from an external (sociological) analysis of the law in this area. ‘Rights’ theorists might reject the degree of positivism implicit in this conclusion; those who accept the reasoning of the courts might also reject the notion that many of the property rights described herein (particularly those described in relation to the Lockean Exception) are in fact illiberal in substance. This paper has sought to demonstrate that such dissent would probably be a result of the philosophical and jurisprudential confusion exhibited in this area of the law.

This confusion arguably arises because the philosophy of liberalism does support autonomy and self-ownership, but many of the reasons society intervenes in the sale of human body parts fall outside the parameters of ‘pure’ liberalism. Hence the conflict. Courts and legislators feel (consciously or otherwise) that they must be seen to be upholding the principles of liberalism and therefore frame decisions and laws in these terms. But other social norms interfere (such as a desire to protect the needy and

¹⁸⁰ This is generally explained in terms of the idea that a government must not constrain liberty on the ground that one conception of ‘the right’ or ‘the good’ is superior to any other conception of ‘the right’ or ‘the good’. It is a common thread of modern liberal thought, see generally, eg., Rawls, John, *A Theory of Justice* (Oxford: Oxford University Press, 1999); Dworkin, Ronald, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985). However it should be noted that the nuances implied by this idea vary according to different conceptions of liberalism (such as ‘egalitarian liberalism’, ‘minimalist liberalism’, ‘neutralist liberalism’, ‘political liberalism’ or ‘voluntarist liberalism’). For discussions of this, see generally the essays in George, Robert P. (ed.), *Natural Law, Liberalism and Morality* (Oxford: Clarendon Press, 1996).

discourage ‘exchanges of desperation’) and these are also justified in liberal terms (for example, “protection of *the autonomy* of the needy”) even though they are not truly liberal.

In a society where liberal credentials provide legitimacy, covering illiberal policies with a veneer of liberal self-ownership and autonomy rhetoric has the effect of offering the appearance of legitimacy. This is socially workable – while such laws continue to reflect social norms, they remain socially legitimate and effective as tools of social control – even if it does rest on a legal fiction that dilutes the society’s liberal credentials. Autonomy is central to liberalism and it seems possible to generalise that law-makers acknowledge ‘property’ in a body or its parts only when they consider that it would not hurt the future autonomy of the inhabitant of the body to do so (as in the cases of dead bodies or detachable and regenerative body parts). By contrast, they do not find property where to do so could affect the future autonomy of the person or cause social harm by creating health care costs or sorrow to onlookers (this could even be portrayed as protecting society’s ‘autonomy’ not to be harmed). In addition, it is only when it would not affect the future autonomy of the inhabitant of the body concerned that property has been awarded to third parties and justified by liberal principles, even though that outcome might affect the affected person’s future decision-making authority about his or her detached body part.

By refusing to allow people to sell their body parts when doing so could permanently affect their future decision-making ability, courts *appear* to be protecting the autonomy of the individual (albeit paternalistically). However, in doing so they in fact interfere with decision-making authority. This is particularly ironic when the same laws allow people to give their body parts away (irrespective of the equally permanent effect on their decision-making authority) and allow removed body parts to be used for commercial gain by almost anyone except the donor, possibly even without the donor’s consent. The legal system has tried to reconcile the competing norms of liberal autonomy and other social imperatives, and the resulting compromises have created the inconsistencies and confusion apparent in the law relating to the transfer of human body parts. ‘Property’ has taken its place at the centre of the confusion as law-makers have tended to use it as *the* synonym for ‘legally enforceable decision-

making authority about the use of human body parts', rather than considering what (if any) decision-making authority is actually appropriate in the social circumstances.

Instead of investigating policy issues and perhaps adopting 'property' if it is deemed to be an appropriate legal tool for enforcing a society's determination about whether or not there should indeed be legally enforceable decision-making authority in the human body, a weak 'no property' principle (that implies an absolute lack of decision-making authority in the human body) has been riddled with 'property' exceptions (that grant legally enforceable decision-making authority in the human body, even though not always in one's own body). And even these rules are not always consistent with the liberal philosophy by which they would appear to be justified.

Attempts to clarify the issues have tended to focus on property doctrines and are almost certainly examples of misspent energy. They have assumed 'property' to be the appropriate doctrine and have therefore tried to fit questions about the 'proper' use (as judged by a particular society) of human bodies and their parts into standard property frameworks, and have tried to apply standard property remedies. The result is the self-reproducing tangle of inconsistent principles that was surveyed in the first part of this paper.

This paper suggests that a more helpful path to clarifying the issues would be to ask:

1. In this society, should people have decision-making authority over their bodies and body parts that would – in a practical sense – entitle them to trade in those parts? And, if so, should such trade be compensable?

Then, once this fundamental issue has been resolved, the issue of property could (if desired) be introduced with the following question:

2. Is 'property' an appropriate legal tool with which to help implement the answer given to Question 1? This is a question that should be answered by reference to a wide range of possible legal rights and remedies – such as those of tort, contract and criminal law – rather than by focussing on the implications of the 'property' label in isolation (as has occurred in many cases to date).

It therefore seems initially irrelevant whether the human body is classified as property or not. Although there might be some rhetorical consequences and perhaps even benefits of labelling the human body and its parts ‘property’, the effect seems little more than cosmetic unless it is employed in the context of a more structured analysis such as that just outlined above. The impact of rhetorical cosmetics might be to influence the way in which the world perceives the human body and its parts, and it might even lead to greater (or lesser) respect being placed on an individual’s decision-making authority in his or her own body. But, in the end, it is the fact and degree of this decision-making authority that is important.

As the degree of an individual’s decision-making authority is a socially determined fact that precedes the legal label it is given – although it is noted that the legal label could itself then contribute to the internal reproduction and continuing redefinition of that ‘right’ – the answers to these questions will ultimately be legal reflections of social norms about the relative importance placed on, for example, personal autonomy and paternalism. It is therefore proposed that discussions about whether or not the body is termed ‘property’ have generally been employed in an essentially irrelevant – and even misleading – manner in legal discussions about the use, transfer and sale of human bodies and their parts. The rhetoric of property corresponds with the idea of legally enforceable decision-making authority in the body; beyond that, ‘property’ is largely superfluous to the discussion.

Thus the crucial issue to which the focus should be shifted is whether liberal society is content for illiberal policies to trump individual autonomy in the sphere of decision-making authority about the use and transfer of human bodies and their parts. ‘Property’ might have a role as a way of implementing the conclusions after these questions have been answered, but it should not be allowed to complicate and confuse the discussion before this stage has been reached.

[P]roperty rights, like many other rights, are defeasible. In specific social contexts, they can and do compete and conflict with other rights, they can bear

*savagely on those who do not own or control. They are no longer and never should have been trumps in the game of life.*¹⁸¹

¹⁸¹ Tay, Alice Ehr-Soon & Kamenka, Eugene, "Introduction: Some Theses on Property" (1988) 11 *UNSW Law Journal* 1 at 10.

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