

HAMISH ALEXANDER DIXON

**NOBODY'S BODY:
PROPERTY RIGHTS IN HUMAN BODIES
AND BODY PARTS**

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Nobody's Body

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*Te Whare Wananga
o te Upoko o te Ika a Maui*



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1 INTRODUCTION

ABSTRACT

In light of increasing advances in medicine and biotechnological research, a new perception of value has developed in the human body and its body parts. This has consequently created a new area requiring to be regulated by the law, and one suggested method is by instilling property rights in the human body. Statutes and case law have traditionally held that there are no property rights in the human body, which is reflected in New Zealand's current legal framework and cultural environment. This paper submits that property rights are both inappropriate and unnecessary to regulate the human body and body parts. Property rights are inappropriate because of various moral objections against labelling people as property, as well as the undesirable practical consequences of the commodification of body parts. Property rights are unnecessary because the existing law can adequately manage current and future circumstances through a combination of methods including criminal law, tort law, fiduciary law, fundamental rights, privacy and informed consent. For all the apparent ease of using property rights, they are a danger to who we are as people and therefore should – and can – be avoided.

Word Length

The text of this paper (excluding contents page, footnotes, and bibliography) comprises approximately 13,500 words.

I INTRODUCTION

Legal taxonomy is purposive. Objects are treated as property, for example, not because they have some intrinsic or objectively measurable characteristic that identifies them as property, but rather because labelling them as property, and thereby subjecting them to property law, best effectuates a broad range of social, philosophical, psychological and economic goals. Accordingly, legal classification is the antithesis of a technical or objective exercise. It is a normative process. It is rooted in value judgements and entails making fundamental policy choices.¹

Somebody once calculated that the "value" of the human body, when broken down into its chemical components, was little more than one or two dollars.² While such a useless fact has little more value than a conversation starter, it illustrates the subjective nature of "value" with respect to the human body, and notably how our perception of this value has changed.

Much of the reason for this change is associated with development in technology; it is of common occurrence in recent times that legal theorists are forced to readdress fundamental questions in light of new technology that challenges existing views. Developments in biotechnology, organ transplantation and in vitro fertilisation have all contributed to a change in the "value" of a human body and its parts. This has inevitably raised new questions about what can and cannot – and should and should not – be regarded as "property".

Advances in technology have led to opportunity for increased commercialism. Such commercialisation requires a legal framework to determine an individual's rights (especially with respect to remuneration).³ One such

¹ Moe M Litman "The Legal Status of Genetic Material" in Bartha Maria Kuoppers (ed) *Human DNA: Law and Policy – International and Comparative Perspectives* (Kluwer Law International, The Hague, 1997) 17, 17 ["The Legal Status of Genetic Material"].

² Russell Scott *The Body as Property* (Viking Press, New York, 1981) 3 [*The Body As Property*].

³ Randy W Marusyk and Margaret S Swain "A Question of Property in the Human Body" (1989) 21 *Ottawa L Rev* 351, 351 ["A Question of Property"].

approach to this framework is the recognition of property rights in the human body and, for practical purposes, its constituent parts. It has been proposed that the common "bundle of rights" attributed to property – for example the right to possess, the right to use and manage, the right to income, the right to security, and the power of transmissibility⁴ – would be suitable to govern this new medico-legal area.

While it is done with good intentions, the adoption of property rights in the human body has potential dangers. This paper argues that a property regime is both inappropriate and unnecessary for the human body. It is *inappropriate* due to a number of moral objections, public policy arguments, and practical consequences. It is *unnecessary* because existing law may be sufficient to manage the situation, and if not then there are other more viable and suitable options than property rights. It is maintained that alternatives to property rights are equally or more effective *and* appropriate to control the use of the human body. However it is first necessary to look at the development of the law relating to property rights in human bodies, and the current legal framework operating in New Zealand.

⁴ See Laurence C Becker *Property Rights: Philosophical Foundations* (Routledge Kegan & Paul, London, 1977).

II HISTORY OF PROPERTY RIGHTS IN BODIES

The notion of property rights in living human bodies is not new; however historically it was applied to the ownership of another person. While slavery is the obvious example, it was also accepted that a wife's body was her husband's property, and a that debtor could be regarded as part of payment for a debt.⁵

The general historical rule is that there is no property right in a dead body. However it is a rule not without contention, having varying interpretations and qualifications in different jurisdictions.

A The United Kingdom and Australia

A no-property rule has existing in England for hundreds of years. Blackstone wrote in 1765 that "stealing a corpse itself, which has no owner (though a matter of great indecency), is no felony."⁶ However justification for this statement and similar other statements made by classical common law writers have dubious authority; they either quote each other or rely on cases which may not have in fact developed such a rule.⁷

Judicial recognition of a no property rule can be traced back to the ecclesiastical courts, and specifically *Haynes Case*⁸ in 1614. William Haynes was indicted for the theft of burial sheets, and it was necessary to determine with whom the property should be laid in the indictment. The judges stated that, "the property of the sheets remain in the owners, that is, in him who has property therein, when the dead body was wrapped therewith; for the dead body is not capable of it..."⁹ It seems obvious that the case was deciding whether dead bodies could

⁵ Stephen Ashley Mortinger "Spleen for Sale: *Moore v Regents of the University of California* and the Right to Sell Parts of Your Body" (1990) 51 Ohio St L J 499, 503 ["Spleen for Sale"].

⁶ *The Body As Property* above n2, 7.

⁷ P Matthews "Whose Body? People as Property" (1983) 36 Current Legal Problems 193, 198 ["Whose Body?"].

⁸ *Haynes Case* 12 Co Re 113, 77 ER; Susan Pahl "Whose Body is it Anyway?" (1992) NZLJ 427, 428.

⁹ "Whose Body?" above n7, 197.

own property rather than whether they *are* property; however it is from cases such as this that the no-property rule was established.¹⁰

The first authoritative statement came in 1857 in *R v Sharpe*.¹¹ Sharpe, a religious dissenter, was convicted of breaking and entering into a Church of England graveyard and removing his mother's corpse. In his judgment Erle J declared "our law recognises no property in a corpse",¹² supposedly following precedent from *R v Lynn*.¹³ *Lynn* was a case concerning a "resurrectionist", which less fancifully put is a grave-robber, which was, at the time, a lucrative business due to incessant demand from universities and medical colleges for bodies to dissect. Body-snatching remained a problem in England until Parliament enacted the Anatomy Act in 1832, and also by giving educational institutions greater and more legal access to cadavers.¹⁴ However the difficulty with relying on the *Lynn* case is that Lynn was not charged with larceny (but rather for disinterring the body), and so issues of ownership did not arise.¹⁵ Therefore some commentators dismiss Erle J's comment in *Sharpe* that there is no property in the human body as *obiter*, but others interpret it as *ratio* for denying a particular claim of defence; due to its brevity the reported judgment unfortunately does not make this clear.¹⁶

A clearer pronouncement of the law is made in *Williams v Williams*,¹⁷ which, while denying any proprietary right in a corpse, allowed limited rights of possession by executors for the purpose of burial. The deceased had indicated to Williams that he wished his body to be cremated, but instead the executors buried the body. Williams got permission to exhume the body and have it reburied in another cemetery, but then she took it to Italy to be cremated.

¹⁰ See also *Excelby v Handyside* (1749) 2 East PC 652 where while it was reported that "no person had any property in corpses", the authority is doubtful as the case was decided 15 years before the birth of the reporter; "Whose Body is it Anyway?" above n8, 428.

¹¹ *R v Sharpe* (1857) Dears & Bell CC 160; 169 ER 959 [*Sharpe*].

¹² *Sharpe* above n 11, 960.

¹³ "Whose Body?" above n7, 199.

¹⁴ *The Body as Property* above n2, 4.

¹⁵ "Whose Body?" above n7, 199.

¹⁶ Debra Mortimer "Proprietary Rights in Body Parts: The Relevance of *Moore's Case* in Australia" (1993) 19 Monash U LR 217, 236 ["Proprietary Rights"].

¹⁷ *Williams v Williams* (1882) 20 Ch D 659.

Williams then claimed expenses from the executors, and it was necessary to determine whether she was lawfully in possession of the body, and if so what rights that entitled her to. Kay J held that there was no property in a body, relying on *Sharpe*. Commentators have noted that Kay J draws no distinction between buried and unburied bodies,¹⁸ although the effect of any such distinction (and the ability to draw an identifiable line between the two) is questionable.

What is significant about *Williams* is that the personal representatives of the body are given limited rights over it; only possessory rights and only for the purpose of disposal. It illustrates how certain attributes of property – namely possession – are not necessarily proof that such a property right exists.¹⁹ Of course this conclusion does depend on how “property” is defined. Some commentators consider that a reduced level of rights, powers or duties (a lesser “bundle” of rights) amounting to anything less than full ownership can also be called “property”.²⁰ However in the case of *Williams* these rights are so limited – in duration, extent and purpose – that to call them property rights seems overly artificial.²¹ Furthermore, avoiding the use of property rights altogether removes the difficult necessity of determining what rights and how many rights (how big a “bundle”) would constitute “property”. Such an imprecise line would be hard to decide upon.

An interesting qualification to the no-property rule came from the Australian High Court decision in *Doodeward v Spence*.²² It was held that the corpse of a two-headed stillborn baby could be the subject of an action in detinue. The lead judgment stated that on principle a human body may be the subject of property, but in this case the presentation and preparation of the foetus meant it had been so changed by lawful exercise of human skill that it could no longer be regarded as a mere corpse. It has been commented that the conflicting reasoning of the judgments in *Doodeward* make it dubious authority for the attachment of

¹⁸ “Whose Body?” above n7, 211.

¹⁹ “Proprietary Rights” above n 16, 238.

²⁰ “Whose Body?” above n7, 194.

²¹ “Proprietary Rights” above n 16, 238.

property rights to human bodies.²³ Griffiths CJ accepted that while a body may be property, the skill and labour had changed the foetus in this case. Barton J agreed with the Chief Justice on the end result (that the foetus was no longer technically a body), but found that a human body could never be property. Alternatively, Higgins J in his minority judgment relied on English authorities already mentioned, that a body can never be property and this included altered or preserved foetuses.

While the facts are historically redundant, the case raises other issues more relevant to contemporary scenarios; what skill or labour would create property rights in body parts, especially from biotechnology? The majority in *Doodeward* would support the argument that ownership should go to the "first knowing appropriator" of benefit from the human tissue, rather than its original donor.²⁴ The case also raises questions where the value obtained is not from the body itself, but from genetic information extracted from it. These concerns will be addressed later in the paper.

The English Court of Appeal recently affirmed the no-property rule in *Dobson v North Tyneside Health Authority*.²⁵ In that case the plaintiff had previously collapsed and been taken to the defendant hospital where they were discharged. Two months later it was discovered that the plaintiff had two large brain tumours, and soon after they died. Another hospital (the second defendant) removed the deceased's brain pending further investigation which was not pursued, and so the brain was disposed of. Three years later, the deceased's mother wished to sue the first defendant hospital for negligence, and so the second hospital was also sued for failing to retain the brain for the purposes of that civil litigation.

²² *Doodeward v Spence* (1908) CLR 406.

²³ Roger S Magnusson "The Recognition of Proprietary Rights in Human Tissue in Common Law Jurisdictions" (1992) 18 Melb ULR 601, 606.

²⁴ J W Harris "Who Owns My Body?" (1996) 16 Oxford Journal of Legal Studies 55 ["Who Owns My Body?"]

²⁵ *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 [*Dobson*].

The claim was unsustainable as the case depended on the executor's right to the brain in which no property existed. Gibson LJ declared: "in the present state of the English authorities there is no property in a corpse".²⁶ Having said that, he identified two possible qualifications; possessory rights for the purpose of burial, and for the application of human skill such as stuffing or embalming. While the first exception was accepted, Gibson LJ found the second proposition only "properly arguable".²⁷ Even if a skill and labour exception did exist, it was found not to apply to mere post mortem preservation of the brain.

B United States

The United States of America have appeared more willing to recognise a wider range of property rights in human bodies.²⁸ For example in *Pierce v Proprietors of Swan Point Cemetery*,²⁹ another case involving unauthorised disinterment of a body by aggrieved family members, it was stated by Potter J:³⁰

That there is not right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by some one towards the dead; a duty, and we may also say a right, to protect from violation; it may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case.

The judge goes on to say that the person in charge of the body is by far from the owner, but instead holds it in a "scared trust for the benefit of all who may from family or friendship have an interest in it".³¹ Interestingly, the way this

²⁶ *Dobson* above n 25, 600.

²⁷ P D G Skegg "The No Property Rule And Rights Relating To Dead Bodies" (1997) 5 Tort Law Review 222, 224 ["The No Property Rule"].

²⁸ Thomas H Murray "On The Human Body As Property: The Meaning Of Embodiment, Markets, and the Meaning Of Strangers" (1987) 20 Journal of Law Reform 1055, 1061 ["The Human Body As Property"].

²⁹ *Pierce v Proprietors of Swan Point Cemetery* (1872) 10 R.I. 227 [*Pierce*].

³⁰ *Pierce* above n29, 242.

³¹ *Pierce* above n29, 243.

judgment has been applied in the United States is that the "trustee" is the owner of the piece of land in which the body is buried, rather than family members.³²

Property rights have also been found in blood plasma,³³ cell lines³⁴ and even excrement, provided there is express intention to maintain control over it.³⁵ However in perhaps the most well known case involving human body parts the existence of property rights was rejected, albeit vaguely; yet the case was a catalyst for a whole new debate on the existence of these potential rights. In *Moore v Regents of the University of California*³⁶ John Moore was diagnosed with a rare leukemia, and his spleen was removed. Doctors then used the spleen to create a cell line which had medical applications worth billions of dollars. While the California Court of Appeal found that Moore had a property right in his spleen (and its applications), the Supreme Court of California rejected this argument and found for Moore based on breaches of fiduciary duty and lack of informed consent.

In a rather consequentialistic argument which seemed to put development of medical research ahead of individual rights, the Court believed that any property right would be too high a burden on biomedical research.³⁷ While this argument would prevent the use of body parts for research, a similar utilitarian stance could be used to support the case for using body parts for transplantation, and the existence of a body parts market. This illustrates that in deciding whether property rights exist in the human body, different considerations may apply depending on the particular use of the body or part.

³² "Whose Body?" above n7, 202.

³³ *United States v Garber* (1979) 607 F 2d 92 (5th Cir).

³⁴ *Diamond v Chakrabay* (1980) 447 US 303.

³⁵ *Venner v Maryland* (1977) 30 Md App 599.

³⁶ *Moore v Regents of the University of California* (1991) 271 Cal Rptr 146 (Sup Ct) [Moore].

C New Zealand

I Case Law

There has been little discussion of the no-property rule in New Zealand; the most apparent is Hammond J's *obiter* comments in the case concerning the body of Billy T James.³⁸ Upon the entertainer's death, his body was embalmed and taken to his family home in preparation for a church funeral in several days time. However a group of distant Maori relatives took the body (without consent of James' widow) to be placed in a marae prior to its interment, in accordance with Maori custom.

The court case arose by way of a defamation claim against a weekly newspaper, brought by one of the Maori relatives who objected to being called "Billy's body snatching uncle". Hammond J found this to be fair comment on a matter of public interest, which was upheld by the Court of Appeal.³⁹ However more interesting are the judge's further comments relating to the last wishes of Billy T.⁴⁰

At common law a person does not 'own' his or her body. But those persons responsible for the estate of a deceased person have a duty to see to a proper burial according to law... An executor has the right to a body for burial purposes, even against the wishes of the widow... Here nobody had a common law right to Billy T's body at the relevant time. But the body was in lawful possession of the widow and those in the Muriwai [James' family home] house.

This is basically a restatement of the rule in *Williams* that while a body is not property, limited custodial rights exist for disposal purposes.⁴¹

³⁷ John Martinez "A Cognitive Science Approach to Teaching Property Rights in Body Parts" (1992) 42 J Legal Educ 290, 293.

³⁸ *Awa v Independent News Auckland Ltd* [1995] 3 NZLR 701.

³⁹ *Awa v Independent News Auckland Ltd* (1995) unreported, Court of Appeal, CA 9/96.

⁴⁰ *Awa v Independent News Auckland Ltd* above n 38, 710.

2 *Statutory restrictions*

If the human body and its parts are to be regarded as property, then many of the limitations that occur will be imposed by the state.⁴² However not all restrictions are necessarily a recognition of property rights;⁴³ property-independent rights exist that apply irrespective of ownership interests.⁴⁴ For example, rights set out in the Code of Health and Disability Services Consumers' Rights operate regardless of whoever owns those parts.⁴⁵ Right 7 (9) states:

Every consumer has the right to make a decision about the return or disposal of any body parts or bodily substances removed or obtained in the course of a health care procedure.

Additionally, Right 7(10) states:

Any body parts or bodily substances removed or obtained in the course of a health care procedure may be stored, preserved or utilised only with the informed consent of the consumer.

Similarly, consent provisions in any anticipated IVF legislation, such as the Assisted Human Reproduction Bill 1998 or the Human Assisted Reproductive Technology Bill 1996, using wording such as "belong" need not be interpreted as evidence that the law has adopted a proprietary model for managing embryos.⁴⁶

This avoidance of property rights can also be seen in New Zealand's key piece of legislation relating to bodies, namely the Human Tissue Act 1964 which

⁴¹ "The No Property Rule" above n 27, 227.

⁴² "Spleen for Sale" above n 5, 506.

⁴³ "A Question of Property" above n 3, 346.

⁴⁴ J W Harris "Is Property a Human Right?" (Seminar Paper, Property and the Constitution Seminar, NZ Institute of Public Law, July 1998).

⁴⁵ The Health And Disability Commissioner (Code Of Health And Disability Services Consumers' Rights) Regulations 1996 [Code Of Health And Disability Services Consumers' Rights].

⁴⁶ "Proprietary Rights" above n 16, 251.

applies when tissues or organs are taken from a dead body for any other reason than to determine the cause of death. Section 3 of that Act allows specific uses of a body only after obtaining consent from "persons in lawful possession". Those particular purposes and requirements of consent are expressed in section 3(1):

3(1) If any person, either in writing at any time or orally in the presence of 2 or more witnesses during his last illness, has expressed a request that his body or any specified part of his body be used after his death for therapeutic purposes or for purposes of medical education or research, the person lawfully in possession of his body after his death may, unless he has reason to believe that the request was subsequently withdrawn, authorise the removal from the body of any part or, as the case may be, the specified part, for use in accordance with the request.

"Lawful possession" is defined in section 2(2), and includes persons in charge of hospitals, mental hospitals and penal institutions. Notably, the subsection grants lawful possession "Without limiting the rights, powers, or duties of any person entitled under any rule of law to the possession of any body..." This could be interpreted as allowing for the possessory rights as expressed in *Williams*, but having those possessory rights temporarily overridden by the provisions of the Act due to its necessity.

Unlike in Australia (which has a similar legislative scheme), Hammond J's comments in *Awa* have suggested that "lawful possession" in New Zealand does not necessarily presuppose ownership.⁴⁷ Therefore the Human Tissue Act is another example of a working framework for the control of dead bodies and body parts that does not resort to a property approach.

This is not to say that the Human Tissue Act and its operation is not without problems. Those in lawful possession of a body are only allowed to remove tissue and organs with the consent of the individual, as stated in section 3(1).

⁴⁷ "The No Property Rule" above n 27, 228.

However in certain circumstances section 3(2) allows such removal without consent:

3(2) Without limiting subsection (1) of this section, it is hereby declared that the person lawfully in possession of the body of a deceased person may authorise the removal of any part from the body for use for the said purposes if, having made such reasonable inquiry as may be practicable, he has no reason to believe---

- (a) That the deceased person has expressed an objection to his or her body being so dealt with after death, and had not withdrawn it; or
- (b) That the surviving spouse or any surviving relative of the deceased person objects to the body being so dealt with.

To assist in the operation of the consent provisions, a Health Department Code of Practice supplements the Act.⁴⁸ The Code acknowledges that the Act has no legal requirement for those in lawful possession of a body to inform relatives of the deceased's wishes, yet states that it is desirable to approach relatives and inform them of those wishes. If the relatives oppose any removal, the Code states that the person in lawful possession may decline to authorise the removal. It has been suggested that this allowance is a recognition of the limited possessory rights in *Williams* and their superiority to the statute,⁴⁹ however if this is true then Parliament should have made the intention clearer by including provisions in the principal Act that concerned the consent of relatives.

The Code presents a similar problem in situations when the deceased has made no request regarding removal of their tissue or organs.⁵⁰ Section 3(2) allows organ removal once having made "such reasonable inquiry as may be practicable" that either the deceased or surviving spouse or relatives had made no objection. The Code however sets a very low standard for "reasonable inquiry as may be practicable", requiring the person in lawful possession of the body only to discuss the matter with "any one relative who has been in close

⁴⁸ *A Code of Practice for Transplantation of Cadaveric Organs*, 1987 [Code of Practice].

⁴⁹ Susan Pahl "Removal of Body Parts: The Legal Position" (1993) NZLJ 144, 144 ["Removal of Body Parts"].

⁵⁰ "Removal of Body Parts" above n 49, 145.

contact with the deceased" in order to obtain the views of the deceased and all other relatives.⁵¹ As Pahl notes:⁵²

Ironically then, if the Hospital follows the guidelines, a person who has made no request regarding the disposition of his or her organs or tissue may be more likely to become a donor than the person who specifically requested that his or her organs or tissue can be used.

From the preceding discussion it is therefore submitted that a clear distinction must be drawn between possessory rights imposed by statute and possessory rights created by common law. While both are important, each has a different function; the statutory framework for the regulation of therapeutic use, medical education and research, and the common law rights for the purpose of final disposal by burial or cremation. Obviously these two situations will often conflict, and so some system of priority should be established.

3 *Cultural issues*

Relatives who refuse to allow the removal of organs or tissue, whether in accordance with the deceased's wishes or not, are often motivated by religious and cultural reasons. Different cultures often have differing views of death and how the human body should be treated upon death, and this is particularly relevant in New Zealand's multi-cultural society where Maori and Polynesian beliefs often attach a strong significance on the sanctity of the body as a whole.⁵³

In a recently released paper, the Ministry of Maori Development has identified a number of cultural concepts and issues relevant to health care and body parts.⁵⁴ Central to this is Whare Tapa Wha, a holistic approach to health care

⁵¹ *Code of Practice* above n 48, iv.

⁵² "Removal of Body Parts" above n 49, 145.

⁵³ New Zealand Law Commission *Coroners: A Review: A Discussion Paper: PP36* (Wellington, 1999) 4 [*Coroners: A Review*].

⁵⁴ Ministry of Maori Development *Hauora o te Tinana me ona Tikanga: Service Providers* (Wellington, 1999) 11 [*Hauora o te Tinana me ona Tikanga*].

and well-being symbolised by four walls of a strong house; wairua (spiritual well-being), hinengaro (mental well-being), tinana (physical well-being) and whanau (social well-being). A person is considered to be healthy only if all four walls are strong, and insensitive treatment of the body can affect any of these foundations.⁵⁵ Maori consider that all parts of the body contain a life spirit passed down from ancestors which is contributed to by each generation and passed on to future generations.⁵⁶ Furthermore, some particular body parts such as the head are considered tapu or sacred, and so must be treated with greater sensitivity.

The possibility of organ donation is new to Maori, and given the increasing need for donated organs by the Maori community it is seen as a gift of taonga. For example, despite the fact that the rate of Maori dying from kidney-related disease is four times greater than for non-Maori, traditional reluctance to separate body parts from a dead body means that the high demand for organs is not being met by a sufficient supply.⁵⁷ Even when organs are available, there are further issues associated with accepting another's body part; especially when the recipient is unaware of the identity of the donor or their whakapapa.

Cultural considerations must be taken into account when dealing with body parts. In its ever-broadening scope as a founding document of New Zealand, the Treaty of Waitangi underpins the provision of health services to all New Zealanders.⁵⁸ The Crown's obligation to protect tikanga and tino rangatiratanga should allow Maori to determine how their body parts are to be treated.⁵⁹ One of the best ways to achieve this is to ensure a continual process of consultation with Maori; not only with the individual patient and their whanua, but also iwi and hapu on a more general level. The Code of Practice states that:⁶⁰

⁵⁵ *Hauora o te Tinana me ona Tikanga* above n 54, 12.

⁵⁶ *Coroners: A Review* above n53, 9.

⁵⁷ *Hauora o te Tinana me ona Tikanga* above n 54, 16.

⁵⁸ *Hauora o te Tinana me ona Tikanga* above n 54, 10.

⁵⁹ Treaty of Waitangi, Ko te Tuarua (Article the Second).

⁶⁰ *Code of Practice* above n 48, 3.

[I]t is generally reasonable to assume that if the patient belonged to an ethnic or religious group whose members usually object to the removal and use of the organ and tissue in question then the patient would have objected to its removal and use.

The Ministry of Maori Development has also provided a guide for service providers which assists them in respecting Maori values and tikanga.⁶¹ It asserts that client wishes are paramount, but whanau should be involved if the client wishes. Maori health concepts should be acknowledged in both policy and procedures, and information should be provided specifically for Maori clients and whanau. In relation to body parts, health professionals should assist patients and their whanau in making informed decisions, and where requested the body parts should be returned in a culturally appropriate manner.

These and other recommendations are hardly burdensome on health providers; in fact many of the suggestions apply not only to cultural sensitivity but also general good practice. It has been suggested that most people would have similar feelings and attitudes towards the treatment of their or their family's body parts, but because Maori often have a closer connection with a body upon death, they are in a better position to be aware of the treatment.⁶²

In such situations perhaps cultural considerations should be dominant, not only for traditional reasons but also in accordance with various statements of anti-discrimination in New Zealand legislation.⁶³ This approach is also consistent with Right 1(3) of the Code of Health and Disability Services Consumers' Rights which states:⁶⁴

Every consumer has the right to be provided with services that take into account the needs, values, and beliefs of different cultural, religious, social, and ethnic groups, including the needs, values, and beliefs of Maori.

⁶¹ *Hauora o te Tinana me ona Tikanga* above n 54, 20.

⁶² "Removal of Body Parts" above n 49, 148.

⁶³ See New Zealand Bill of Rights Act 1990, s19; Human Rights Act 1993, s21.

Cultural attitudes towards body parts (and especially their removal and use) illustrate another very different view of the body altogether. It is a view that is even further from a property view than our current perception of the body, and this should be taken into account when determining the legal framework to govern this area of medicine and law; a first and foremost reason against the use of property rights in the human body is its cultural offensiveness to a significant section of the population.

be divided (perhaps somewhat arbitrarily) into two main categories, first that property rights are, by both their nature and effect, inappropriate to impose upon the human body, and secondly that such an imposition is unnecessary as other alternatives are possible and more desirable.

One of the arguments that property rights are inappropriate is a moral objection to classifying human beings (and to a lesser extent their parts) as property. While such an argument has little immediate legal force, the law is based upon moral principles,⁶³ and therefore any development in the law should be consistent with its moral environment.

As a further qualification, it is important to note that the strength of many arguments will vary depending on certain factors. The body or body part in particular, the intended use, and the relevant right in the "bundle" (for example a possessory or transferability right) will all affect the validity of any objection.⁶⁴ However it is hoped from the discussion below that a general picture will emerge and assist in forwarding a total argument against property rights in body parts.

1.1 The human body

Self-ownership is often the basis for property-specific justice reasons.⁶⁵ A clear example is the Lockean concept of a natural property right in labour, the "fruits of labour" argument.⁶⁶ Under this approach an individual's ownership of his or

⁶³ Lord Devlin *The Philosophy of Law* (Oxford University Press, Oxford, 1977) 71.

⁶⁴ "The Human Body as Property" above n 28, 107.

⁶⁵ Code Of Health And Disability Services Consumers' Rights, above n 45.

III INAPPROPRIATE USE OF PROPERTY RIGHTS IN BODIES

A Moral Objections

Regardless of whether the current law relating to bodies and body parts is or is not based in a property system, there are strong arguments that it *should not* be so. These arguments can be divided (perhaps somewhat arbitrarily) into two main categories; first that property rights are, by both their nature and effect, inappropriate to impose upon the human body, and secondly that such an imposition is unnecessary as other alternatives are possible and more desirable.

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⁶⁵ Lord Devlin *The Philosophy of Law* (Oxford University Press, Oxford, 1977) 71.

⁶⁶ "The Human Body as Property" above n 28, 1075.

⁶⁷ "Who Owns My Body?" above n 24, 65.

⁶⁸ John Locke *The Second Treatise of Government* Ch V.

her body is the presumption that enables them to own things external to themselves.⁶⁹ Harris states the argument simply as:

1. If I am not a slave, nobody else owns my body. Therefore
2. I must own myself. Therefore
3. I must own all my actions, including those which create or improve resources.

Without examining the issue of whether labour is a natural property right, it is obvious to see the extraordinary leap in logic between statements 1 and 2, which Harris terms "the spectacular non-sequitur".⁷⁰ The reasoning does not provide for the option that no one owns the human body. Perhaps a better starting point is by way of what Harris labelled a "bodily-use freedom principle", from which external ownership can be justified *and* moral objections against body ownership can be made.⁷¹

The existence of bodily-use freedom does not presuppose ownership of the human body. The bodily-use freedom principle was used without resorting to ownership claims by the minority in the House of Lords in *R v Brown*.⁷² Lord Mustill argued that the criminal law should not interfere in sado-masochistic activity between consenting adults due to a right of bodily freedom. However he did not express that this freedom was derived from the individuals having property rights in their own bodies.⁷³ If Lord Mustill had based a bodily-use freedom argument on the presence of human property rights, it is difficult to see where any lines could be drawn between permitting the activities in *Brown* and allowing more serious harm in practices such as duelling, which even the minority objected to.

⁶⁹ Michelle Bourianoff Bray "Personalising Property: Towards a Property Right in Human Bodies" (1990/91) 69 Tex L Rev 209, 212 ["Personalising Property"].

⁷⁰ "Who Owns My Body?" above n 24, 71.

⁷¹ "Who Owns My Body?" above n 24, 63.

⁷² *R v Brown* [1994] 1 AC 212 (HL).

⁷³ "Who Owns My Body?" above n 24, 64.

Moral objections to property in the human body can be religious or secular based,⁷⁴ although often the basis of their objections is similar. A Christian view is that as the body is a creation of God, it is a sacred thing and sacred things should not be within the realm of commerce.⁷⁵ A similar but more secular view is that the body should be respected due to its uniqueness, as illustrated by Kass:⁷⁶

What kind of *property* is my body? Is it mine or is it *me*? Can it be alienated, like my other property, like my car or even my dog? And on what basis do I claim property *rights* in my body? Have I laboured to produce it? Less than did my mother, and yet it is not hers. Do I claim it on merit? Doubtful: I had it even before I could be said to be deserving. Do I hold it as a gift – whether or not there be a giver? How does one possess and use a gift? Is it mine to dispose of as I wish – especially if I do not know the answer to these questions?

However many modern advocates of a no-property rule are merely echoing arguments made over two hundred years ago by philosopher Immanuel Kant (1724 – 1804). Indeed much of Kant's views on the human body continue to shape laws today.⁷⁷ Kant proposed that the notion of property rights in the human body is an affront to human dignity.⁷⁸ He asserted that all humans have dignity, or *würde*. This dignity is unconditional and incomparable; it is a virtue of humanity that cannot be affected so as to lessen it. Dignity is priceless, and so differs from anything with a market price. If humans have property rights in their body or parts, it would conflict with their dignity.⁷⁹ Kant identifies this as a "subject-object dichotomy".⁸⁰

⁷⁴ "The Human Body As Property" above n 28, 1068.

⁷⁵ "The Human Body As Property" above n 28, 1071.

⁷⁶ "The Human Body As Property" above n 28, 1073.

⁷⁷ "A Question of Property" above n 3, 360.

⁷⁸ Stephen R Munzer "An Uneasy Case Against Property Rights in Body Parts" in Ellen Frankel, Fred D Miller Jr and Jeffrey Paul (eds) *Property Rights* (CUP, 1994) 259, 266 ["An Uneasy Case"].

⁷⁹ Stephen R Munzer "Kant and Property Rights in Body Parts" (1993) 6 *Canadian Journal of Law and Jurisprudence* 319, 326 ["Kant and Property Rights"].

⁸⁰ Immanuel Kant "Lectures on Ethics" (trans Louis Infield, rev ed 1930) 165.

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he would have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.

2 *Body parts*

Of course it is difficult to extend this type of analysis to body parts; how can the use of human tissue (especially replenishable items) offend human dignity?⁸¹ Nozick identifies the problems in extending a Kantian analysis to lesser things. In *Anarchy, State & Utopia* he states:⁸²

But could there be anything morally intermediate between persons and stones, something without such stringent limitations on its treatment, yet not to be treated merely as an object? One would expect that by subtracting or diminishing some feature of persons, we would get this intermediate sort of being.

Under such an analysis, Nozick suggests that all "lesser beings" could be infinitely harmed for the sake of one "full being".⁸³ Yet under this approach is the possibility that a "lesser" person, for example by way of physical or mental capacity, could be ranked of lower moral status. Any such result would have the opposite effect of what instilling an inherent dignity is attempting to do.

One solution is to argue that dignity extends beyond the physical integrity of the body to the values that the individual holds, including an interest in

⁸¹ "The Human Body As Property" above n 28, 1074.

⁸² Robert Nozick *Anarchy, State & Utopia* (Basil Blackwell Ltd, Oxford, 1974) 39 [*Anarchy, State & Utopia*].

⁸³ *Anarchy, State & Utopia* above n 82, 41.

separated parts.⁸⁴ Once a body part is removed, the individual still retains some "moral interest" in it and so should be able to control what happens to it as part of their right to self-determination. It has been suggested that this type of dignitary interest already has some implicit recognition in other areas of law; a right to privacy allows an individual to control their name and likeness, and before death an individual has a right to decide what is to happen to their remains.⁸⁵ Both are intangible and yet important to a person, as is the use of body parts.

Another possible argument is that a degree of human dignity exists in body parts, where the status of any given body part is similarly derived from the status of the whole. The level of commodification of a body part may vary depending on three related factors; the nature of the body part, the reason for the transfer, and the appropriateness of the use.⁸⁶

(a) the nature of the part

Kant himself made a distinction between body parts integral to the functioning of the body – such as kidneys or (according to Kant) testicles – and body parts that were not as vital – such as hair or fingernails.⁸⁷ If the more essential body parts (usually organs) were treated as commodities it was a greater offence to dignity because they were of greater importance to the whole body. In today's biotechnological environment such a distinction may prove inadequate; genetic material in hair or fingernails can be just as useful as the same material in kidneys, thus making the totality of Kantian dignity more difficult to dispute. However there are a number of other ways body parts can be defined as to vary their insult to dignity.

⁸⁴ Sharon Nan Perley "From Control Over One's Body To Control Over One's Body parts: Extending The Doctrine of Informed Consent" (1992) 67 N Y U L Rev 335, 349 ["Control Over One's Body"].

⁸⁵ "Control Over One's Body" above n 84, 350.

⁸⁶ "An Uneasy Case" above n 78, 276.

⁸⁷ "An Uneasy Case" above n 78, 268.

An obvious distinction is based on biological necessity.⁸⁸ Body parts that are replenishable, naturally shed and have no risk in their removal may face less resistance to commodification. At the other end of the spectrum there are body parts that have an associated loss or risk or even morbidity in their removal, for example a kidney or cornea. This is especially so if the removal is *inter vivos* – while the donor or seller is still alive. Potential markets for body parts include not only supply during life or after death, but also a “futures market” where the seller would receive an annual payment in return for any useable body parts on their death.⁸⁹

A further differentiation is the level of personal attachment to the body part (obviously not literally). There may be certain “emotionally loaded” body parts that also provoke a conflict with Kantian dignity if commodified, regardless of their biological necessity.⁹⁰ For example, the sensitivity and emotional attachment surrounding reproduction may result in increased attachment to gametes, testicles, ova and placentas.

Emotional attachment to body parts may come from a sense of identity that they possess. We define who we are in terms of our physical selves, and removal of certain body parts could lead to a loss of identity, even after death.⁹¹ Organs such as eyes, skin and the heart may be susceptible to an identity attachment, and the recent developments in transplantation of whole body parts (most infamously that of a hand transplant) could cause similar feelings of a loss of identity.

(b) the nature of the removal or transfer

If a body part is made a commodity, by definition it is bought and sold. It is therefore unclear what the status of donations would be; either no offence to dignity or merely voluntary commodification. Kant argues that even donation

⁸⁸ “An Uneasy Case” above n 78, 261.

⁸⁹ “An Uneasy Case” above n 78, 262.

⁹⁰ “Who Owns My Body?” above n 24, 76.

⁹¹ “Personalising Property” above n 69, 240.

of essential organs is morally wrong,⁹² however it is difficult to see how a humanitarian gesture of donation is morally objectionable. If it is the selling itself which is so reprehensible, this can only be because transferring a body part for money is a superficial and objectionable reason to sell, especially for any body part with great biological necessity or emotional attachment.⁹³

As an advocate of donation as a means of organ and tissue transfer, Murray regards gifting as a necessary assertion of community.⁹⁴ While it can be argued that the right to buy and sell body parts is an exercise of individual liberty that the law should not prevent, Murray states "gifts of the body are one of the most significant means mass societies have to affirm the solidarity, or community, that humans need in order to mature and flourish as individuals."⁹⁵

Although donations to known recipients may create and sustain personal relationships, the case is more difficult when attempting to explain impersonal gifts. The most obvious example is the donation of blood, although other examples have been found; for example when US President Eisenhower suffered a heart attack many living Americans offered their own hearts.⁹⁶ Even when systems have been established that compensate for the giving of blood (either through payment or "blood insurance" where it is guaranteed that blood will be available for donors), free donation has remained and flourished.⁹⁷ Murray suggests that this generosity is also derived from the nature of community.⁹⁸

We affirm our solidarity when we give of ourselves – literally – to fellows in need. We give out of generosity *and* because we need community; we need to affirm our connectedness in the face of the many forces in mass society that drive us apart.

⁹² "Kant and Property Rights" above n 79, 327.

⁹³ "An Uneasy Case" above n 78, 270.

⁹⁴ "The Human Body As Property" above n 28, 1085.

⁹⁵ "The Human Body As Property" above n 28, 1085.

⁹⁶ Guido Calabresi "Do We Own Our Bodies?" in Bernard M Dickens (ed) *Medicine and the Law* (Dartmouth Publishing Co, London, 1993) 6 ["Do We Own Our Bodies?"].

⁹⁷ "The Human Body As Property" above n 28, 1087.

⁹⁸ "The Human Body As Property" above n 28, 1088.

However should this liberality fail, could the law ever be used to force the giving of a body part? Such coercion is not as improbable as one might think; English statutes in the eighteenth century allowed the bodies of hanged murderers to be dissected, and a United States judge has demanded that prisoners "donate" blood.⁹⁹ In another case an individual unsuccessfully tried to force his cousin into giving vital bone marrow.¹⁰⁰ Occasions like these are rare, but increasing emphasis on autonomy and individualism alongside biotechnological advances may cause further problems. Calabresi proposes that our acceptance of any type of law forcing individuals to give body parts depends on our attitude to property.¹⁰¹ If another Chernobyl-type accident occurred and there was great demand for bone marrow, he foresees necessary support for a law demanding donation. Calabresi even likens any such rule as an extension of the social contract we have with the state; our "bodies" can be appropriated for military service or jury duty, so why not our individual body parts?¹⁰²

(c) the appropriateness of the use

A final factor which may influence how body parts are seen as commodities is the intended use of the body part. Consider the difference between selling blood to someone in desperate need of a transfusion and selling blood to be used as a prop in a horror movie; or, as one commentator has suggested, the difference between selling skin for a graft for a burn victim and selling skin to be used as upholstery.¹⁰³ These are extreme and far-fetched examples, yet they illustrate how there may be a difference between the need for an organ or tissue for life-saving purposes, and the same or different organ or tissue required for reasons of comfort or appearance. It can be argued that in certain cases the benefit

⁹⁹ Lori B Andrews "My Body, My Property" in Elizabeth Mensh and Alan Freeman (eds) *Property law (Vol II)* (Dartmouth Publishing Co, London, 1992) 32 ["My Body, My Property"].

¹⁰⁰ *McFall v Shimp* (1978) 10 Pa D & C 3d 90.

¹⁰¹ "Do We Own Our Bodies?" above n 96, 7.

¹⁰² "Do We Own Our Bodies?" above n 96, 3.

¹⁰³ "An Uneasy Case" above n 78, 276.

gained from the transfer may outweigh any disadvantages associated with the necessary commodification.

One inherent difficulty in taking into account these three "mitigating moral factors" is that it is inconsistent with the totality of Kantian dignity. In order to make such concessions, that one body part is more important than another or that one method of giving is morally superior to another, would require a rethink of the fundamental principle behind the supposed dignity concern. Otherwise the Kantian notion that one cannot use a person for another's benefit becomes largely self-justifying and unworkable.¹⁰⁴

3 *Personhood and property*

An extension of Kant's ideas can be seen in the work of Margaret Jane Radin who emphasises a relationship between personhood and property.¹⁰⁵ Property can be categorised as somewhere on a continuum between *personal* property and *fungible* property, where personal property is defined as being part of the person; it is an intuitive view which is best measured by the pain if the property is lost, or the inability to reimburse the loss.¹⁰⁶ Under Radin's theory, personal property gives a stronger moral claim than mere fungible property, although it is still defined as property.

Radin originally asserted that the human body was personal property as it was "literally constitutive of one's personhood".¹⁰⁷ Like other types of personal property, body parts could become fungible through a change of ownership. Radin later identified the "paradox" in this analysis that the human body may be so personal to not be property at all.¹⁰⁸ While similar to Kant's dignity approach, Radin's personal property is based on individual attributes or

¹⁰⁴ "Do We Own Our Bodies?" above n 96, 12.

¹⁰⁵ Margaret Jane Radin "Personhood and Property" (1982) 34 *Stan L Rev* 957 ["Personhood"].

¹⁰⁶ "Personhood" above n 105, 960.

¹⁰⁷ "Personhood" above n 105, 966.

¹⁰⁸ "Personalising Property" above n 69, 214.

endowments. Therefore loss to personhood is a subjective matter, rather than loss based on some “undifferentiated Kantian moral agency.”¹⁰⁹

According to Radin, if the human body is regarded as beyond the sphere of property due to an inherent personhood then the body and body parts are “market-inalienable” – they have a worth beyond the market.¹¹⁰ A market-inalienability analysis allows for quasi-property rights in body parts that permits donation but not sale.¹¹¹ Therefore market-inalienability invokes only limited non-transferability, which “places some things outside the market-place but not outside the realm of social intercourse.”¹¹² If people turn themselves into commodities, the humanity of everyone declines. Radin uses this premise to make arguments against the sale of human organs, as well as against prostitution, baby selling, and surrogate motherhood.

It is arguable that the paradox identified by Radin – that the human body is property so personal so as to not be property at all – is a self-defined problem. Creating a continuum of property which ranges from absolutely fungible to absolutely personal so as to be beyond the sphere of property inevitably creates a difficulty in distinguishing what is offensive to personhood and what is not. A further argument against Radin’s ideas is that a similar loss to personhood may arise from desperate social conditions which force a person to commodify their body. The loss of personhood is an effect of wider social justice reasons irrespective of whether the commodification was permitted or not.¹¹³

¹⁰⁹ Margaret Jane Radin *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts & Other Things* (Harvard University Press, London, 1996) 34, 60 [*Contested Commodities*]. Radin goes so far to say that Kantian persons (and dignity) are so objective to be mere fungible units. While Kantian objectivity is beneficial for promoting equality, it is less useful for determining individual loss through commodification.

¹¹⁰ Margaret Jane Radin “Market-Inalienability” (1987) 100 Harv L Rev 1849 [“Market-Inalienability”].

¹¹¹ “Personalising Property” above n 69, 239.

¹¹² *Contested Commodities* above n 109, 18.

¹¹³ *Contested Commodities* above n 109, 125.

B Public Policy Arguments Against Property Rights

A second and alternative argument that property rights in the human body may be inappropriate states that although the body and tissue *could* be property, it is against public policy to make it so.¹¹⁴ This can be traced back to early English cases such as *Sharpe*, where the reason that the law would not allow property rights over a dead body in those circumstances (unauthorised reburial) was that it would offend public notions of religion, health and decency.¹¹⁵

Conversely, public policy can also be used to argue in favour of *allowing* ownership in certain circumstances.¹¹⁶ Therefore in situations such as *Williams*, it is in the public interest that somebody is responsible for the burial of a body. Additionally, if lawful possession is based on public policy, then institutions such as museums and medical schools should be able to own human bodies. This interpretation has a similar result to the skill and labour exception in *Doodeward*. Unfortunately the issue becomes more difficult when “public good” is less obvious, especially when it may be in conflict with an individual’s rights or benefits. For example in *Moore* there is definite public good in the cell line being developed from Moore’s spleen, and yet it is difficult to say at whose benefit this should be made.

Another disadvantage to the public policy approach is that by allowing “property rights” in some cases and not in others, there is a loss of certainty which is one of the few advantages that a property system has. To leave the classification of body parts as transferable or not (and in what circumstances they may be so) to judicial interpretation would create further difficulties in practice. This is especially the case with developing technology and uses that may take time to reach to courts.

¹¹⁴ “Proprietary Rights” above n 16, 254.

¹¹⁵ “Proprietary Rights” above n 16, 239.

C *Practical Consequences of a Body Parts Market*

All abstract concepts of dignity and personhood aside, there are practical reasons against allowing property rights in body parts, based upon the typical commodification that will result on an open market.¹¹⁷ Admittedly some of these arguments are stronger than others, and some are only relevant to particular body parts and particular uses such as organ transplantation.¹¹⁸

The first problem is that those already disadvantaged in society will feel forced to sell body parts, with market demand creating a price they cannot refuse. An illustration of this problem occurred in 1989 when the infamous tissue dealer Count Ranier Rene Adelman von Adelmansfelden sent the following letter to names appearing in German public bankruptcy records:¹¹⁹

Dear Bankrupt Person,

I have obtained your name from court documents. Your bankruptcy is a matter of public record, as is the fact that no one should do business with you, that no one can grant you credit, that the police probably have a file on you, and, finally, the anyone who associates with you places himself under suspicion... as soon as you donate your kidney you will receive the money from the association treasury. (You can also donate a kidney belonging to your wife or your relatives.) You will be able to work at once. Your life will be saved, and the loss of a kidney is consolable.

Countless examples exist closer to home. Wealthy patients have offered huge sums for kidneys in order to avoid hospital waiting lists. Beneficiaries have offered to sell kidneys to escape from mounting financial debt. Most recently, in August 1999 the following posting appeared on the internet auction site eBay:¹²⁰

¹¹⁶ "Proprietary Rights" above n 16, 241.

¹¹⁷ "Spleen for Sale" above n 5, 508.

¹¹⁸ "The Human Body As Property" above n 28, 1075.

¹¹⁹ "A Question of Property" above n 3, 372.

¹²⁰ <<http://www.ebay.com>>

Fully functional human kidney for sale. You can choose either kidney. Buyer pays all transplant and medical costs. Of course only one for sale, as I need the other one to live. Serious bids only.

The invitation was quickly removed by site administrators, but not before bidders had raised the price to \$US5.7 million, although it is unknown how many of those offers were serious. Nevertheless, the selling of body parts, in addition to other medical developments such as surrogacy, may create another way of dividing society into restrictive classes that are beyond the control of the individual.¹²¹

This creates a second problem in that some of the poor and disadvantaged individuals who may be forced to sell human tissue would be malnourished, alcoholics or drug users. These conditions affect the quality of the body parts and their viability for transplantation or research purposes. The inferiority of the tissue may outweigh the benefits of an increased supply.¹²²

Although this argument applies less to human organs and tissue sold for research purposes, especially where there is no hardship on (and even a benefit to) the original donor, it can still be argued that the cost of medical research would increase because of the need to obtain control over a body part, even when this may not be necessary. Using the *Moore* case as an example, if the researchers had been required to "buy" Moore's spleen (or its information) before conducting research or even operating, John Moore could have held his spleen to ransom (at least until he died from leukemia) unless he was suitably compensated. Given that researchers may not know the potential commercial value of the biological material of any particular patient, having to secure these rights in every case would be financially arduous.

Thirdly, in the presence of any such market, organ donations will cease, especially in more generic body parts (such as blood) where there is no relationship between the donor and the donee. A spirit of generosity can only go

¹²¹ "Personalising Property" above n 69, 242.

so far; forcing people to purchase organs will inevitably increase the costs of the entire transplantation process.¹²³

These difficulties suggest that the free market is not an appropriate system for body parts, and especially organ donation. There is a variance between the cost to the supplier and the value to the recipient, thus creating supply and demand pressures.¹²⁴ Indeed Murray even suggests that the free market itself is an inappropriate model upon which to place body parts.¹²⁵ He identifies two problems; the assumptions applied to a market model not applying to body parts, and the "moral externalities" that economics omits.

Of the assumptions made in a market model, perhaps the most inappropriate is that human beings behave rationally. It is a presumption that is only tenuously applied to consumerism, and so care should be taken when applying it to something much more sensitive and emotional as body parts. Even if it can be said generally that people make rational decisions, there are still those who cannot – for example children and the mentally incapacitated – for whom rationality cannot be assumed. It is these people who would need extra protection within a market of buying and selling body parts. Related to vulnerability is the likelihood of abuse within a market; fraud, misrepresentation and coercion are all possible. This type of abuse is obviously not limited to body parts markets, but in those situations its effect would be so much greater than in other circumstances.¹²⁶ For example fraud in a commercial contract may result in financial loss, whereas fraud in the sale or purchase of a vital organ may lead to ill-health or even death.

A final assumption made by free market proponents that is difficult to apply to a market in body parts is that desire and need are the same thing.¹²⁷ A discrepancy would inevitably exist between what people would pursue in a

¹²² "Spleen for Sale" above n 5, 508.

¹²³ "Spleen for Sale" above n 5, 509.

¹²⁴ "The Human Body As Property" above n 28, 1076.

¹²⁵ "The Human Body As Property" above n 28, 1078.

¹²⁶ "The Human Body As Property" above n 28, 1078.

¹²⁷ "The Human Body As Property" above n 28, 1079.

market and what people require for their well-being. This could apply both ways; individuals may desire more on a body parts market than they need, but also not be able to obtain from the market what they desperately need.

Murray also identifies "moral externalities" that the market does not pick up. As discussed, feelings of disrespect, devaluation and desecration of the human body and body parts fail to enter into a simple market contract. A more tangible externality would be damage to personal relationships; for example the relationship between family members requiring genetically-related body parts, and also the relationship between patient and doctor which may be jeopardised by a lack of trust.¹²⁸

¹²⁸ "The Human Body As Property" above n 28, 1081.

IV UNNECESSARY USE OF PROPERTY RIGHTS IN BODIES

Not only is a property regime inappropriate for human bodies and body parts, but it may also be unnecessary. Current law or relatively simple developments to the law could work as a suitable legal framework for bodies and human tissue. As one commentator states:¹²⁹

The common law (and the common lawyer) are renowned for creativity; but that creativity needs to be tempered by a reminder that justice and community interest are not always best served by the introduction of new theories of liability.

Attributing elements of property to the human body and body parts, while not a new concept, has been emphasised by developments in biotechnology, as illustrated by the *Moore* case. Before recent advancements in science increased the possible uses of organs and tissue, the common law rule in *Williams* had operated relatively trouble-free. Therefore it is likely that new problems are likely to arise in association with these new medical developments, and so require legal controls.

However any attempted regulation of the human body and body parts should give regard to important factual distinctions that may be present in a wide range of uses for the body and body parts.¹³⁰ Different scenarios require different solutions. Separate treatment should be given to organs or tissue obtained from living and dead donors. If the donation is *inter vivos*, special attention should be paid to the capacity of that individual to make decisions about their body. A third distinction relates to the organs themselves and their necessity; for example whether they are regenerative or not, and whether they are paired or non-paired organs. Finally some relevance should be placed on the role of the family and of hospitals – something evidently acceded to in New Zealand's own legislation.

¹²⁹ "Proprietary Rights" above n 16, 243.

A Using Current Law to Regulate Human Bodies

There are many existing rules that can be used to regulate activities involving body parts, whether organ donation and transplantation, biotechnological research or assisted reproduction. The following examples show how some of these areas of law can operate to control body parts. Note however that this is not intended to be an exhaustive list of laws applied to the human body; the attraction of this approach is that in light of new and unpredictable needs to control the use of body parts, current law is able to meet all eventualities as they occur. Clearly existing statutes and cases already referred to that deal specifically with these issues – such as the Human Tissue Act 1964, despite its already identified problems – are also evidence of the satisfactory nature of existing laws, which do not adopt a property-based approach.

1 Criminal law

Although instances may be rare, the criminal law could be used to prevent the theft of body parts. Stories of tourists waking in a bath of ice water with their kidneys missing exist as urban legends, however more down to earth examples such as the theft of biological material for research purposes are certainly more probable.

Section 217 of the Crimes Act 1961 gives a definition of things that are capable of being stolen:

Every inanimate thing whatsoever, and every thing growing out of the earth, which is the property of any person, and either is or may be made moveable, is capable of being stolen as soon as it becomes moveable, although it is made moveable in order to steal it.

Clearly this definition relies on the thing stolen as being “the property of any person”, and therefore it is difficult to maintain a no-property approach. While a

¹³⁰ *The Body as Property* above n 2, 253.

similar rule could be developed to include body parts as capable of being stolen, care must be taken not to create such a rule where body parts are not property only in name. Incorporating the human body and body parts into a law previously applied only to property may signify that they are to be treated as such. Arguments have been made that the criminal law is still useful by relying on the theft of storage containers or facilities taken or interfered with,¹³¹ however applying the law based on such technicalities appears forced and, even worse, could give rise to inappropriate loopholes when a container is not stolen. Similar arguments can be made against relying on trespass of the premises where the body parts are being held.¹³²

There are recent examples where the criminal law has been applied to the "theft" of body products when urine samples obtained for the purpose of testing alcohol levels were illegally disposed of. In *R v Welsh*¹³³ the defendant poured his urine sample down the drain before it could be tested. The case was reported as an appeal against sentence, and the Court only mentioned the theft in passing as a "technical offence". Whether the urine could be regarded as property or not was not considered,¹³⁴ however if it had been then the intention to maintain control over the sample may have become relevant.

In another similar case, *R v Rothery*,¹³⁵ the issue was framed to specifically avoid the issue of property rights. In that case the defendant illegally took his blood sample with him when he left police custody, and so was liable for failing to give a blood sample as a statutory offence.¹³⁶ Even though property was not an issue, the issue was framed so as to apply to removing the container rather than the blood in it.¹³⁷ While these two cases involve body products that are replenishable and of little value and therefore may be more susceptible to be regarded as mere property, the courts are not willing to make that classification.

¹³¹ "Proprietary Rights" above n 16, 243.

¹³² Trespass Act 1980, s 3.

¹³³ *R v Welsh* [1974] RTR 478.

¹³⁴ "Proprietary Rights" above n 16, 244.

¹³⁵ *R v Rothery* [1976] RTR 550 (CA).

¹³⁶ Road Traffic Act 1972 (UK), s 9(3).

¹³⁷ "Proprietary Rights" above n 16, 245.

Regardless, the current law is able to manage these situations without having to rely on labelling the body parts as property.

2 Tort law

There are further avenues in tort law that may assist in regulating the control of body parts without resorting to a property approach. Both intentional torts (such as assault and battery) and unintentional torts of negligence could be applied to a range of situations involving body parts, but are most easily applied when a third party is involved; for example a medical practitioner.

The principle of inviolability of the body is the cornerstone of intentional tort law; any unwanted touching may constitute trespass to the person.¹³⁸ An assault requires a direct and intentional threat that causes apprehension of an imminent battery;¹³⁹ therefore any threat to remove a body part or take biological material, even if that threat is conditional, may constitute an assault. If that threat is intentionally carried out, then a battery has been committed. A common and necessary exception to a claim of battery is that the touching was impliedly consented to. As stated in *Wilson v Pringle*:¹⁴⁰

Generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact.

In most cases involving body parts, this exception is of little value; most interference with body parts goes well beyond ordinary touching. However there may be cases where biological and genetic material such as skin and blood samples can be taken without invasive and obvious touching. In that situation, it may be difficult to maintain that a battery had been committed, unless the purpose of the touching could be included as a decisive factor.

¹³⁸ *In Re F (Mental Patient – Sterilisation)* [1989] 2 WLR 1063, 1082.

¹³⁹ *Police v Greaves* [1964] NZLR 295.

¹⁴⁰ *Wilson v Pringle* [1987] 1 QB 237, 251.

There may be many instances where the negligent action of another causes loss related to body parts. Often this will be the inadvertent disposal of a body part following an operation where that body part should have been kept.¹⁴¹ However any such claims are significantly affected by New Zealand's accident compensation scheme, which institutes a statutory bar on actions for compensatory damages from personal injury claims.¹⁴² The definition of personal injury includes death, physical injuries and mental injuries,¹⁴³ and can be caused not only by accident but also by other grounds, including medical misadventure.¹⁴⁴ Under section 35 of the Accident Insurance Act 1998, medical misadventure is defined as personal injury caused by medical error or medical mishap. Medical error is subsequently defined as the failure of a registered health professional to observe a standard of care and skill reasonably to be expected in the circumstances,¹⁴⁵ and medical mishap occurs when properly given treatment results in adverse consequences that are severe, and unlikely to have occurred under the given treatment.¹⁴⁶

Situations may arise where a claim in negligence over damage or loss to body parts will therefore be barred under the scheme. For example, a medical professional failing to obtain informed consent over a procedure in which organs or tissue are removed would constitute medical error,¹⁴⁷ and so the patient would be entitled to compensation.

However there are other instances where the Accident Insurance Act 1998 does not apply and a negligence claim may be permitted; when the action is not related to a personal injury (notably when the effect is nervous shock suffered by another),¹⁴⁸ or a claim for exemplary damages. However it should be noted that New Zealand courts have held that exemplary damages will only be

¹⁴¹ For example, see *Dobson* above n 25.

¹⁴² Accident Insurance Act 1998, s394.

¹⁴³ Accident Insurance Act 1998, s 29.

¹⁴⁴ Accident Insurance Act 1998, s 39.

¹⁴⁵ Accident Insurance Act 1998, s 36(1).

¹⁴⁶ Accident Insurance Act 1998, s 37.

¹⁴⁷ Accident Insurance Act 1998, s 36(2)(a)(i).

¹⁴⁸ *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA).

awarded in cases that are "rare and exceptional",¹⁴⁹ and in the case of unintentional torts, would require a very high level of negligence.

Where the action is not related to a personal injury (as defined by the Accident Insurance Act), the accident compensation bar does not apply. This is of great significance when seeking to regulate body parts, as often separating parts from the body causes no injury at all. Obviously the normal requirements of a negligence claim apply – a duty of care, and a breach of that duty which causes loss – and so some damage must have occurred. In the case of genetic and biological material, a strong case can be made that economic loss is likely to be suffered following a negligent act; for example, if somebody had thrown away the cell line developed from John Moore's spleen. While courts are often reluctant to extend negligence into areas of economic and consequential loss,¹⁵⁰ developing the law in this area would provide an adequate control for these problems without requiring a property right to be infringed. Naturally some limits would have to be imposed on how consequential the loss is, but remoteness of damages has always been a fundamental feature of the law of torts.¹⁵¹

Another possible damage that could be claimed is mental injury, or nervous shock. The exact medical nature of nervous shock, or Post-Traumatic Stress Disorder as it is more frequently known is often unclear, and expert evidence is often conflicting;¹⁵² unfortunately this confusion has been matched in the legal area. However it has been found in England that nervous shock does not have to be caused by the apprehension, or actual sight, of injury to a human being. In *Owens v Liverpool Corporation*,¹⁵³ an action in negligence was allowed against the defendant, who had driven a tramcar into a funeral procession causing the coffin to be overturned in front of relatives of the deceased, some of whom suffered from nervous shock. It could be argued by analogy that seeing the

¹⁴⁹ *McLaren Transport v Somerville* [1996] 3 NZLR 424.

¹⁵⁰ *Spartan Steel & Alloys Ltd v Martin & Co Ltd* [1973] 1 QB 33.

¹⁵¹ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound No 1)* [1961] AC 388.

¹⁵² For example, see *Vernon v Bosley (No 1)* [1997] 1 All ER 577.

¹⁵³ *Owens v Liverpool Corporation* [1939] 1 KB 394.

destruction of your own body parts could give rise to a similar claim, although its success may depend on the particular body part. As previously discussed, certain organs and tissue have a special emotional and personal attachment, which if lost or damaged may be more likely to cause mental suffering.

One example that causes considerable difficulty is the negligent loss of gametes,¹⁵⁴ which could quite easily happen at an in-vitro fertilisation facility. For some people, sperm and ova are seen as replenishable and invaluable body products, but for others there may be a much stronger personal attachment. What rights individuals have over post-fertilisation embryos (and what rights those embryos have themselves) is another matter entirely and is beyond the scope of this paper; yet it is unlikely that a property label would be desired in any situation.

3 *Fiduciary law*

Using fiduciary law to govern the treatment of body parts again only applies where a third party causes the problem and can be held to owe an equitable obligation. However in many cases medical professionals will easily fit into this category, and they are often at the cause of problems associated with body parts. The doctor-patient relationship is not by definition a fiduciary relationship, instead it merely gives rise to a wide number of fiduciary obligations.¹⁵⁵ It is arguable that the doctor-patient relationship should be a fiduciary one (and so benefit from the prima facie expectation that fiduciary obligations exist), as it exhibits the three hallmarks of such relationships as identified by Wilson J in *Frame v Smith*.¹⁵⁶ First, the doctor has scope for the exercise and discretion of power over the patient; second, the doctor can exercise that power to affect the patient's interests; and third, the patient is vulnerable to the doctor's power.

¹⁵⁴ "My Body, My Property" above n 99, 29.

¹⁵⁵ *Sidaway v Board of Governors of the Bethlem Royal Hospital* [1985] AC 871.

¹⁵⁶ *Frame v Smith* (1986) 42 DLR (4th) 81, 99.

Regardless of these arguments, certain well-established fiduciary obligations exist, including a duty of confidence, a duty to perform proper treatment in good faith, and most relevant to the regulation of body parts, a duty to avoid any conflict of interest. This would be particularly relevant where the medical practitioner is also involved in research or organ transplantation, and has the opportunity to betray the patient's trust and loyalty to gain advantage for themselves, their research or another patient. The clearest example of this is the *Moore* case, but also in New Zealand in *Green v Matheson*¹⁵⁷ it was alleged that a doctor had included cervical cancer patients in a research project without obtaining their consent.¹⁵⁸

4 New Zealand Bill of Rights Act 1990

The right and freedoms in the New Zealand Bill of Rights Act 1990 may also provide an avenue to regulate the use of body parts without relying on a proprietary interest. The relevant rights are contained in section 8 (the right to not be deprived of life except on grounds of fundamental justice), section 9 (the right not to be subjected to torture or cruel treatment), section 10 (the right not to be subjected to medical or scientific experimentation) and section 11 (the right to refuse to undergo medical treatment).

In *Simpson v Attorney-General (Baigent's Case)*¹⁵⁹ it was held that in appropriate cases, damages could be awarded as a result of a breach of the rights in the Act. Therefore the Act may provide a useful remedy for more serious cases relevant to body parts, such as unauthorised experimentation or organ removal. It should be noted that under section 3 of the Act, the Bill of Rights only applies to act done by the government or "by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law".¹⁶⁰ Consequently a claim is only possible if the entity breaching the rights is performing a public function,

¹⁵⁷ *Green v Matheson* [1989] 3 NZLR 564.

¹⁵⁸ The case was later settled out of court before any judgment was delivered on the breach of fiduciary duty claims.

¹⁵⁹ *Simpson v Attorney-General (Baigent's Case)* [1994] 3 NZLR 667 (CA).

although it could be argued that health providers (whether publicly owned or not) fit into this category and so are covered by the Bill of Rights.

5 *Privacy and the body as information*

One specific type of body matter that may be subject to further legal protection is genetic material. The classification of genetic material goes beyond the distinction between "person" and "property", as it can also be regarded as information.¹⁶¹ Indeed it is often the information contained within the physical genetic material that is of any use or value to researchers, and so perhaps protection based on the information rather than the substance itself may be more useful.

An information-based approach does not deny that the protection of the physical existence of the genetic material is also possible. Because of the strong connection between a person and their genetic material, laws usually applying to persons could be used to govern biomedical research. As Litman notes:¹⁶²

Human genetic material emanates from, and is integral to human beings. It is also of profound importance in the biological process of constituting human beings. Accordingly, it would not be illogical to legally characterize genetic material as "person" rather than "property".

Under such an analysis, fiduciary duty and informed consent theories can be used to protect genetic material by requiring full disclosure of the use of that material. This was the position taken by the Supreme Court in *Moore*, when Panelli J stated that it was not necessary "to force the round pegs of 'privacy' and 'dignity' into the square hole of 'property' in order to protect the patient..."¹⁶³

¹⁶⁰ New Zealand Bill of Rights Act 1990, s 3(b).

¹⁶¹ "The Legal Status of Genetic Material" above n 1, 18.

¹⁶² "The Legal Status of Genetic Material" above n 1, 19.

¹⁶³ *Moore* above n 36, 158.

The unique feature of genetic material is that while the substance itself is tangible, it has an equally important incorporeal side.¹⁶⁴ Gene sequences contain vital information that scientists have only recently begun to understand through the establishment of the Human Genome Project.¹⁶⁵ It is information that is, while important, also common to everyone, and like all such information, it is regarded as "common property" – a term used to describe something that is owned by everyone, or perhaps more realistically, owned by no one.¹⁶⁶

There are however exceptions to this rule. Certain genetic information may be patentable as intellectual property when some inventive step has been made to create a new and industrially applicable use.¹⁶⁷ However the property rights granted are an exceptional case, based on the policy that those developing an invention should be rewarded for the cost and effort incurred. Therefore intellectual property should not be used to argue that private property exists in all unpatented genetic information.

A second exception to the general rule that information is not protected applies when that information is private or confidential. Such information is not protected as a property right, but merely as an interest that deserves legal protection.¹⁶⁸ Certain genetic material contains information that is clearly confidential, such as medical information about future health risks that would jeopardise an individual obtaining employment or health insurance. When this particular genetic information can be linked to an individual, then a privacy interest capable of legal protection exists.

¹⁶⁴ "The Legal Status of Genetic Material" above n 1, 19.

¹⁶⁵ The Human Genome Project is an international coordinated effort to determine the complete gene sequence of over 80,000 genes. <http://www.er.doe.gov/production/ober/hug_top.html>.

¹⁶⁶ "The Legal Status of Genetic Material" above n 1, 19. Litman suggest that using the term "common property" illustrates the tendency to characterise things as property even when they are not.

¹⁶⁷ Patents Act 1953, s 2; *Wellcome Foundation Ltd v Commissioner of Patents* [1983] NZLR 385.

¹⁶⁸ "The Legal Status of Genetic Material" above n 1, 20.

Note that this protection should only apply to genetic information that is somehow unique to an individual (or group of individuals), which is a factor that Rothman J A of the Californian Court of Appeal failed to distinguish in *Moore*.¹⁶⁹ He attempted to analogise the situation in *Moore* with the rule in *Lugosi v Universal Pictures*¹⁷⁰ which granted a proprietary right in the actor Bela Lugosi's famous persona (although the right did not survive the actor). If there was a property right in a persona that was an expression of a person's genes, then there must be a property right in those genes. This argument was rejected by the Supreme Court, and rightly so; whereas Lugosi's persona was created by a unique expression of genetic material, John Moore had no such uniqueness in his spleen (except a higher concentration of RNA due to the cancer).¹⁷¹

There is no existing privacy law in New Zealand preventing the appropriation of information for another's benefit. The United States has a series of "false endorsement" cases (often involving the unauthorised use of the likeness of a celebrity¹⁷²) that could be used as a grounds for granting protection of genetic information. However New Zealand's Privacy Act 1993 may also assist in controlling the collection, use, storage and disclosure of genetic information.¹⁷³

The Privacy Act 1993 regulates the collection, use and disclosure of personal information (about an identifiable individual) by agencies (most public and private organisations¹⁷⁴) through a series of Information Privacy Principles.¹⁷⁵ Genetic information is often about an identifiable individual, and so would be defined as "personal information" under the Act.¹⁷⁶ Particularly relevant to genetic information are Principles 3, 10 and 11. Principle 3 requires an agency collecting personal information to inform the individual concerned of the

¹⁶⁹ *Moore v Regents of the University of California* (1988) 249 Cal Rptr 494 (Ct App).

¹⁷⁰ *Lugosi v Universal Pictures* (1979) 603 P 2d 425.

¹⁷¹ "A Question of Property" above n 3, 357.

¹⁷² For example, see *Bette Midler Pl v Ford Motor Co and Young & Rubican Inc* (1988) 849 F 2d 460, where a car advertisement featuring a song imitating the style of singer Bette Midler was held to be an unauthorised appropriation of Midler's voice.

¹⁷³ Privacy Act 1993, Long title.

¹⁷⁴ Privacy Act 1993, s 2.

¹⁷⁵ Privacy Act 1993, s 6.

¹⁷⁶ Privacy Act 1993, s 2.

collection, its purpose, who is collecting it and what rights of access and correction the individual has. Principle 10 restricts an agency from using personal information for any other purpose than for which it was collected. Principle 11 limits the disclosure of personal information to another body. These provisions could prevent the unauthorised appropriation and use of genetic information by researchers, totally independent of any rights over the source material itself.

6 Consumer law

The purpose of consumer protection legislation is to readdress the increasing inequalities in bargaining power between sellers and consumers. In the provision of health services that inequality is emphasised by the consumer's lack of medical knowledge and often the necessity of the situation. For these reasons, it may be appropriate for services such as organ transplantation to be covered by consumer legislation.

The Consumer Guarantees Act 1993 provides a series of implied warranties when goods or services are supplied to a consumer. Therefore the preliminary question must be whether a process such as organ or tissue transplantation is a good or service that falls within the Act. The organ that is transplanted could be a good, however to speak of a good implies a proprietary interest that, as previously stated, is undesirable.¹⁷⁷ The question of whether consumer protection legislation applies to the provision of blood has been addressed in Australia when a number of people were infected with the HIV virus from contaminated blood.¹⁷⁸ They sought to use the implied warranties under Australia's comparable Trade Practices Act 1974, which required the blood to be "materials supplied in connection with provision of services".¹⁷⁹ In *E v*

¹⁷⁷ Consumer Guarantees Act 1993, s 2 "good" includes "Goods attached to, or incorporated in, any real or personal property".

¹⁷⁸ *PQ v Australian Red Cross Society* [1992] 1 VR 19; *E v Australian Red Cross Society and Others* (1991) 99 ALR 601 [*E v Australian Red Cross*].

¹⁷⁹ Trade Practices Act 1974 (AUS), s 74(1).

Australian Red Cross Society and Others Wilcox J held that blood might be materials,¹⁸⁰ but this does not necessarily imply that blood is a good.¹⁸¹

A better solution is to regard the whole transplantation process as a service as defined in section 2 of the Consumer Guarantees Act.¹⁸²

“Service” means any rights, benefits, privileges, or facilities that are or are to be provided, granted, or conferred by a supplier under any of the following classes of contract:

- (a) A contract for, or in relation to, –
 - (i) The performance of work (including work of a professional nature), whether with or without the supply of goods...

The transplantation of an organ will consequently be a service under the Act so long as it was carried out under a contract. This is easily established when the operation is performed by a private health provider, but the situation is less clear when the transplantation occurs within a public health system. Hopefully an implied contract or even social contract with the state could be used by the courts on policy grounds of consumer protection to include these circumstances within the Act.

If an organ transplantation is a service for the purposes of the Consumer Guarantees Act 1993 then two implied warranties are relevant. Section 28 guarantees that the service is carried out with reasonable care and skill, and section 29 guarantees that the service is reasonably fit for any particular purpose (which is likely to be the survival or good health of the consumer). Should either of these guarantees be breached, the consumer is entitled to a range of remedies.¹⁸³ Some of them may not be appropriate (such as repair), but section 32(c) allows for liability for reasonably foreseeable consequential loss caused by the breach which may prove valuable to an organ donee.

¹⁸⁰ *E v Australian Red Cross* above n 178, 646.

¹⁸¹ “Proprietary Rights” above n 16, 247.

¹⁸² Consumer Guarantees Act 1993, s 2 “service” (2)(a)(i).

These examples illustrate that existing rules are sufficient to govern current uses of body parts, and so property rights are therefore unnecessary. It is also argued that the current law is robust and flexible enough to manage advances in technology and the use of body parts, again without having to adopt a property regime. However it should be noted that there are instances where the current law *should* not adapt to meet the circumstances, which are those that have previously been identified as morally repugnant. For example, a market in body parts could be governed by various pieces of contract legislation, but the inappropriateness of a body parts market at all should prevent this.

The solution given in this paper, that property rights are totally inappropriate in the human body and body parts, is an extreme view. There are commentators who suggest that the total abandonment of property rights in the body is too impractical to maintain, and so propose a range of property rights that are market-inalienable.¹⁸⁴ Market inalienable property rights would allow body parts to be transferred as a gift, but they could not be exchanged for consideration. However as previously discussed, it becomes difficult to draw the line at which aspects of property are allowed and which are not, thus creating a confusion that a property right approach is supposed to avoid. To propose a "no-property at all" argument may appear less practical, but it is undoubtedly safer.

Furthermore, many apparent current uses of property rights may not be required, but rather mere trespassory rules; those which impose obligations on every person not to "use" the property in question without the consent of those that have some relationship with the property.¹⁸⁵ Trespassory rules in the human body clearly exist; there are laws banning murder, assault and rape for example. To speak of ownership and property is therefore only rhetorical, so that "... such

¹⁸³ Consumer Guarantees Act 1993, s 32.

¹⁸⁴ "Personalising Property" above n 69, 215; "Market-Inalienability" above n 110.

¹⁸⁵ "Who Owns My Body?" above n 24, 63.

invocations may add pithiness and force to what would otherwise seem laboured and tame."¹⁸⁶

B An Alternative – Extending the Doctrine of Informed Consent

Currently the doctrine of informed consent is of little use to regulate the use of body parts. As the doctrine is premised on an individual's bodily integrity and right to self-determination, it is narrowly interpreted to only apply to information about risks and benefits directly concerning the patient, and not what becomes of body parts removed from them.¹⁸⁷

Assuming that some people would object to certain uses of their body parts (whether on financial, religious or moral grounds), it may be possible to extend the doctrine to include such concerns.¹⁸⁸ However this would necessitate a recasting of the principles behind informed consent; "bodily integrity" would have to include body parts. If so, then individuals could accept, refuse or place restrictions on the use of their body parts.¹⁸⁹ This may be a better approach to consent than the one taken by the Supreme Court of California in *Moore*, which was based on the fiduciary duty between Moore and his doctor. In most cases however, it is unlikely that the GP will also be the researcher (as it was in that case) and a general doctrine of informed consent may extend to a wider range of circumstances.

Extending the doctrine of informed consent is only one example of how current law could successfully adapt to meet the increasing uses of body parts. Yet it is also an example of the difficulties faced if an individual does not look after their own interests, because in many cases it is the responsibility of that individual to take action. At what stage does an extended doctrine of informed consent (and other laws) become too paternalistic?

¹⁸⁶ "Who Owns My Body?" above n 24, 64.

¹⁸⁷ "Control Over One's Body" above n 84, 346.

¹⁸⁸ "Control Over One's Body" above n 84, 357.

¹⁸⁹ "Control Over One's Body" above n 84, 359.

V CONCLUSION

"Some of the finest advances in society have resulted from a refusal to characterise human beings... as property."¹⁹⁰

This paper has asserted that it is both incorrect and unrequired to instil a property regime in human bodies. Despite the range of vague and elusive definitions of property that exist, Harris suggests that all people seem to share an intuitive sense of what property is, influenced by the environment, time and culture.¹⁹¹ Therefore it must be asked whether in our current legal, medical and technological environment there is an intuitive sense that the human body should be classified as property.

The arguments presented in this paper against property rights in the human body are varied and diverse, ranging from moral regnancy to practical consequences. So too are the illustrations of the existing law's ability to manage current and arising circumstances. It is a cumulative argument; each matter is required to counter the strength of a property approach. For as Litman states:¹⁹²

The legal institution of property exists for an indeterminate number of reasons. It exists to encourage productivity, to reduce conflagration, to enhance autonomy, to provide for sustenance, security and privacy, and for numerous other reasons. In principle, therefore, the more objects of property, the better.

Yet even if property was the simplest and most workable system for the management of body parts, especially compared with the existing ad hoc system, there is still strong resistance to it. For to speak of people as property seems to be no great innovation, but rather has all the hallmarks of a great leap backwards. It opens up an array of dangerous consequences, some of which we are yet unable to contemplate.

¹⁹⁰ "My Body, My Property" above n 99, 36.

¹⁹¹ "Who Owns My Body?" above n 24, 58.

¹⁹² "The Legal Status of Genetic Material" above n 1, 18.

Earlier this century ownership of human bodies would be readily conceded to and evident in the form of slavery. While this view has changed (either to self-ownership or absence of any property interest), increasing technological advances and commercial opportunities are forcing us back down that path.

Creating a property institution in body parts also underestimates the flexibility of the current law to adapt to meet new problems as they arise, so long as the law keeps in line with those changes. Therefore to truly succeed in the regulation of the human body and its parts, a close relationship between the law, medicine and technology must be maintained.

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