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THE LAW OF THE BODY

Meredith M. Render*

ABSTRACT

This Article posits that a “law of the body” is overdue. In the absence of clarity about the legal status of the human body, courts have constructed a collection of circumstantially defined categories for resolving the question of human body ownership and use. This patchwork approach is awkward, unwieldy, incoherent, and, by many lights, ultimately unjust. Many able minds have been applied to critiquing the distributive consequences of a regime in which we cannot—at any point in our lives—“own” our own bodies (or its constituent parts), but other people can and do. But what has been missing from these conversations is a conceptual foundation for understanding the living human body as property. This Article supplies that piece of this byzantine puzzle. Specifically, the thesis presented here holds that by employing a property framework to understanding the legal status of the human body we can explain with coherence and consilience our existing legal commitments concerning the treatment of the human body.

Moreover, this Article addresses the standard objections to explicitly acknowledging the human body as an object of property and demonstrates that they are predicated on a series of misunderstandings. These misunderstandings generally fall into three categories: misunderstandings about the nature of “property”; conceptual misunderstandings about bodies and selves and the capacity to own oneself; and misunderstandings about the necessary consequences of adopting a property framework with respect to the human body. Once these misapprehensions are clarified, the intellectual path will be cleared for a “law of the body” to emerge, and legislators, courts, and scholars can begin the important work of shaping it into a doctrine that is consistent with our normative ends.

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INTRODUCTION

People have begun to sell their skin. This is not meant euphemistically, as a pornographer may be said to sell “skin.”¹ Instead, people have begun to sell their actual skin tissue as advertising space.² In these arrangements, the seller agrees to obtain a tattoo of a company’s logo or other advertising mark. The tattoos are temporarily (or sometimes permanently) affixed to the seller’s arm or back—or, occasionally, forehead—and serve as novel advertising for the buyer. Through this transaction the seller’s body is transformed into a

¹ Of course, in this less literal sense, “skin” has long been a commodity. Sex trade consumers have purchased the temporary right (and in our darkest corners, the permanent right) to touch or look at human bodies since time immemorial. Within this euphemistic “skin” is catalogued a host of manners in which the sexual use of the human body has been commercially exchanged. For a provocative consideration of these types of commodification of the human body, see generally MARTHA C. NUSSBAUM, *SEX & SOCIAL JUSTICE* 276–85 (1999), which argues that taking money in exchange for sexual services is more analogous to other types of work than our initial intuitions may reveal.

² This practice, sometimes referred to as “human billboard,” has been growing in popularity since the turn of the millennium. The practice made headlines in 2001 when a casino paid a boxer \$100,000 to wear a temporary tattoo on his back during a championship fight. See Albert Chen, *Tattoo You*, *SPORTS ILLUSTRATED*, Mar. 18, 2002, at 26. Human billboards were in the news again in 2003 when a web-hosting company paid a twenty-two-year-old \$7,000 to permanently tattoo the company’s logo on the back of his head. Eric Gwinn, *An Ad That’s a Head of the Game*, *BALT. SUN* (May 02, 2003), http://articles.baltimoresun.com/2003-05-02/features/0305020175_1_jim-nelson-faulkner-tattoo. Similarly, in 2005, an entrepreneurial, aspiring college student named Andrew Fischer auctioned his forehead on eBay amid much press fanfare. *Man Auctions Ad Space on Forehead*, *BBC NEWS*, <http://news.bbc.co.uk/2/hi/technology/4161413.stm> (last updated Jan. 10, 2005).

commercial space, and, more remarkably, it adopts an attribute once thought to be antithetical to a living and intact human body: the seller's body assumes an aspect of *alienability*. A third party now enjoys a property-like interest in an aspect of the seller's living human body.³

In executing such an agreement, the seller's body becomes a commodity—an alienable economic good.⁴ But is it accurate to say that the seller *owned* that which he sold? How should we characterize the legal relationship that the seller has with his own living body?

To illustrate the complexities inherent in this question, consider a second way in which skin has become a commodity. Disembodied human skin is used by biotech companies to create an array of products, ranging from life-saving skin grafts to cosmetic lip fillers and anti-aging creams.⁵ The skin used in these products is sold to biotech companies by tissue procurement agencies and hospitals.⁶ Agencies obtain skin tissue from donated cadavers.⁷ Hospitals sell skin tissue that would otherwise be discarded from surgical procedures—for example, the amputated foreskins of circumcised babies.⁸ Biotech companies purchase the tissue and convert it into useful and profitable products.⁹ A chain of skin ownership stretches from the procurement agency to the biotech company to the patient who receives a skin graft. But what of the person whose body originally produced the skin tissue? Did the originator of the skin ever “own” it in the same sense that the biotech company owned it?

³ Some may conceive of the interest that the buyer-company enjoys in the seller's skin as more akin to a contract interest: the seller has an obligation to perform (wear the tattoo) or face liability for breach. However, websites that tout the practice of human billboard advertising and serve to connect buyers and sellers tend to describe the interest created as a *lease*. See, e.g., LEASE YOUR BODY, www.leaseyourbody.com (last visited Jan. 26, 2013).

⁴ This at least applies to the portion of the seller's body that is occupied by the advertisement. The seller is presumably still able to use his living and intact body in much the same way that he was able to without the tattoo.

⁵ See Kerry Howley, *Big Business in Body Parts*, L.A. TIMES, Mar. 6, 2007, at A17; Coco Ballantyne, *A Cut Above the Rest?: Wrinkle Treatment Uses Babies' Foreskins*, SCI. AM. (Feb. 12, 2009), <http://www.scientificamerican.com/article.cfm?id=a-cut-above-the-rest-wrin> (discussing human foreskins used in anti-wrinkle creams).

⁶ Howley, *supra* note 5, at A17.

⁷ *Id.*

⁸ See David Solomon, *Informed Consent for Routine Infant Circumcision: A Proposal*, 52 N.Y.L. SCH. L. REV. 215, 220 (2007–2008) (“[A]mputated foreskins are transferred to burn units to make skin bandages for burn victims. . . . [F]oreskins are also sold to pharmaceutical and cosmetic companies (for a profit) for a wide range of uses, including the testing of cosmetics, the creation of artificial skin, and the manufacture of the widely used cancer drug Interferon.” (footnote omitted)).

⁹ See *id.*

Advancements in biotechnology have complicated this question of human body ownership by producing an extraordinary array of uses for the human body.¹⁰ Some of these advancements involve the use of discarded, donated, or disembodied body parts, as with the example of skin above. Others involve the whole and living body, as with, for example, surrogacy.¹¹ Still others involve knowledge of the workings of the human body, as with the discovery and patenting of genes.¹² And some biotechnology involves the creation of new humans, as with assisted reproduction such as in vitro fertilization.

So how has our legal scheme responded to the increasing alienability of the human body's capacities? Not surprisingly, lawmakers have addressed the issue in a patchwork manner, fashioning idiosyncratic rules as novel legal questions arise, while failing to satisfactorily address the deeper and more difficult autonomy-versus-distributive-justice tensions created by body alienability.¹³ This is not an unusual legal response to a technological sea change—the Industrial Revolution and the development of the Internet come to mind.¹⁴ In the wake of a technological revolution, it takes time for our legal norms to first comprehend and then meaningfully order our actual practices. For example, when the Industrial Revolution transformed human labor practices, courts and other lawmakers first applied traditional contract principles to the controversies that followed, and when traditional contract principles failed to address the deeper problems born of mass production, the

¹⁰ ROHAN HARDCASTLE, *LAW AND THE HUMAN BODY: PROPERTY RIGHTS, OWNERSHIP AND CONTROL* 3–7 (2007) (identifying many of the uses that biotechnology has developed for biological material in the recent past).

¹¹ A woman's entire body (i.e., her cardiac, circulatory, lymphatic, digestive, and endocrine systems, to name a few) is conscripted during pregnancy toward the task of gestation. As such, paid surrogacy, particularly where the surrogate is not genetically related to the fetus (which would more vividly raise the specter of baby-buying), represents perhaps the closest real-life example of whole-and-living-body commodification. Although it is sometimes circumscribed by state law, paid surrogacy is permitted in limited circumstances in some jurisdictions. Deborah Hellman, *Money and Rights*, 35 N.Y.U. REV. L. & SOC. CHANGE 527, 537 & n.57 (2011) (“[Florida law allows] payments made for ‘preplanned’ adoptions. . . . [T]he intended parents may pay for all reasonable legal, medical, and living expenses (as well as reasonable compensation for inconvenience, discomfort, and medical risk) of the volunteer mother.”).

¹² See generally Steven H. Schilling, Note, *DNA as Patentable Subject Matter and a Narrow Framework for Addressing the Perceived Problems Caused by Gene Patents*, 61 DUKE L.J. 731 (2011).

¹³ See Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 363–64 (2000) (“[T]he lack of coherence in our concept of the body promotes an inconsistent and haphazard approach that enables different treatment of the body under essentially similar circumstances.”).

¹⁴ See generally Lawrence Lessig, Commentary, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 503–05 (1999) (arguing that the unique plasticity of cyberspace creates regulatory problems that are distinct from the regulatory problems we face in “real-space”).

legal conceptual framework of “labor law” gradually emerged.¹⁵ Similarly, when it began to be clear that our existing models for regulating communication were not helpful in ordering the Internet, the legal conceptual framework of “cyberlaw” began to emerge.¹⁶

But what is unusual in the context of the human body is that lawmakers and courts have been severely limited in their ability to develop a “law of the body” (or even to apply existing legal principles to questions of human body commodification) by a peculiar, almost superstitious, disinclination to assign the living human body a legal status.¹⁷ For the most part, this disinclination takes several forms, the first of which is an objection to defining the human body as mere property.¹⁸ Defining the body as a type of property, the objection holds, debases it.¹⁹ The living human body is too special and too sacred to be classified as a thing that can be owned.²⁰ Further, the objection holds, it is not clear that a living human body *can* be owned, at least by the person whose body it is, because it is not clear that a person is anything more than her living body and one cannot both be oneself and own oneself.²¹ Moreover, if we were to assign the body a legal status that is consistent with ownership, we might

¹⁵ See John Godard, *The Exceptional Decline of the American Labor Movement*, 63 INDUS. & LAB. REL. REV. 82, 84–92 (2009) (detailing the unique conditions and circumstances that gave rise to the American labor movement).

¹⁶ See LAWRENCE LESSIG, CODE: VERSION 2.0 (2006).

¹⁷ See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 498 (Cal. 1990) (in bank) (Arabian, J., concurring) (“The ramifications of recognizing and enforcing a property interest in body tissues are not known, but are greatly feared . . .”).

¹⁸ See, e.g., *Davis v. Davis*, 842 S.W.2d 588, 597–98 (Tenn. 1992) (identifying a spectrum of “respect” that should be accorded to various categories of human tissue with “persons” on one end of the continuum (connoting the most respect) and “property” on the other end of the spectrum (connoting the least respect)). The *Davis* court concluded that frozen embryos occupy an intermediate place on the respect spectrum: “We conclude that preembryos are not, strictly speaking, either ‘persons’ or ‘property,’ but occupy an interim category that entitles them to special respect because of their potential for human life.” *Id.*

¹⁹ Michael J. Sandel, *What Money Can’t Buy: The Moral Limits of Markets*, in RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE 122, 124 (Martha M. Ertman & Joan C. Williams eds., 2005) (“Once we characterize the good at stake [including human body parts or services], it is always a further question whether, or in what respect, market valuation and exchange diminishes or corrupts the character of that good.”).

²⁰ See Richard Gold, *Owning Our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167, 1192–93 (1995). Discussing the symbolism of the human body with respect to sacredness (and profanity), Gold noted, “The human body is an earthly reflection of the divine: according to Western religions, our bodies are made in the image of God.” *Id.*

²¹ David Price, *From Cosmos and Damian to Van Velzen: The Human Tissue Saga Continues*, 11 MED. L. REV. 1, 28 (2003) (“Indeed, to accept the . . . proposition [that one could own oneself] would seemingly be to embrace a Cartesian dualist separation of body from an ‘owning’ mind . . .”).

run afoul of the prohibitions of the Thirteenth Amendment.²² Finally, were we to legally recognize the human body (and its constituent parts) as a type of property, we would commodify it (or render it vulnerable to further commodification) and thereby open the door to an array of terrible distributive consequences.²³

The immediate goal of this project is to address these objections and thereby pave the way for the development of a “law of the body,” one that sensibly begins with the understanding that each of us owns our own living and intact body. At base, the theory offered here is simple: we own our bodies. The legal status of the human body is best explained through a property framework and, consequently, a living and intact human body—separate from or in addition to whatever metaphysical or spiritual exceptionality or sacredness we ascribe it—is an object of property. Moreover, the standard objections to explicitly acknowledging the human body as an object of property are predicated on a series of misunderstandings. These misunderstandings generally fall into three categories: misunderstandings about the nature of property; conceptual misunderstandings about bodies and selves and the capacity to own oneself; and misunderstandings about the necessary consequences of adopting a property framework with respect to the human body. Once these misapprehensions are clarified, the intellectual path will be cleared for a “law of the body” to emerge, and legislators, courts, and scholars can begin the important work of shaping it into a doctrine that is consistent with our normative ends.

This project is necessitated by the fact that a “law of the body” is overdue.²⁴ In the absence of clarity about the legal status of the human body, courts have constructed a collection of circumstantially defined categories for

²² Margaret Jane Radin & Madhavi Sunder, *The Subject and Object of Commodification, Introduction to RETHINKING COMMODIFICATION*, *supra* note 19, at 8, 9 (arguing that the Thirteenth Amendment forms the backdrop of cases involving a property interest in the human body).

²³ See DONNA L. DICKENSON, *PROPERTY IN THE BODY: FEMINIST PERSPECTIVES* 14 (2007) (“In relation to [human] tissue, many commentators have mistrusted the property approach because they wrongly perceive property as an all-or-nothing concept. In the *Moore* case . . . [the court] rejected bestowing a property right in tissue . . . partly because the court assumed that such a right would entail all the sticks in the bundle.”).

²⁴ Margaret Brazier observed that “[i]here is little dissent from the view . . . [that the] confused and tangled web of different statutes and outdated common law principles must be clarified.” MARGARET BRAZIER, *MEDICINE, PATIENTS AND THE LAW* 479 (3d ed. 2003). The United Kingdom subsequently passed the Human Tissue Act 2004, the purpose of which was “to provide a ‘consistent legislative framework for issues relating to whole body donation and the taking, storage and use of human organs and tissues.’” HARDCASTLE, *supra* note 10, at 103–04.

resolving the question of human body ownership and use.²⁵ For example, deceased bodies are judicially cognizable “quasi property,” and traditional property principles apply to the disposition of corpses under certain circumstances.²⁶ Traditional property principles also apply to some disembodied body parts (for example, sperm, spleens, cells, and foreskins) depending on the circumstances surrounding their separation from the body.²⁷ A kidney that is separated and “abandoned” in the course of a medical procedure may become the property of the hospital and traditional property principles will apply,²⁸ while a kidney that is donated from one spouse to another does not become the property of either spouse.²⁹ Arrangements that involve the reproductive use of a living human body, such as agreements for surrogacy, are not governed by property principles (instead contract and family law principles generally apply),³⁰ but disagreements regarding the disposition of human embryos created for in vitro fertilization often are governed by property principles.³¹

²⁵ Rao, *supra* note 13, at 369–87.

²⁶ *E.g.*, *Lawyer v. Kernodle*, 721 F.2d 632, 634 (8th Cir. 1983) (“In the sense in which the word ‘property’ ordinarily is used, one whose duty it becomes to bury a deceased person has no right of ownership over the corpse; but, in the broader meaning of the term, he has what has been called a ‘quasi property right.’” (quoting *Rosenblum v. New Mt. Sinai Cemetery Ass’n*, 481 S.W.2d 593, 594 (Mo. Ct. App. 1972))); *see also* *Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (“A majority of the courts confronted with the issue of whether a property interest can exist in a dead body have found that a property right of some kind does exist and often refer to it as a ‘quasi-property right.’” (quoting *In re Estate of Moyer*, 577 P.2d 108, 110 n.5 (Utah 1978))). *But see* *Crocker v. Pleasant*, 778 So. 2d 978, 986–88 (Fla. 2001) (declining to describe the interest that next of kin has with respect to a dead body as a “quasi-property” interest and instead preferring the term “legitimate claim of entitlement”).

²⁷ *See* *Hecht v. Kane*, 20 Cal. Rptr. 2d 275, 283 (Ct. App. 1993) (holding that frozen sperm is “property” and applying traditional property principles to its deposition); *see also* *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (en banc) (“[B]lood plasma, like a chicken’s eggs, a sheep’s wool, or like any salable part of the human body, is tangible property . . .”).

²⁸ Rao, *supra* note 13, at 375–76 (describing human organs as occupying a state of “limbo” with respect to legal status, but observing that the National Organ Transplant Act “permit[s] both the donation of organs for transplant and their sale for other purposes, such as research or education”).

²⁹ In 2009, Richard Batista made headlines when Batista announced he was seeking \$1.5 million in compensation for the value of a kidney that Batista had previously donated to his now-estranged wife. Sarah Netter, *Medical Expert Says Surgeon’s Quest for Kidney Compensation Is ‘Soap Opera’*, ABC NEWS (Jan. 8, 2009), <http://abcnews.go.com/US/story?id=6603460&page=1>.

³⁰ Richard A. Epstein, *Surrogacy: The Case for Full Contractual Enforcement*, 81 VA. L. REV. 2305 (1995) (contract law); Christen Blackburn, Note, *Family Law—Who Is a Mother? Determining Legal Maternity in Surrogacy Arrangements in Tennessee*, 39 U. MEM. L. REV. 349 (2009) (family law).

³¹ *See* *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989) (noting that a cryopreservation agreement between parents and a medical college created a bailor–bailee relationship between the parties). However, some states have made a move to identify embryos as “persons” and to locate embryo disposition within a family law framework. For example, a Louisiana statute defines a preimplantation embryo as a “juridical

This patchwork approach is awkward, unwieldy, incoherent, and, by many lights, ultimately unjust.³² Many able minds have critiqued the distributive consequences of a regime in which we cannot—at any point in our lives—“own” our own bodies (or their constituent parts), but other people can and do.³³ What has been missing from these conversations is a conceptual foundation for understanding the living human body as property. This Article supplies that piece of this byzantine puzzle. Specifically, the thesis presented here holds that by employing a property framework to understand the legal status of the human body, we can explain with coherence and consilience our existing legal commitments concerning the treatment of the human body.

In addition to providing coherence and consilience to an ill-adapted body of law, this Article posits a second reason why a “law of the body” is needed. This second reason has to do with the uniqueness and indeed the “thingness” of the body itself.³⁴ While it may be awkward to think of the body as a “thing”—a point that is grappled with in Part II—the human body is unlike any other known entity. Its complexity is astounding and its use-potential is perhaps unlimited. But it is itself, as a physical object in the world, quite limited. The human body is a thing of boundaries, both temporal (each body changes with time, each body will one day cease to be a human body) and physical (each body occupies a definite, finite place in space). Unlike ideas, promises, or words, a human body is a valuable resource that we cannot duplicate, replicate,

person until such time as the in vitro fertilized ovum is implanted in the womb; or at any other time when rights attach to an unborn child in accordance with law.” LA. REV. STAT. ANN. § 9:123 (2008).

³² See, e.g., Charles C. Dunham IV, “Body Property”: *Challenging the Ethical Barriers in Organ Transplantation to Protect Individual Autonomy*, 17 ANNALS HEALTH L. 39, 65 (2008) (arguing that “[a]llowing donor compensation would protect the dignity of donors and would reduce the suffering and death of the many people waiting for transplant organs”).

³³ Jonathan Herring & P.-L. Chau, *My Body, Your Body, Our Bodies*, 15 MED. L. REV. 34, 43 (2007) (“In the Western world, biotech scientists and their employers make large sums of money through research on parts of bodies. Why should they make all the gains from the body parts and not the people from whom the samples originated?”); Michele Goodwin, *Private Ordering and Intimate Spaces: Why the Ability to Negotiate Is Non-Negotiable*, 105 MICH. L. REV. 1367 (2007) (reviewing MARK J. CHERRY, *KIDNEY FOR SALE BY OWNER: HUMAN ORGANS, TRANSPLANTATION, AND THE MARKET* (2005)) (disallowing the commercial exchange of organs has created an organ shortage, particularly for African-Americans); accord Russell Korobkin, *Buying and Selling Human Tissues for Stem Cell Research*, 49 ARIZ. L. REV. 45, 47 (2007) (arguing that “purchasing tissues for biomedical research should be both legal and socially acceptable”). For an argument on the other side, see Gabriel M. Danovitch & Francis L. Delmonico, *The Prohibition of Kidney Sales and Organ Markets Should Remain*, 13 CURRENT OPINION ORGAN TRANSPLANTATION 386, 387 (2008), which expressed concern that the sale of organs would result in poor distributive consequences for poor and vulnerable populations.

³⁴ The notion that attention should be paid to the “thingness” of property has been part of property discourse for some time. See, e.g., Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1193–94 (1999) (suggesting that a “boundary principle” may better accommodate the “thingness” of private property than the bundle-of-rights thesis).

or replace. If it is lost, the person who loses it cannot ever be made whole. Unlike real property, it is a valuable resource that will not transcend into future generations—a living human body cannot be devised or repurposed or renewed. And all the while, locked within this finite and fleeting resource reside complexly encoded clues that illuminate issues that have long held us in thrall: issues of health and illness, of aging and dying, of why we become who we become. It is this fleeting finiteness, as well as the fascinating capacities of the human body, that—when coupled with the technological revolution that is quickly bringing ever-more biological secrets within our grasp—necessitates that we take seriously the human body as a subject (and object) of law.

These arguments are presented in the following form: Part I considers the *in rem* body by first explicating the correct understanding of the concept of property rights in the context of the human body and then applying that concept to the human body. Parts II and III take up the task of addressing the primary objections to identifying the human body as property. Part II clarifies a series of conceptual misunderstandings regarding the concepts of “body” and “person,” and Part III discusses the extent to which anti-commodification critiques should affect the application of the concept of “property” to the human body, while considering how the uniqueness and the “thingness” of the body necessitates a “law of the body.”

I. THE BODY AS PROPERTY

The argument presented here holds that a property framework best explains our existing commitments with respect to the legal treatment of the living human body. But before situating a living human body within our existing property institutions, a word or two about property as a concept and as an institution are warranted.

A. *The In Rem Theory of Property*

There was a time not long ago when those laboring within the discipline of legal scholarship seemed to be uniformly in the thrall of what has been (perhaps misleadingly) described as the “bundle-of-rights” conception of property, that anyone who spoke of “property” as a distinct concept must surely have missed the first day of their first-year property course.³⁵ Most

³⁵ Abraham Bell & Gideon Parchomovsky, *Reconfiguring Property in Three Dimensions*, 75 U. CHI. L. REV. 1015, 1015 (2008) (“As any first-year student knows, modern theorists have savaged the idea of ‘absolute dominion’ and tend, instead, to view property as a ‘bundle of rights’” (footnotes omitted)).

major casebooks on the subject seem to contemplate a definition of “property” that “refers not to things, material or otherwise, but to rights or relationships among people with respect to things. . . . [consisting] of a number of disparate rights, a ‘bundle’ of them.”³⁶

The term “bundle of rights” as it relates to property theory (very) generally connotes agreement with one or both of two major tenets.³⁷ The first tenet is relatively uncontroversial. It holds that “ownership” is not a single thing but is instead a collection of severable incidents (or powers) that can be divided between and among several “owners.”³⁸

However, often when property scholars discuss the bundle-of-rights conception of property they are referring to a second and more controversial tenet: that property rights are indistinct from other types of entitlements.³⁹ Within the second-tenet bundle-of-rights conception of property, property rights are nothing more than a collection of Hohfeldian correlatives (rights, privileges, powers, and immunities) that regulate the relations of people with respect to valued resources.⁴⁰ Within this conception of property rights, the concept of “property” adds nothing to the concept of “rights.”⁴¹ Moreover, the intuition that property rights must be in some way uniquely intertwined with “things”—that is, tangible (and intangible) objects in the world—is simply

³⁶ JESSE DUKEMINIER ET AL., PROPERTY 83 (7th ed. 2010).

³⁷ This is an unfortunate but necessary oversimplification, for there are in fact many “bundle theories” that rely on many substantively distinct claims. See generally Stephen R. Munzer, *A Bundle Theorist Holds On to His Collection of Sticks*, 8 ECON J. WATCH 265 (2011) (describing different conceptions of bundle theories).

³⁸ This notion has its origin in A.M. Honoré’s classic description of the eleven incidents of ownership. A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 112–28 (A. G. Guest ed., 1961).

³⁹ Thomas W. Merrill & Henry E. Smith, Essay, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 385 (2001) (attributing to this view the understanding that property rights are analytically indistinct from other types of entitlements).

⁴⁰ Penner provides a description that is in accord with most understandings of the bundle-of-rights thesis:

In its conventional formulation, the bundle of rights thesis is a combination of Wesley Hohfeld’s analysis of rights and A.M. Honoré’s description of the incidents of ownership. According to Hohfeld, any right in rem should be regarded as a myriad of personal rights between individuals. . . . Hohfeld splinters a property right into a bundle of “rights” of various kinds, including liberties, claim-rights, powers, and immunities. Hohfeld’s model is complemented by the list of the “incidents” of ownership described by Honoré in his landmark paper *Ownership*.

J.E. Penner, *The “Bundle of Rights” Picture of Property*, 43 UCLA L. REV. 711, 712–13 (1996) (footnotes omitted).

⁴¹ Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1078 (1997) (“[F]rom Hohfeld and Coase it is an easy step to say that property rights are simply rights, to which the term ‘property’ adds nothing at all.”). The term *rights* is used loosely here. It is meant to connote a non-specific type of entitlement or interest.

mistaken within this second-tenet bundle-of-rights understanding of property.⁴² Instead, property rights are just rights, qualitatively identical to the legal entitlements assigned in contract, tort, and so forth.⁴³

Analytically, these two tenets are severable in the following manner: one may embrace the first (or even aspects or versions of the first) and discard the second (e.g., believing that ownership rights are severable, but also that they are analytically distinct from other species of entitlement), or embrace the second (or aspects or versions of the second) and discard the first (e.g., believing that ownership connotes the right to set the terms of voluntary transfer and nothing more). One might also embrace both.⁴⁴ The arguments presented here, for example, assume a version of the first tenet (that incidents of ownership are multiple and severable) but challenge the second—at least with respect to the subset of property rights that concern the ownership of tangible objects.

Nonetheless, the literature discussing the validity and utility of the bundle-of-rights conception of property most often collapses these two tenets into one unified notion that is dominated by the claims attendant to the second tenet: that property rights are analytically indistinct from other types of entitlements. Moreover, this second-tenet-dominated understanding of property as a bundle of rights enjoyed for a long while a remarkable predominance among those concerned with property theory.⁴⁵ Therefore, in the interest of simplicity, it is this second-tenet-dominated notion that the term “bundle of rights” will refer to throughout the remainder of this piece.

Many scholars⁴⁶ have traced this bundle-of-rights conception of property rights to the 1920s and 1930s era legal realists’ skepticism about natural-law-

⁴² See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 16–17 (1990) (distinguishing the popular conception of property as relating to “things” from the legal conception of property regulating the relations among people with respect to valuable resources).

⁴³ See Merrill & Smith, *supra* note 39, at 357 (describing the label of “property” on this view as “almost meaningless”).

⁴⁴ This bundle-of-rights idea is also sometimes referred to as a “bundle-of-sticks” conception of property. If one is inclined to the overly meta, this description of the severability of these ideas might be referred to as the bundle-of-sticks understanding of the bundle-of-rights conception of property—that is, assuming that three sticks qualifies as a *bundle*.

⁴⁵ While the bundle-of-rights thesis has been the subject of sufficient critique in the last fifteen to twenty years, such that there is no longer a clear consensus on the merit or role of the thesis in property discourse, as recently as 1996 Penner observed, “[T]he prevalence of the [bundle-of-rights] paradigm is undeniable.” Penner, *supra* note 40, at 713; see also Merrill & Smith, *supra* note 39, at 357–58.

⁴⁶ For example, Gregory S. Alexander observed in 1997:

based property rights, a skepticism that was implicitly supported by Ronald Coase's 1960 canonical article, *The Problem of Social Cost*. Coase's analysis suggested to many that labeling an entity *property* served only as a baseline-setting mechanism for ordering voluntary exchanges.⁴⁷ The realists' reductive idea that property rights were purely conventional rather than in some deep way ontological, coupled with Coase's perspective that all legal rights were qualitatively interchangeable (and bolstered by Wesley Hohfeld's influential notion that in rem rights were merely aggregated in personam rights), served to all but erase the conceptual category of in rem rights.⁴⁸ Within this understanding, as Thomas Merrill and Henry Smith have described it, "[p]roperty rights are simply 'entitlements,' little empty boxes filled with a miscellany of use rights that operate in the background of a world consisting of nothing but in personam obligations."⁴⁹ By 1980, Thomas Grey surveyed this landscape of collapsing property concepts and famously announced property's demise by observing that "property . . . is no longer a coherent or crucial category in our conceptual scheme,"⁵⁰ and that, in fact, property "ceases to be an important category in legal and political theory."⁵¹

[A]mong the endogenous factors influencing the shift to a more thoroughly commodificationist understanding of property is the growing acceptance of the Realists' critique of the old Blackstonian conception of property. . . . [The Realists] were responsible for replacing in mainstream legal consciousness that conception with the disaggregated, more explicitly social "bundles of rights" conception. . . . From this point of view, it simply makes no sense to think of property as pertaining only to things. Property exists in whatever resources have market value, and increasingly in American society the most valued goods are not the tangible things but the intangible interests, expectations, and promises.

GREGORY S. ALEXANDER, *COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776-1970*, at 381 (1997); see also Merrill & Smith, *supra* note 39, at 359-60, 364-66 (tracing "the rise of the view among modern legal economists that property is simply a list of use rights in particular resources," a notion that they argue finds its roots in Ronald Coase's implication "that property has no function other than to serve as the baseline for contracting or for collectively imposing use rights in resources").

⁴⁷ R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁴⁸ See Penner, *supra* note 40, at 729 ("The logical implication of Hohfeld's view is that while the notion of a thing qua *tangible object* may be functional with respect to describing one variety of rights in rem, no concept of a right to a thing provides any plausible basis for defining a subset of rights in rem under the rubric of 'property rights.'").

⁴⁹ Merrill & Smith, *supra* note 39, at 385.

⁵⁰ Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69, 74 (J. Roland Pennock & John W. Chapman eds., 1980).

⁵¹ *Id.* at 81.

Grey's eulogy was insightful insofar as it was addressed to the extraordinary change in the way we acquire and interact with wealth.⁵² Grey astutely observed that from the dawn of humanity until the modern era, the wealth we had was primarily tangible.⁵³ Wealth resided in our material objects: our food, shelter, and tradable commodities.⁵⁴ But in the modern era our wealth resides in our promises and claims backed by the force of law: trusts, bonds, insurance, and securities.⁵⁵ These are not things that we can touch. The "thingness" of property—the focus on the possibilities attendant to in rem rights—seemed, in light of Grey's insight, antiquated. *Property* as a distinct intellectual discipline seemed like a relic from a bygone worldview that is best brushed away to make way for the modern realist-Coasean-Hohfeldian world where wealth is created, transferred, and destroyed solely through our interactions with others: a perfectly in personam world.⁵⁶ When we speak of property, in Grey's view, we mean to speak of wealth, and our wealth is no longer in rem.⁵⁷

Grey was not wrong in describing this dissonance between modern wealth creation and in rem rights.⁵⁸ But he reached too broadly when he swept all of property away with this insight. In personam entitlements are best suited to structure our abstract wealth (and the markets that generate that wealth), but it does not follow that in personam entitlements are best suited to order our interactions with the tangible world. And ordering our interactions with the

⁵² *Id.* at 73. For an excellent overview of the intellectual evolution of the concept of *property* in American legal discourse, see ALEXANDER, *supra* note 46. Alexander begins with a description of the concept of *property* in the Civic Republican Era (late 18th century America) as primarily concerning real estate (a significant portion of which was not freely market alienable) and carrying through to the modern perception that the "basic, if not sole, purpose of property is the satisfaction of individual preferences through market transactions." *Id.* at 379.

⁵³ Grey, *supra* note 50, at 73 ("Much of the wealth of the preindustrial capitalist economy consisted of . . . houses . . . land . . . [and] shops and tools . . ."); see also ALEXANDER, *supra* note 46, at 4 ("Property, of which the only important form was the freehold estate in land, was more than wealth; it was authority . . .").

⁵⁴ *Cf.* Grey, *supra* note 50, at 73 ("Much of the wealth of the preindustrial capitalist economy consisted of the houses and lots of freeholders [and] the land of peasant[s] . . .").

⁵⁵ *Cf. id.* at 70, 74 ("[T]he collapse of the idea of property can best be understood as a process internal to the development of capitalism itself.").

⁵⁶ *See id.* ("We have gone . . . from a world in which property was a central idea mirroring a clearly understood institution, to one in which it is no longer a coherent or crucial category in our conceptual scheme."); Merrill & Smith, *supra* note 39, at 385 ("Most modern economic accounts . . . [state that] [p]roperty rights are simply 'entitlements,' little empty boxes filled with a miscellany of use rights that operate in the background of a world consisting of nothing but in personam obligations.").

⁵⁷ *See* Grey, *supra* note 50, at 69–70.

⁵⁸ *Id.*

tangible world has always been the province—the unique province—of the conceptual framework of property. We will still need a concept of “thingness” as long as we live in a world of things.

Fortunately, the concept of in rem property rights has in recent years enjoyed something of an intellectual renaissance. Merrill and Smith, in particular, have worked to provide a place for the concept of in rem property rights within property theory writ large.⁵⁹ In their view, property rights are qualitatively distinct from other types of rights in that they are properly understood as in rem rights, rights that exist by virtue of one’s relation to a particular object,⁶⁰ rather than merely as a type of entitlement indistinguishable from other types of entitlements.⁶¹ They described this distinction:

Because core property rights attach to persons only through the intermediary of some thing, they have an impersonality and generality that is absent from rights and privileges that attach to persons directly. When we encounter a thing that is marked in the conventional manner as being owned, we know that we are subject to certain negative duties of abstention with respect to that thing—not to enter upon it, not to use it, not to take it, etc. And we know all this without having any idea who the owner of the thing actually is. In effect, these universal duties are broadcast to the world from the thing itself.⁶²

By arguing that “core” property rights are in fact in rem rights, and that in rem rights are qualitatively distinct from in personam rights, Merrill and Smith returned attention to the tangibility, the “thingness” of property rights—or at least, as argued here, *some* property rights—thereby articulating the qualitative line between property rights and other species of entitlements.⁶³

The argument presented here builds upon these ideas about the in rem character of property rights and holds that *tangible* property rights form an

⁵⁹ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) (arguing that the *numerus clausus* principle is necessitated by the in rem nature of property rights).

⁶⁰ Merrill & Smith, *supra* note 39, at 359. Merrill and Smith actually extended their claims with respect to the in rem character of property rights, and would have included intangible (yet “core”) property interests, such as intellectual property interests, within their understanding of in rem rights. Merrill & Smith, *supra* note 59, at 19. This Article, however, deals (for better or worse) only with the concept of in rem rights in tangible objects of property, and the argument presented here departs in this way from the full implications of Merrill and Smith’s position.

⁶¹ Merrill & Smith, *supra* note 39.

⁶² *See id.* at 359.

⁶³ *See id.*

analytically distinct form of “ownership,” a form that is both characterized by and constituted by the attribute of “thingness.” The “thingness” of property rights is significant in that we know things about our legal duties with respect to a thing that is owned even if we do not know who the owner is.⁶⁴ We know, for example, that we cannot take it, or use it, or destroy it without permission.⁶⁵ We know, too, that we have these duties with respect to a thing even though we are not party to a contract. We know this because everyone has the same duties with respect to that thing. Merrill and Smith elaborated:

Because property rights create duties that attach to “everyone else,” they provide a basis of security . . . [T]his feature of property imposes an informational burden on large numbers of people As a consequence, property is required to come in standardized packages that the layperson can understand at low cost. This feature of property . . . constitutes a deep design principle of the law that is rarely articulated explicitly.⁶⁶

This deep design principle is known as the principle of *numerus clausus* (literally, “the number is closed”).⁶⁷ The principle of *numerus clausus* limits the kinds of interests that are possible in property to a set number and thereby prevents the customization of property interests.⁶⁸ For example, in real and personal property the principal forms of ownership interest are the fee simple, fee simple defeasible, life estate, and leasehold.⁶⁹ There are also interests that concern the right to use real and personal property, which include servitudes, profits, and licenses.⁷⁰ Thus, in contrast to contractual obligations—which can assume almost any form (excluding, of course, a narrow band of unconscionable, illegal, and otherwise unenforceable agreements) and consequently result in a perhaps infinite number of types of obligations—our entitlements and obligations with respect to “core” property rights must fit within the standardized and finite set of recognized property interests.⁷¹

The classic example of the application of the principle comes from the oft-discussed case of *Garner v. Gerrish*, in which a landlord drafted a lease authorizing the tenant to stay in possession of the leasehold property as long as

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ *Id.*

⁶⁷ Merrill & Smith, *supra* note 59, at 4.

⁶⁸ *Id.*

⁶⁹ *Id.* at 3.

⁷⁰ The forms of interests available in intellectual property are a bit more complex. *See id.* at 8.

⁷¹ Merrill & Smith, *supra* note 39, at 387.

the tenant wished—ostensibly granting the tenant the exclusive right to terminate the lease.⁷² The landlord died, and his successor in interest tried to terminate the lease.⁷³ The court held that because there was no such thing as a “lease for life,” the court would have to determine which of the recognized forms of property interests came closest to capturing the interest the landlord intended to convey.⁷⁴ Though the agreement suggested that the landlord intended to create a “lease for life,” the landlord was precluded from creating this interest by the principle of *numerus clausus*.⁷⁵

As the *Garner* example illustrates, the principle of *numerus clausus* curtails the power of the owner to distribute his property in unconventional forms.⁷⁶ The principle is necessary in the context of property (as opposed to say, contract) in part because the property obligations we assume often burden our tangible resources and those resources are finite. For example, assume that you rent my house and you overstay our agreement. If our agreement were to sound in contract you would owe damages, but you would not (excluding special circumstances) be required to specifically perform (which, here, would mean leaving the house). However because our agreement to lease my house sounds in property rather than contract, I have the option as a matter of course to have you put out of the house.⁷⁷ This is because the lease governs the disposition of a particular and unique entity—my house, not merely your behavior with respect to my house. The house itself lies in the foreground of our agreement and our respective behavior with regard to the house lies in the background.

More significantly, most of what is important to know about the legal status of the house we know by virtue of the entity itself, without reference to any particular agreement. Because it is a house we know that someone has the right to use it, as someone always has the right to use a piece of real property.⁷⁸ Our lease merely fills in the details of *who* has the right to use it and for *how long*.⁷⁹ A set of in rem interests attend the existence of the valuable entity, and those

⁷² 473 N.E.2d 223, 223 (N.Y. 1984).

⁷³ *Id.*

⁷⁴ *See id.* at 224.

⁷⁵ The court ultimately decided that the landlord had conveyed a determinable life estate. *See id.* at 225.

⁷⁶ *See* Merrill & Smith, *supra* note 59, at 3 (“Generally speaking, the law will enforce as property only those interests that conform to a limited number of standard forms.”).

⁷⁷ *See, e.g.,* Randy G. Gerchick, Comment, *No Easy Way Out: Making the Summary Eviction Process a Fairer and More Efficient Alternative to Landlord Self-Help*, 41 UCLA L. REV. 759, 777–80 (1994) (explaining that a landlord may evict a tenant under certain circumstances).

⁷⁸ *See* Merrill & Smith, *supra* note 39, at 359 (explaining that rights are broadcast from the thing itself).

⁷⁹ *See id.*

interests are assignable in various standardized forms to different owners at different times.⁸⁰

Further, unlike entitlements created in contract, we can know our obligation with respect to the valuable entity without knowing who has the right to enforce that obligation. A stranger passing by my house does not need to know the details of our agreement—whether you or I have the right of present possession with respect to the house—to avoid trespassing.⁸¹ The stranger need not know *who* has the right to use my house in order to respect that right. The right to exclude is broadcast by the object itself.⁸²

It is this sense that in rem interests append to the valuable entity itself that sets property entitlements apart from other types of legal interests. Of course it is not literally the case that inanimate objects can be said to “have” or “convey” interests. Only people have and convey interests. But in rem interests are irrevocably appended to a *particular* entity. You own a particular car or a particular parcel of real property.⁸³ Tokens, not types, are the province of in rem interests.⁸⁴ In other legally bounded areas of life, rights, interests, privileges, duties, and obligations are created and destroyed through our interactions with others. Yet, in rem interests exist by virtue of the existence of a valuable entity, even in the absence of either a specific holder of the rights or even a specific person against whom it may be immediately pressed. If, for example, I were to abandon my house without transferring the right of possession to another person, the capacity of the house to be owned would not be diminished.⁸⁵ The house would remain “ownable” even if I fail to pass *my*

⁸⁰ *Id.* This point illustrates that the in rem theory of property rights advanced here is compatible with—indeed relies upon—the first tenet of the bundle-of-rights conception of property, which holds that the incidents of ownership are severable.

⁸¹ Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59, 74 (2011) (“Normally, privately owned tangibles convey clear signals with respect to whether or not non-owners are welcome to use them in certain ways. A residential house presents asocial (though not necessarily anti-social) signals, as non-owners are not invited unless expressly so.”).

⁸² Merrill & Smith, *supra* note 39, at 359.

⁸³ Dorfman & Jacob, *supra* note 81, at 64 (“Ownership, in other words, is a form of decisional authority over the legal status of others vis-à-vis an object.”).

⁸⁴ For an explanation of tokens and types, see LINDA WETZEL, TYPES AND TOKENS: ON ABSTRACT OBJECTS (2009).

⁸⁵ The term “abandon” here is used colloquially and does not refer to the legal term of art because one cannot legally abandon real property. See *Pocono Springs Civic Ass’n v. MacKenzie*, 667 A.2d 233, 236 (Pa. Super. Ct. 1995). One can, however, lose title to real property by failing to eject an adverse possessor within the statutory period, and it is this scenario that the hypothetical contemplates. See Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 140–41 (1918).

right of possession on to another person.⁸⁶ A third party could enter the house and gain the lawful right of possession without ever entering into an agreement with me. Instead the third party could gain the right of possession exclusively by interacting with the house itself (i.e., by retaining exclusive possession of the house for a statutory period of time). My abandoned house stands capable of conferring ownership, even in the absence of an agreement between consecutive owners, because houses are inherently “ownable.”⁸⁷

Similarly, the value of my house as a thing in the world, as shelter, although influenced certainly by in personam entitlements (most notably the complex system of claims and promises backed by force of law that constitutes the “market” that sets housing prices in my neighborhood) resides in part, yet irreducibly, within the carpentry of its hardwood floors, the craftsmanship of its dormers. Regardless of what we agree to believe about my house, about the housing market, about mortgages and insurance, there lie the floors. While our property concepts collapsed into in personam entitlements, the dormers stood. The tangible world is ordered, certainly, by our claims and promises, but we should not mistake it for claims and promises.

Finally, this in rem quality of property rights has significance because it lowers information costs, thereby making it possible to make better use of our valuable resources.⁸⁸ More often than not, when we encounter and interact with an object in the world, we do not also have the opportunity to interrogate all of the object’s previous owners.⁸⁹ Consequently, if we had to investigate an infinite number of ways in which interest in an object could be allocated, it would be difficult to make profitable use of the object.⁹⁰ Imagine, for example, that I want to buy a car from my neighbor. The property interests one can hold in a car are standardized and finite, and so I know that if I purchase the car in fee simple, I will be free to use the car as I wish.⁹¹ However, in the absence of the principle of *numerus clausus*, it is possible that a previous owner of the car

⁸⁶ See Ballantine, *supra* note 85, at 141.

⁸⁷ See *id.*

⁸⁸ See Merrill & Smith, *supra* note 39, at 387 (“If the legal system allowed in rem rights to exist in a large variety of forms, then dutyholders would have to acquire and process more information whenever they encountered something that is protected by an in rem right.”).

⁸⁹ See *id.*

⁹⁰ See *id.* (“Each dutyholder would either incur great costs in informing herself [of her duties vis-à-vis the object], or would be forced to violate property rights wholesale, defeating the benefits of security, investment, and planning that these rights were meant to secure.”).

⁹¹ See DUKEMINIER ET AL., *supra* note 36, at 194 (“The fee simple absolute is as close to unlimited ownership as our law recognizes.”).

sold a peculiar interest in the car to a third party—say, the right to drive the car every third Wednesday of the month—before selling the car to my neighbor. In a world in which any imaginable interest can be created with respect to the car (and assuming my neighbor knows nothing about the third-Wednesday interest), it would be prohibitively burdensome for me to investigate all imaginable interests that might have been conveyed with respect to the car. Under such circumstances, I would be disinclined to purchase the car, as I would be too uncertain about the scope of the rights I could acquire through the purchase.

Thus, the principle of *numerus clausus* is appropriate when we are concerned about ownership interests that append to “things” because of the inherent “thingness”—the *in rem* character—of the *tangible* subjects of property.⁹² When I convey an interest in my real or personal property, the scope of the interest I can convey is inherently limited by the entity itself (e.g., I cannot convey to you more house than I have), and it is limited by the finite number of interests that are legally cognizable with respect to that entity (e.g., I can only convey a fee simple, a defeasible fee, a life estate, or a leasehold). At the same time, *everyone* is obligated to respect my property interests (my right to the exclusive use of my house lies *against all others*).⁹³ But because others need not investigate an infinite array of interests that might exist vis-à-vis my house, they can succeed in respecting my rights (and meeting their legal obligations) at a relatively low cost.⁹⁴

So property interests in the *tangible* objects of property are more than “little empty boxes filled with a miscellany of use rights” indistinguishable from other types of entitlements.⁹⁵ With the restoration of the concept of *in rem* rights, we can identify the deep design at the core of tangible property interests that reflects the simple fact that tangible property interests (while owned by people) append to *things*.⁹⁶ This deep design implicitly and intuitively structures our interactions with the material world, a world populated by finite, unique, and valuable things. And it is with this deep design in mind that attention is now turned to the task of demonstrating that this *in rem*

⁹² This is not to say, of course, that property principles do not or should not extend to intangible entities. It is only to say that our legal principles assume a special character—an *in rem* character—in the context of the tangible. See Dorfman & Jacob, *supra* note 81, at 72–80 (characterizing the “circumstances of tangible property” as distinct from those of intangible property).

⁹³ See Merrill & Smith, *supra* note 39, at 359.

⁹⁴ See *id.*

⁹⁵ See *id.* at 385.

⁹⁶ See *id.*

understanding of property rights best explains the legal treatment of the living human body.

B. The In Rem Body

The law is silent on the question of the legal status of a living human body. A person, of course, enjoys a legal identity. A person's blood, organs, tissue, sperm, and ovum can enjoy legal identities.⁹⁷ A deceased body enjoys a legal identity.⁹⁸ But a living body is omitted from this taxonomy.⁹⁹ Yet despite this omission, the law's treatment of the living human body is consistent with the paradigm of in rem property interests described above. In fact, a conception of the human body as our unique and finite property best explains both the legal treatment of a living human body and our conventional and intuitive understandings of our relationship to our bodies. These ideas are explored in turn below.

1. The Legal Construction of In Rem Body Rights

To say that the human body is an entity of value is to make an understatement, and generally when we encounter a new entity in the world (or, as here, an entity that has gained new value through technological revolution), the contours of our concept of what counts as "property" extend to include the new entity.¹⁰⁰ However, in finding the living human body to be an unsuitable extension of the concept of property, we have made an exception to our usual practice.

Usually, two criteria are sufficient for an entity to fall within our concept of property: (1) the entity must be valued (i.e., the entity is capable of being put to a valuable use); and (2) it must be "ownable" (i.e., ownership rights backed by

⁹⁷ See generally Rao, *supra* note 13 (describing the legal status of these bodily products).

⁹⁸ See *id.* at 446–59 (explaining that dead bodies are protected as quasi-property).

⁹⁹ But see Peter Halewood, *On Commodification and Self-Ownership*, 20 *YALE J.L. & HUMAN.* 131, 141 (2008) ("Liberal legalism has a complex relationship to the body and embodiment; it simultaneously emphasizes and de-emphasizes the body.").

¹⁰⁰ Harold Demsetz famously described the process of the extension of the legal concept of property in the following manner:

[P]roperty rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization. Increased internalization, in the main, results from changes in economic values, changes which stem from the development of new technology and the opening of new markets, changes to which old property rights are poorly attuned.

Harold Demsetz, *Toward a Theory of Property Rights*, 57 *AM. ECON. REV. (PAPERS & PROC.)* 347, 350 (1967).

the force of law can be assigned with respect to the entity). In the legal context, the extension of the concept of property to a new entity has historically been driven by either the discovery of the new entity or some significant change in circumstances regarding the use of a known entity.¹⁰¹ For example, when copying technologies advanced from handwritten copies to the moveable printing press, our legal concept of property matched pace, affording first a property right in the physical product (i.e., the book) and then in the content of the book.¹⁰² When the movable press eventually gave way to a revolution in electronic copying technologies of ever-increasing sophistication, our concept of property followed suit, itself exploding into a sophisticated array of ways to own what was once only “ownable” in physical form.¹⁰³

Thus, when conditions are ripe—when we discover something new (or something that is useful in a new way) that is also “ownable”—our concept of property bends to accommodate the new entity. Historically, this process of concept extension has unfolded in three discrete analytic steps. First, when a new (valuable) entity has been discovered or created, or when a new use has been uncovered with respect to an existing entity, we have extended the legal concept of property to that entity.¹⁰⁴ Once we have identified the entity as property (i.e., “ownable”), we have used the principles and conventions that govern our concept of ownership to discern the *owner* of the entity (i.e., the criteria by which ownership rights should be distributed in this context).¹⁰⁵ Finally, once the entity has been identified as property and the owner properly identified, we look at the nature of the resource in question and the degree to which its use stands in tension with other uses and rights to determine the scope of the rights (or, more accurately, “incidents of ownership”) that attach to the ownership of that entity.¹⁰⁶

¹⁰¹ See Sherwin, *supra* note 41, at 1076. Discussing the circumstances in which new property interests are created, Sherwin wrote:

[There are] three ingredients of a property right: an object of property, conditions of ownership that identify who owns it, and incidents of ownership, which include all the ways in which the owner is legally permitted to use and benefit from the object. A property right arises whenever the law defines the first two of these—an object of property and conditions of its ownership—by means of substantially determinate rules, rules whose meaning will be fairly constant over time.

Id.

¹⁰² See BRIAN FITZGERALD ET AL., INTERNET AND E-COMMERCE LAW: TECHNOLOGY, LAW AND POLICY 154 (2007).

¹⁰³ See *id.*

¹⁰⁴ See Sherwin, *supra* note 41, at 1076.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

But the entity of the living human body has proved impervious to this process of concept extension. The touchstone of this imperviousness—and indeed the touchstone of nearly all analysis of the legal status of the human body—has long been the oft-cited case of *Moore v. Regents of the University of California*.¹⁰⁷ It has been more than twenty years since the California Supreme Court articulated its surprisingly enduring conception of the degree to which one owns one's body, yet it still remains the primary articulation of courts' reluctance to extend the concept of property to the human body.¹⁰⁸

In *Moore*, the court was called upon to determine whether John Moore, who suffered from hairy-cell leukemia, "owned" or had other property interests in his spleen after it had been removed from his body during the course of a medical treatment.¹⁰⁹ In the course of his treatment, Moore's doctors discovered that Moore's white blood cells were clinically unique. Without Moore's knowledge or consent, his doctors retained his spleen for medical research.¹¹⁰ The research culminated in the patenting of a highly lucrative cell line,¹¹¹ and Moore, upon discovering that his cell structure formed the basis of the cell line, sued the doctors for conversion on the theory that he retained a property interest in his spleen after its removal.¹¹²

The court decided that Moore lacked the requisite ownership interest in his spleen to sustain an action for conversion.¹¹³ The court, in reaching this conclusion, observed that the "laws governing such things as human tissues

¹⁰⁷ 793 P.2d 479 (Cal. 1990) (in bank). That the case remains a touchstone of analysis regarding property in the human body is perhaps best illustrated by the fact that the author has yet to find an article, essay, or book that deals centrally with the question of property in the body that does not both cite and discuss *Moore* as the prime (and, in most instances, only) statement of the common law approach to property in the body. Peter Halewood, for example, provided a particularly colorful account of the significance of the case:

The decision [in *Moore*] is at once an ordinary dispute about consent and profit, and a strange story of profanity and sacredness, abandonment and salvation, dismemberment and attachment, authorship and exclusion, injury and healing, truth and virtue, slavery and freedom. It represents an important (and baffling) moment in judicial, jurisprudential, and scholarly grappling with the social meaning of the body, its relationship to the self, and the rights the body enjoys or conveys.

Halewood, *supra* note 99, at 148–49 (footnotes omitted); *see also, e.g.*, DICKENSON, *supra* note 23, at 16–17; HARDCASTLE, *supra* note 10, at 65–71; J. W. Harris, *Who Owns My Body*, 16 OXFORD J. LEGAL STUD. 55, 77–84 (1996).

¹⁰⁸ *See Moore*, 793 P.2d at 494 (explaining that "[l]iability based upon existing disclosure obligations, rather than an unprecedented extension of the conversion theory," protects Moore's interest).

¹⁰⁹ *Id.* at 480.

¹¹⁰ *Id.* at 481.

¹¹¹ *Id.* at 482.

¹¹² *Id.* at 487.

¹¹³ *Id.* at 497.

[and] transplantable organs . . . deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property.”¹¹⁴ The court then revealed its principal concern over extending the concept of property to include bodily materials to be instrumental: “The extension of conversion law into this area will hinder research by restricting access to the necessary raw materials. . . . This exchange of scientific materials, which still is relatively free and efficient, will surely be compromised if each cell sample becomes the potential subject matter of a lawsuit.”¹¹⁵ Extending the concept of property to include bodily materials would create uncertainty of title because it would be prohibitively expensive to investigate the origin of bodily materials.¹¹⁶ Uncertainty of title in bodily materials, in turn, would chill biological research, which is a public good.¹¹⁷

However, not insensitive to the perceived injustice that befell Moore (he was, after all, the person who inadvertently produced the unique raw material upon which the lucrative patent ultimately depended), the court concluded that Moore could have better protected his interest had he been informed by the researchers of the potential value of his tissue.¹¹⁸ Informed consent, then, rather than property, was the mechanism by which the court sought to give effect to Moore’s interest in his bodily material.¹¹⁹

Yet in concluding that Moore could protect his interest in this bodily material by being informed of its value, the court implicitly adopted an *in rem* understanding of Moore’s living human body. Although the court avoided describing Moore’s interest in the spleen as a property interest, and instead described his interest as a bodily integrity interest, Moore’s bodily integrity was not meaningfully in contest in the course of the removal of his spleen. Moore consented to removal of the spleen in the course of his medical treatment.¹²⁰ The spleen would have been removed regardless of whether it was of research value. The use of his disembodied spleen did not affect the integrity of Moore’s otherwise intact body. On the other hand, by providing Moore with a mechanism for determining what would happen to his bodily

¹¹⁴ *Id.* at 489 (footnotes omitted).

¹¹⁵ *Id.* at 494–95 (citation omitted).

¹¹⁶ *Id.* at 494.

¹¹⁷ *See id.*

¹¹⁸ *See id.* at 485.

¹¹⁹ *See id.*

¹²⁰ *Id.* at 481.

material after its removal, the court implicitly assumed that Moore had a property interest in the disembodied material that could survive its removal as long as Moore *voluntarily transferred* his interest in the spleen rather than *abandoning* it.

In this framing, the court's decision is entirely consistent with property doctrine's emphasis on possession and the voluntary transfer of interests in the context of in rem rights. Our interest in our personal property is generally destroyed when we abandon it, and when we surrender possession without first transferring our interest in our property, our actions suggest abandonment. This is particularly true when—as with Moore—we surrender possession with no expectation of having our property (here, the spleen) returned to us and no intention of seeking its return.¹²¹ For example, if I abandon my sofa on the sidewalk with no intention of returning for it, in the hope that a third party will assume possession of it (and thereby relieve me of the difficulty of having it hauled away) and a third party does indeed assume possession of it, I have no claim against the third party. While I certainly had property rights in my sofa prior to my abandonment, all of my interest in my sofa is destroyed upon abandonment.

This doctrine of abandonment seeks to quiet title and thereby encourage the use of valuable objects, while balancing the interest of a bona fide (if neglectful) owner against the public value of encouraging the best use of finite resources.¹²² An abandoned object ceases to broadcast a clear message about our shared obligations concerning the object (as in rem rights are good against all others), and the doctrine of abandonment seeks to resolve that uncertainty.¹²³ Of course, what it is to abandon a sofa is distinct from what it is to abandon a car, a railroad track,¹²⁴ or a piece of jewelry, and it is unremarkable that property doctrine is filled with explanations aimed at illuminating what constitutes abandonment in these and other contexts.

In this light, the central holding of *Moore* is merely an articulation of the standard for abandonment in the context of bodily material: we abandon our bodily material when we consent to its removal and make no provision for its

¹²¹ See Richard A. Posner, Essay, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535 (2000) (describing abandonment and its consequences).

¹²² See *id.* at 559 (describing a rationale for the doctrine of adverse possession).

¹²³ See Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 361 (2010).

¹²⁴ See *Preseault v. United States*, 100 F.3d 1525, 1544–49 (Fed. Cir. 1996) (en banc) (identifying actions that give rise to abandonment in the context of a railroad track).

disposition or return.¹²⁵ For it to be possible for us to abandon our interest in an object, we must first have an interest in the object. By tying abandonment and the survival of that interest to the concept of possession, the court implicitly assumed that the interest we have in our bodily material is an in rem interest. Moore's interest was irrevocably bound to that particular spleen, and his actions regarding that spleen determined the scope and survival of his interests.

So rather than denying the possibility that we own our bodies, the holding in *Moore* actually *relies* upon the assumption that we own our bodies. If Moore had no interest in his spleen prior to the splenectomy, the decision would be rendered incoherent. *Moore* cannot stand for the proposition that Moore abandoned his interest in his spleen by voluntarily surrendering it with no expectation of its return, if Moore had no interest in his spleen prior to the splenectomy. Further, it follows that if Moore owned his spleen while it was part of his living and intact body, Moore likewise owned his living and intact body. It is difficult to imagine a rendering of human body ownership in which we own some parts of our intact and living body (such as our spleen) but not, somehow, the whole.

Let us return now to the idea that core property rights are in rem interests, and that in rem interests are unique in that they accommodate the attributes of "thingness" attendant to the tangible world, including: (1) the fact that tangible objects are unique to varying degrees (the paradigmatic example of a unique resource is real property) and finite;¹²⁶ (2) that they exist independent of our claims and promises concerning them; (3) that we often encounter and interact with objects in the absence of their owners; (4) that the interests that exist in material substances are binding on everyone, and yet those interests do not necessarily depend upon an agreement between anyone; and (5) that as a general matter the existence of an object provides notice as to our legal obligations with respect to that object.

The primary means by which in rem interests (in contrast to in personam interests) accommodate these attributes of "thingness" is through the principle of *numerus clausus*, which limits the forms that interests in objects can assume. This standardization of the forms of property takes account of the attributes described above by reducing the ways in which finite and tangible property can be laden with burdensome and remote interests and by reducing

¹²⁵ See Strahilevitz, *supra* note 123, at 361.

¹²⁶ See Dorfman & Jacob, *supra* note 81, at 73 ("[T]angible objects come with discrete, *spatial boundaries*, not merely metaphorical, but real: doors, gates, locks, bag zippers, picket fences, or walls . . .").

information costs surrounding rights in property. Accordingly, we are able to more easily adduce our rights and obligations when we encounter objects in the world and tangible property can be put to its best use.

The living human body (and its constituent parts and products) fits squarely within this in rem rights paradigm. As a resource, the human body is finite and unique not only in that there are an exhaustible number of living human bodies, but also in that living human bodies are not fungible. My body is not an adequate substitute or replacement for your body. Each living body serves a unique and nontransferable function, and a person who is separated from her body cannot be made whole with either money damages or a replacement body. Of all the other core property interests, only real property shares this attribute of uniqueness so completely, and real property is the model upon which our in rem understanding of rights is built.¹²⁷

Further, an in rem rights regime responds directly to the public policy concerns voiced by the court in *Moore*.¹²⁸ The court was concerned with whether researchers who encounter human tissue could proceed with productive experimentation free of worries about quieting title to the tissue.¹²⁹ The court noted that biological researchers often encountered human tissue years or even decades after it had been separated from the body of origin, and if lingering, undefined interests could be retained by the original owner, biological experimentation would surely be hindered.¹³⁰

Yet while carefully avoiding describing human tissue as “property,” the court utilized the tools already in place within our legal scheme for dealing with tangible, finite resources to protect against the typical pitfalls that hinder the productive use of tangible resources.

So the court reached a result that is consistent with our existing understandings of in rem interests—indeed relies on those understandings—but the great failure of the opinion is that the court was unwilling to explicitly classify Moore’s interest in his own living body as a property interest. *Moore* has been cited more than 4,000 times and virtually every jurisdiction to consider the question has adopted some version of the *Moore* court’s

¹²⁷ See *id.* (“It [is] not surprising, then, that land, especially a discrete piece of land with a house built on it, is often considered ‘the central symbol for property.’” (quoting Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 351 (1996))).

¹²⁸ See *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 493–97 (Cal. 1990) (in bank).

¹²⁹ See *id.* at 494.

¹³⁰ See *id.* at 494–95.

approach.¹³¹ As a result, the legal status of the living human body has been suspended in a kind of limbo as courts following *Moore* persist in assuming without acknowledging that we have a limited, standardized set of rights in our bodies, yet decline to identify those interests as “property.”

As a consequence of this silence, we are left with an incoherent doctrine that deems our bodily material to be “property” only once it is separated from us, which allows us to convey good title to (some of) our body parts and products to others and even designate what will become of our body once we are deceased, yet denies that we own our whole and living bodies.¹³²

This unwillingness to describe a human body as property seems predicated on a series of conceptual misunderstandings and misplaced concerns about human body commodification,¹³³ which are discussed in detail in Parts II and III below. But beyond the simple awkwardness, incoherence, and even distributive injustice of the doctrine, this basic denial of the tangibility, the “thingness” of our bodies, has generated a thicket of tensions between our intuitive understanding of our body ownership and the legal scope of our body ownership, a few of which are considered in the section that follows.

2. *The Conventional Construction of the In Rem Body*

Much public attention has been paid to the legal status of the human body.¹³⁴ Frequently this attention follows media coverage of the most sensationalized aspects of human body commodification, as when funeral home directors conspire to steal body parts from cadavers entrusted to them by

¹³¹ *E.g.*, Wash. Univ. v. Catalona, 437 F. Supp. 2d 985, 997 (E.D. Mo. 2006) (holding that research participants conveyed an *inter vivos* gift of their tissue to researchers and any rights the participants had in their tissue disappeared once they were given to a third party); Greenberg v. Miami Children’s Hosp. Research Inst., Inc., 264 F. Supp. 2d 1064, 1074–75 (S.D. Fla. 2003) (holding that a donor retains no property rights in donated human tissue once the tissue has been separated from the body).

¹³² See Rao, *supra* note 13, at 459–60.

¹³³ For example, Justice Arabian, concurring in *Moore*, voiced a misplaced concern that the designation of *property* would necessarily increase commercial alienability of the human body. He observed:

Plaintiff has asked us to recognize and enforce a right to sell one’s own body tissue *for profit*. He entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much.

Moore, 793 P.2d at 497 (Arabian, J., concurring).

¹³⁴ Cf. DICKENSON, *supra* note 23, at 1 (“Commodification of the body . . . has caused great, if sometimes belated, outrage among patients’ rights organisations, academic commentators, journalists and the general public . . .”).

bereaved families;¹³⁵ or black market organ traffickers harvest healthy organs from residents of the world's poorest communities for transplantation into wealthy Americans or Europeans;¹³⁶ or a biotech company charges a controversially high fee for the use of gene-based breast cancer prediction technology;¹³⁷ or a couple becomes embroiled in a custody dispute over frozen embryos;¹³⁸ or even when an individual with body dysmorphic disorder seeks the right to have a healthy limb amputated so that his body may conform to his self-image as an amputee.¹³⁹ Such stories stir the public's imagination regarding the plasticity of the human body and raise questions regarding a person's legal relationship to her own body.

Yet the legal answers to these questions rarely match our intuitions. Although we seem to share a strong intuitive sense that we "own" our bodies¹⁴⁰—that is, that we enjoy a unique dominion in our corporeal selves and that a set of a priori rights attend this dominion—our intuition is mistaken. We do enjoy a constitutional, autonomy-based right of bodily integrity (permitting us, for example, to decline medical treatment). We also enjoy some criminal law protections of our bodily integrity (e.g., laws that punish those that harm our bodies). We even enjoy some private law privileges of bodily integrity (permitting us, for example, to recover when battered). However, none of these rights, protections, or privileges are explicitly predicated on an ownership relationship to our own body.

Yet our intuitive sense that we "own" our bodies is deeply ingrained from an early age. Any parent who has been petitioned with a backseat complaint of "Mom, my sibling is touching me," is familiar with the scope of our intuitive concept of body ownership. In the moral framing of these pro se complainants,

¹³⁵ 3 *Charged with Selling Body Parts*, MSNBC (Oct. 4, 2007, 11:54 PM), http://www.msnbc.msn.com/id/21140879/ns/health-health_care/t/charged-selling-body-parts/; see also Michael Brick, 4 *Men Charged in What Officials Call a \$4.6 Million Trade in Human Body Parts*, N.Y. TIMES, Feb. 24, 2006, at B4.

¹³⁶ Larry Rohter, *Tracking the Sale of a Kidney on a Path of Poverty and Hope*, N.Y. TIMES, May 23, 2004, at A1.

¹³⁷ See HARDCASTLE, *supra* note 10, at 3.

¹³⁸ *Davis v. Davis*, 842 S.W.2d 588, 589 (Tenn. 1992). In *Davis*, a couple collaborated in creating seven pre-embryos for in vitro fertilization but divorced prior to implanting the embryos. *Id.* Each sought the right to decide the disposition of the pre-embryos upon dissolution of the marriage. *Id.* One party wished the pre-embryos to be destroyed while the other wished to donate them to an infertile couple. *Id.* at 590. The court held that the parties each had an interest "in the nature of ownership" with respect to the pre-embryos. *Id.* at 597.

¹³⁹ See generally Tracey Elliott, *Body Dysmorphic Disorder, Radical Surgery and the Limits of Consent*, 17 MED. L. REV. 149 (2009) (discussing the disorder and the degree to which patients have a right to seek elective amputation).

¹⁴⁰ See Harris, *supra* note 107, at 55 ("Property notions are both deeply entrenched in popular consciousness and also extremely fluid.").

the ownership right we enjoy in our bodies encompasses an absolute right to exclude that exists in a nearly intolerable tension with an equally robust right to use. When such rights-conscious owners find themselves confined in taunting proximity, it is perhaps predictable that backseats should erupt into cross-claims of trespass, nuisance, and actions to eject.

The ease with which we intuitively identify our body as “ownable” (and ourselves as the “owner”)¹⁴¹ seems only to accelerate as we pass into adulthood. As adults we observe an array of conventions that delineate and defend the physical boundaries of our “body-property.” For example, we stand the requisite distance from our neighbors, we decline to engage in uninvited touching, we acknowledge our neighbor as the sole authority as to the appropriate treatment of his body, and we recognize the right of our neighbor to object when we violate these conventions.¹⁴² Similarly, as a semantic matter, we use the language of ownership to describe the conventional rights we ascribe to ourselves with respect to our bodies. Linguistically, I lay claim to the right to use “my” body in the manner that I see fit (short of harming the body of another), reserving no linguistic possibility of a more democratic management of this unique resource.

Thus, to measure by our behaviors, we understand our body to be an entity in the world—perhaps the only entity in the world—over which each of us is solely vested with dominion.¹⁴³ We speak and behave with confidence in our body-property, and we have structured our social conventions to enforce these intuitions and thereby regulate relations with others with respect to our body.¹⁴⁴ In other words, both our social practices and our linguistic description of those practices suggest that our conventional concept of “ownership” extends to the human body.¹⁴⁵

¹⁴¹ See Herring & Chau, *supra* note 33, at 34 (“[T]here is a widespread assumption that your body is yours.”).

¹⁴² This is not to say that we self-consciously think of these behaviors as a mechanism of protecting our body-property, or even necessarily that we engage in these behaviors *because* they reflect well-settled norms about the human body (although this may be the case). See ANDREI MARMOR, *SOCIAL CONVENTIONS: FROM LANGUAGE TO LAW 5–7* (2009) (noting that “[w]e often follow norms without being self-consciously aware of the fact that we do so,” or the reason that we do so, or even the reason for the rule itself).

¹⁴³ See, e.g., Richard Birke, *Law of the Body Symposium Introduction*, 45 WILLAMETTE L. REV. 1, 1 (2008) (“[T]o the extent that the body is a thing over which we can exercise dominion, it may be fairly said that we ‘own’ our bodies.”).

¹⁴⁴ See Harris, *supra* note 107, at 58.

¹⁴⁵ See *id.* (“[We] seem to share an intuitive sense of what property is. We get by in daily life with a range of conventional property talk which has no problems in ‘knowing’ who owns [particular objects]. . . . Must we assume that there is a radical disconnection between this conventional property talk and its background

So an understanding of the legal status of the human body that acknowledges explicitly that we have a property interest in our own living body would draw our legal conception of body-ownership closer in line with our conventional conception of body-ownership. But once we make explicit what is implicit in the *Moore* court's legal construction of the human body, what is the content of the property interest we hold in our bodies? This question is considered below.

C. *In Rem Body Rights*

Given that the bundle-of-rights conception of property holds that property rights have no particular content and are instead merely instrumental to the setting of baseline prices for voluntary exchanges, how should we understand the content of an in rem property interest in the body? In other words, what does it mean to "own" one's body?

Property theorists who have rejected the second tenet of the bundle-of-rights theory of property rights have embraced a number of different substantive models of the content of property rights, including but not limited to a version of the in rem model of property discussed above. However, those who reject the bundle-of-rights model generally coalesce around a substantive model of the content of property rights that has as its core the concept of exclusive use. For those that fall into this camp, the doctrine of "against all others" is, by most lights, the central, substantive commitment of a claim to property.¹⁴⁶

So to have an in rem property right is to have the exclusive right to use a tangible entity including, minimally, the right to exclude others (as is necessarily implicit in a right to use that is good against all others). Often this right to use extends to include a limited ability to determine what happens to the entity after an owner is dispossessed of it (as when we devise Blackacre to our devisees, or, alternatively, transfer Blackacre *inter vivos* to our church on

assumptions, on the one hand, and the theoretical agenda of philosophy or the adhocness of legal practice, on the other?").

¹⁴⁶ See, e.g., 2 WILLIAM BLACKSTONE, COMMENTARIES *2 (defining the property right of "against all others" as "that [s]ole and de[s]potic dominion . . . over the external things of the world, in total exclu[s]ion of the right of any other individual in the univer[s]e"); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 711 (1986) ("The right to exclude others has often been cited as the most important characteristic of private property."); see also Thomas W. Merrill, Essay, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 730 (1998) ("[The right to exclude is] the *sine qua non* [of property]. Give someone the right to exclude others from a valued resource . . . and you give them property. Deny someone the exclusion right and they do not have property.").

the condition that it be used for church purposes only).¹⁴⁷ This ability is limited, however, in that we are typically not able to control the future of Blackacre indefinitely. The content of our control is limited by public policy (i.e., unconscionable conditions will not be honored), and we can forfeit the right to future control (by, for example, failing to pay taxes or oust an adverse possessor).¹⁴⁸ Similarly, the right to exclusive use often contemplates the ability to transfer the entity to others—although the degree to which transfer is permitted depends upon both the nature of the entity and public policy considerations.¹⁴⁹

In the context of a living human body, the exclusive right to use is inherent in the structure of the entity itself. A living human body is the most immovable of all resources. If, for the sake of this discussion, we think—provisionally—of the person who is born into a body as that body’s “original owner,” we can readily say that no one else can use a human body in a manner that is in any way commensurate to the manner that the original owner uses it. Certainly other people can make other profitable uses of the owner’s body, for example: labor uses,¹⁵⁰ sexual uses,¹⁵¹ gestational and reproductive uses,¹⁵² or even advertising uses as described in the anecdote that commenced this piece.¹⁵³ But no other living person can use the body in the same way (or as completely) as the original owner. No one else relies on the original owner’s body to wholly sustain his or her life. For no other person can the body become the repository of “personhood”—or, by some lights, the sum of personal identity.¹⁵⁴

¹⁴⁷ BLACKSTONE, *supra* note 146, at *156.

¹⁴⁸ See LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 32–38 (1955) (discussing restrictions on dead-hand control).

¹⁴⁹ For example, an absolute right to transfer would include the right not to transfer. The doctrines of adverse possession and eminent domain thereby render the right to transfer property less than absolute.

¹⁵⁰ G. A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY 165 (1995).

¹⁵¹ Peter Landesman, *The Girls Next Door*, N.Y. TIMES, Jan. 25, 2004, § 6 (Magazine), at 30.

¹⁵² See Hellman, *supra* note 11, at 537.

¹⁵³ See *supra* note 2 and accompanying text.

¹⁵⁴ See, e.g., Halewood, *supra* note 99, at 132 (“At once mysterious and mundane, our bodies are home in a very basic sense to our personhood and subjectivity, however understood.”). However, Derek Parfit has introduced some thought experiments that challenge this conclusion. For example, he imagined a future world in which one can be “transported” to Mars at the speed of light by a teletransporter that scans each cell of the transportee, then destroys the brain and body of the transportee. The teletransporter then replicates the transportee’s body exactly using new material on Mars. The transportee experiences a psychological continuity after the teletransporter destroys and reassembles (or, more accurately simply assembles) his replica. The transportee awakens on Mars feeling himself to be the same person that he was on Earth, yet he is in a new body. Is the body of the replicated transportee *his* body or the body of another person? DEREK PARFIT, REASONS AND PERSONS 200–02 (1984).

This is not to say that an original owner cannot be separated from her body¹⁵⁵ but such a separation necessarily results in death, and death necessarily transforms the living human body into another kind of entity: a corpse. A corpse may still be of use, but it cannot be put to the same uses that a living human body can be put to, as it is a different entity than a living body and is distinguished from a living body by a number of important attributes.

So an “original owner” can be separated from her exclusive right to use—a right, which, as described above, is the central feature of “ownership” within an *in rem* understanding of property rights—but she cannot transfer her exclusive right to use (which, again here is synonymous with “ownership”) to someone else. In other words, no one can become a second or subsequent owner of an intact and living human body. Because of the structure of the entity itself, a body is only “ownable” once and can only be owned by the original owner.

Further, although the use of the term “occupant” is misleading in that it distinctly evokes images of Descartes’s ghost in the machine (as described *infra* at Part II), another way of describing this idea is to analogize a living human body to a house and the person who is born into that body to the house’s first occupant. The human body cannot be severed from the possession of an initial occupant and delivered into the possession of another to serve the same (or an equivalent) function in the subsequent owner as it serves in the first. In fact, if we separate the living human body from its owner, the resource itself is destroyed. It will never again be an intact and living human body. With respect to the first occupant, the body is singularly necessary. No other body will do. To take a body from the initial occupant is to deprive that occupant of any avenue of continued life.

Within this analysis, our relationship to our whole and living body assumes the form of an inalienable property right. “Inalienable” here means that it cannot be separated from the owner of the right and transferred to another—not that it cannot be extinguished at all. As discussed above, the exclusive right to use a whole and living body simply fails to vest in another person because the act of transfer would destroy the entity that is owned—the right to use the body is incapable of separation by virtue of the nature of a living human body. The content of one’s inalienable property right in her body is, minimally, the exclusive right to use her body (e.g., to live), a right that also necessarily

¹⁵⁵ The Cartesian problems of this framing will, aspirationally, be mitigated *infra* at Part II.

encompasses the right to exclude all others (e.g., to exercise sexual and medical autonomy, to be free from injury to the body). These rights are necessarily essential to the concept of “ownership” in the context of the human body, but like all rights they can be circumscribed in deference to other competing rights (e.g., one can forfeit the right to be free from injury to the body when one threatens the bodily integrity of another) and, in some circumstances, extinguished altogether (e.g., the exercise of the death penalty).¹⁵⁶

Further, our existing legal structure (although silent on the legal status of the living human body) backs an exclusive right to use the body with the force of law. For example, rape law, the crimes (and torts) of battery and assault, domestic violence law, the constitutional protections of due process,¹⁵⁷ the Fourth Amendment prohibition against unreasonable seizure,¹⁵⁸ the Eighth Amendment prohibition against cruel and unusual punishment,¹⁵⁹ and the *Cruzan* line of cases guaranteeing the right to bodily integrity all support a person’s right to exclude.¹⁶⁰

So our ownership right in our living body assumes the form of an inalienable, exclusive right to use coupled with an attendant right to exclude. More significantly, this understanding of body-ownership is consistent with (and in fact best explains) the law’s treatment of the living human body. Why then have courts and lawmakers been so recalcitrant in their reluctance to identify property rights in the living human body? As discussed in the Introduction, the primary reasons that courts, lawmakers, and scholars have offered for resisting a property rights paradigm with respect to the human body seem predicated on a series of conceptual confusions and consequentialist fears. These issues are considered in Parts II and III, respectively.

¹⁵⁶ Moreover, beyond the core right of exclusive use, our inalienable property right in our body would seem to encompass at least a limited right to include (e.g., sexual autonomy).

¹⁵⁷ See *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (noting the Fourteenth Amendment prohibits actions that shock the conscience).

¹⁵⁸ See *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) (holding that the Fourth Amendment prohibition against unreasonable seizures includes the right to be free from excessive use of force by police).

¹⁵⁹ See *Estelle v. Gamble*, 429 U.S. 97, 103–04 (1976) (noting that the Eighth Amendment prohibits the unnecessary and wanton infliction of pain).

¹⁶⁰ *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 279 (1990) (recognizing the right of competent persons to refuse certain medical treatments). *But see* *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (deciding that the fundamental right of bodily integrity does not extend to the right to physician-assisted suicide).

II. CONCEPTUAL CLARITY: BODIES AND PERSONS

A whole and living human body is undeniably a material substance in the world.¹⁶¹ It is incontrovertible to say that human bodies are “spatio-temporal continuants consisting of matter, occupying space, excluding other things of the same kind from the space they occupy.”¹⁶² In other words, in this most literal sense, a human body is obviously an object.¹⁶³ That it is also more than a mere object is not disputed here. It is sensible that we should regard the human body as a repository—if not, indeed, the sum—of our personhood, and therefore as a unique and even sacred object in the world.¹⁶⁴ But in addition to whatever metaphysical attributes the human body embodies, it is also an entity in the world that is exceptionally useful and scarce. For those who require organ transplants, bone marrow, or blood, those who yearn for a child but cannot conceive or bear one, those who suffer from diseases that our genes hold the key to curing, indeed for each of us the human body is the most essential entity in existence.

Further, as discussed above, the living human body falls within the extension of both our legal and conventional concepts of property, and a property framework best explains our existing legal commitments concerning the treatment of the human body. Yet by many lights the conclusion that the human body is a type of property remains an uneasy one: if a human body is an object of property, how can this notion be reconciled with existing understandings of personhood (or human status) as paradigmatically distinct from mere objects?¹⁶⁵

The first part of the difficulty that we have with understanding the body as property stems from a semantic awkwardness. What exactly is a human body? In constructing an explanation of the body, language seems to fail because words like “thing” or “object” seem ill-fitting or even grotesque as applied to a human body. We are accustomed to thinking of a word like “object” as a tool in distinguishing the special or superior class of sentient entities from the class of lesser entities that are *mere* things.¹⁶⁶ In this sense, to describe a person as a

¹⁶¹ P. M. S. HACKER, HUMAN NATURE: THE CATEGORICAL FRAMEWORK 29 (2007).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ The question of what, if anything, a person is beyond her living body is touched upon in Part II, although it is not a primary focus of this piece.

¹⁶⁵ MARGARET JANE RADIN, CONTESTED COMMODITIES 155–63 (1996) (discussing the distinction between objects and subjects and that distinction’s relationship to personhood).

¹⁶⁶ *See id.*

“thing” or “object” is to violate this important normative distinction. As a consequence of our intuitive person–object dichotomy, describing the body as a “thing” sounds debasing to many ears.¹⁶⁷

A second, perhaps more salient, set of difficulties with the idea of the body as an object of property lies in our discomfort surrounding the idea of “owning” people.¹⁶⁸ This objection depends on an understanding that a living human body is synonymous with a person and so “owning” a body runs afoul of the Thirteenth Amendment’s prohibition against slavery.¹⁶⁹ An even deeper version of this concern worries that if a person is nothing more than his or her living body (which some scientists and philosophers believe to be the case), then it becomes incoherent to say a person owns his or her own body because one cannot both own something and be the thing that is owned.¹⁷⁰

Each of these sets of worries about identifying a living human body as property is rooted in a conflation of the concepts of “body” and “person.” These two concepts, while certainly related, are sometimes treated as coterminous, and if they are coterminous (i.e., if a person is no more or less than (or nothing other than) her body and vice versa), it may be incoherent to say that a person owns her body. Similarly, concern for the degree to which a body is accorded the same dignity that is due to a person seems to turn on some sense that a living human body is a person. Thus, before a coherent understanding of the legal status of the human body can emerge, attention must be turned to this problematic entanglement of ideas about the concepts of “person” and “body.”

A. *The Subject–Object Problem*

The argument that it is incoherent to say that a person owns herself has its roots in Kant:

Man cannot dispose over himself, because he is not a thing. He is not his own property—that would be a contradiction; for insofar as he is a person, he is a subject, who can have ownership of other things. But now were he something owned by himself, he would be a thing over which he can have ownership. He is, however, a person, who is not property, so he cannot be a thing such as he might own; for it is

¹⁶⁷ *See id.*

¹⁶⁸ *See Radin & Sunder, supra note 22, at 9* (raising the specter of our nation’s “bitter history” of slavery in the context of the question of bodily commodification).

¹⁶⁹ *Id.* (observing that slavery involved equating a person with a thing).

¹⁷⁰ HACKER, *supra* note 161, at 304; PRICE, *supra* note 21, at 28.

impossible, of course, to be at once a thing and a person, a proprietor and a property at the same time.¹⁷¹

However, in addressing this subject-object concern, as an initial point it is important to be clear that our conventional concept of “person” is distinct from our legal concept of “person.” When the law defines what “counts” as a person, it is not applying our conventional concept. Instead, the law is using the same *word* to refer to an entirely different *concept*. Our conventional concept connotes an ontological engagement with the category of personhood: what are the necessary and sufficient conditions to “count” as a person and so forth. The legal concept, in contrast, connotes an engagement with what “counts” as a person in a given legal context. Generally, this inquiry is pursued by using the accepted forms of legal argument, including the accepted tools of statutory construction and the accepted methods of constitutional interpretation.¹⁷² For example, in the context of interpreting 42 U.S.C. § 1983, the Supreme Court determined that municipalities were “persons.”¹⁷³ In deciding this, the Court was concerned with whether the Congress of 1871 that passed § 1983 *intended* for the word “person” to include municipalities within the meaning of the statute. To resolve this question, the Court took § 1983’s legislative history to be evidence of whether municipalities are “persons.”¹⁷⁴ In contrast, the legislative history of § 1983 cannot be thought to have any bearing on the question of what counts as a person in the conventional or ontological sense.

Within the legal concept, a “person” is an entity to whom rights and duties attach, to whom laws apply, and so forth. Depending on the context, both natural persons and non-natural persons such as corporations¹⁷⁵ and, as described above, municipalities, may fall within the extension of this legal concept.¹⁷⁶ The legal concept of “person” delineates the boundaries of hard cases in which it is unclear whether whatever is meant by “person” in a given legal context should be extended to include a particular entity, for example, a

¹⁷¹ IMMANUEL KANT, LECTURES ON ETHICS 157 (Peter Heath & J.B. Schneewind eds., Peter Heath trans., Cambridge Univ. Press 1997).

¹⁷² See, e.g., *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978).

¹⁷³ *Id.* at 690.

¹⁷⁴ *Id.*

¹⁷⁵ See *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886) (holding corporations as persons within the legal concept).

¹⁷⁶ *Monell*, 436 U.S. at 690.

frozen pre-embryo, a fetus, or an individual in a persistent vegetative state.¹⁷⁷ In these hard cases, adjudicators may or may not refer to our conventional or ontological concept of “person” as evidence of what lawmakers intended “person” to mean (or for textualists or constitutional originalists, what the text means) in a given legal context.

Here enters the concept of “ownership.”¹⁷⁸ In the context used here, an “original owner” of a body is the person who is born with that body. The concept of “owner” as used in this sense is a legal concept. It connotes the entity that may claim property rights in an entity.¹⁷⁹ “Owners,” in this sense, need not be people in the conventional, ontological sense at all. A corporation, an elementary school, the United States, the United Nations, and an Indian tribe are all capable of being owners in this sense. With respect to the living human body, an “owner” is an entity that is entitled to lay claim to exclusive use of a living human body, and as discussed above, the only entity that may claim this right is the original owner.

So one easy response to concerns about whether it is coherent to say that a person “owns” her body is to exploit the fact that an owner in this context is a legal concept, and when we speak of a person who “owns” (or who “counts” as an owner), we are referring to the legal concept of “person” (i.e., the entity upon which rights are conferred in a particular legal context) and not the conventional concept of “person,” which is illustrated by the fact that owners of property can be non-natural persons. The fact that in the specific context of body-ownership the owner is always a natural person does not undermine the fact that when we are speaking of “owners” as a class and “people” as a class of owners, we are referring to the legal concepts of “owner” and “people.”

In this light, we need not worry that it is incoherent to say that a person owns her body because when we say this, we are referring to the legal concepts of “person” and “own.” Therefore, it is immaterial whether the conventional or ontological concept of “person” is or is not coterminous with the concept of “body.”

It is tempting to rest there and not trouble any more about the entanglement of ideas about bodies and persons. Yet there are lingering problems with

¹⁷⁷ See, e.g., Kimberly Kessler Ferzan, *Symposium Foreword*, 39 RUTGERS L.J. 237, 237–38 (2008) (surveying the legal personhood of psychopaths, animals, and fetuses).

¹⁷⁸ See Jesse Wall, *The Legal Status of Body Parts: A Framework*, 31 OXFORD J. LEGAL STUD. 783, 785–86 (2011) (describing the ownership spectrum with respect to human body parts).

¹⁷⁹ Where that claim is backed by force of law.

respect to the conflation of the concepts of “bodies” and “persons.” Setting aside the expedience of the distinction between the legal and conventional concepts of “person,” if when we speak of “bodies” we are also necessarily speaking of “people” (that is, if a person is her body), then in identifying the body as property we may necessarily be identifying people as property. This would support the concern that the dignity and personhood status of people is imperiled by designating the human body “property.” Further, it may also lend support to the concern that by describing a living human body as “ownable,” we run afoul of the Thirteenth Amendment’s prohibition against slavery.¹⁸⁰ Therefore, a consideration of whether a person is her body and what this means in the context of body-ownership follows.

B. Disaggregating Persons and Bodies

Analytic philosophers have long been engaged in the project of analyzing the concept of “person,” and this work has yielded a number of discrete accounts of a “person.”¹⁸¹ It is, of course, an enormous intellectual undertaking to attempt to define what “counts” as a person. Fortunately, we need not arrive at a definitive account of the criteria that define “person” in order to dispel the confusions that hinder the emergence of a “law of the body.” Instead we need only to determine whether a person can be said to be anything other than (or anything more than) her body, and, if not, what this conclusion means in the context of body ownership.

This question is situated within what is known in philosophy as the “mind–body problem.” The mind–body problem considers whether one of two mutually exclusive accounts of the connection between a person and her body is correct.¹⁸² The first of these accounts is dualism, which holds that a person is constituted of both physical properties (one’s body) and nonphysical properties¹⁸³ (usually, one’s mind, but sometimes one’s soul, intellect, consciousness, or identity).¹⁸⁴ Modern dualism has its roots in Descartes’s *Meditations*, in which he argued that a person is comprised of two substances: matter (which is extended in space) and the mind (which thinks).¹⁸⁵ On

¹⁸⁰ U.S. CONST. amend. XIII, § 1.

¹⁸¹ *E.g.*, HACKER, *supra* note 161, at 310–16; PARFIT, *supra* note 154.

¹⁸² See William D. Hart, *Dualism*, in A COMPANION TO THE PHILOSOPHY OF MIND 265, 265 (Samuel Guttenplan ed., 1994).

¹⁸³ *See id.*

¹⁸⁴ This is a regrettable oversimplification for the limited purpose of this discussion. There are, of course, many dualisms. *See generally id.* at 265–67.

¹⁸⁵ See HACKER, *supra* note 161, at 240; *see also id.* at 240–47 (detailing the “Cartesian mind”).

Descartes's view, a body operates as a machine in the sense that it proceeds deterministically by a set of laws that govern the physical properties of the body, except when the mind intercedes.¹⁸⁶ When the mind intercedes, the mind, Descartes thought, pulls levers in the brain to cause certain behavioral effects.¹⁸⁷ This account of the mind pulling levers in the brain gave rise to the infamous ghost-in-the-machine description of Descartes's dualism.¹⁸⁸

Modern dualist mind-body accounts have largely departed from Descartes's dualism.¹⁸⁹ The ghost-in-the-machine account has been roundly criticized for failing to provide an account of *how* the mind intercedes in the otherwise deterministic workings of the body, as well as for providing a nonphysical account of the mind when there is no evidence to support such an account, and for other failings too numerous to recount here.¹⁹⁰ To many, if not most, modern philosophers of the mind, the ghost-in-the-machine account represents an intellectual error that continues to structure our conventional sense that we consist of a mysterious, ephemeral "self" that is distinct from, and not dependent on, our physical self.¹⁹¹

The criticism that it is incoherent to say that a person both is and owns her body makes reference to this ghost-in-the-machine error, and posits that one entity cannot both be the subject and object of ownership.¹⁹² On this view, to understand that a person owns her own body is to necessarily imply that a person is something other than her body.¹⁹³ Whatever this "other" is falls outside of the physical phenomena of the living human body and is, therefore, akin to a ghost in the machine.

A mutually exclusive alternative to the dualist account of the connection between a person and her body is reductionism (sometimes associated with

¹⁸⁶ See *id.* at 240–41.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*; see also GILBERT RYLE, *THE CONCEPT OF MIND* 15–18 (Univ. of Chi. Press 2002) (1949) (describing the ghost-in-the-machine metaphor).

¹⁸⁹ Although Descartes's dualism has largely been abandoned, some modern philosophers of the mind proceed from the assumption that mental states are irreducible to physical (i.e., neurobiological) phenomena. See Howard Robinson, *Dualism*, *STAN. ENCYCLOPEDIA PHIL.* (Nov. 3, 2011), <http://plato.stanford.edu/entries/dualism/>.

¹⁹⁰ See RYLE, *supra* note 188, at 15–18; Robinson, *supra* note 189.

¹⁹¹ See RYLE, *supra* note 188, at 15–18; Robinson, *supra* note 189.

¹⁹² But see HACKER, *supra* note 161, at 304. Hacker states the problem this way: "To speak of the body I have is to speak of [an entity that I inhabit or *occupy*]. But I cannot *inhabit* what I *am*. . . . The thought that one inhabits the body one has arises from failure to grasp the logical character of the idioms of *having a body*." *Id.* (internal quotation marks omitted); Wall, *supra* note 178, at 786.

¹⁹³ See HACKER, *supra* note 161, at 304.

materialism), which in the context of the mind–body problem holds that all phenomena related to the person/body connection depend upon (or can be reduced to) physical phenomena.¹⁹⁴ Although there are many strands of reductionism, each of which posits discrete and sophisticated accounts of the mind–body connection, for the limited purpose of the discussion here it is sufficient to focus on the most radical of these accounts, which I will conveniently (and, unfortunately, reductively) refer to as the *radical reductionist view*.¹⁹⁵ Within the radical reductionist view, not only are all mental phenomena reducible to physical phenomena, but a person (or self) is composed of physical and psychological continuity and nothing more.¹⁹⁶ There is, in this view, no “self” (no mind, no mental processes, no identity, no consciousness) that stands apart from the physical continuity.¹⁹⁷

It would seem that the radical reductionist account of a person presents the greatest challenge to the coherence of the statement: a person owns her body. If this account is true, then when we speak of a person we really are speaking of nothing more than a living human body (a deceased body being another entity altogether). It would follow that to the extent that the demarcation of property is debasing when applied to a person, it is equally debasing when applied to a body. In this case, the “thingness” connotation of property does violence to the important normative distinction between “mere objects” and “persons.”

However, if we embrace the radical reductionist view then it is not clear that a coherent normative distinction between “mere objects” and “persons” exists. If it is indeed the case that we are nothing apart from the sum of the physical processes of our bodies, then the “thingness” connotation seems sensible, even true, in that we are comprised of literally the same “thingness” as all other things. It may be the case that our physical processes give rise to special attributes (e.g., sentience and sapience) and that these attributes are particularly worthy of dignity and moral respect, but it is not clear how describing an entity that has these attributes as “property” debases that entity, when the attributes themselves are reducible to a set of things (e.g., atoms, biological processes). It should not be debasing to accurately describe an entity. It is only when we omit or ignore important moral distinctions that we

¹⁹⁴ See Howard Robinson, *Davidson and Nonreductive Materialism: A Tale of Two Cultures*, in *PHYSICALISM AND ITS DISCONTENTS* 129, 129–30 (Carl Gillett & Barry Loewer eds., 2001).

¹⁹⁵ See PARFIT, *supra* note 154, at 266–73.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

debase an entity. I say this not to advocate that we should embrace the radical reductionist account, but only to demonstrate that if we do embrace this account then the critique this account levels at the idea we own our bodies seems to lose its bite.

On the other hand, if it is an error to think of a person as merely the aggregate of things (e.g., atoms, biological processes), then the radical reductionist account is wrong, and we are left with some version of either non-reductionist materialism or some version of dualism. In either case, there exists some criterion of “self” (or mind, or mental processes, or identity) that is irreducible to the aggregated physical phenomena of the body, and whatever that criterion is distinguishes the concept of “person” from the concept of “body.” If this account is true, we need not worry that when we call a body “property” we are necessarily debasing the concept of “person” because “person” and “body” are different concepts.

So without knowing whether the dualist, non-reductionist materialism or radical reductionist account of the connection between a person and her body is correct, we can conclude that either “person” and “body” are distinct concepts or, alternatively, it is not debasing to describe a person as “property.” Further, in light of the distinction between the legal and conventional concepts of “person,” as well as the meaning of “ownership” in the context of the living human body, we can safely conclude that it is not incoherent to say a person owns her body.

The insights described above should be sufficient to likewise put to rest concerns about whether a property interest in a living human body necessarily stands in tension with the prohibitions of the Thirteenth Amendment. However, because concerns about body-ownership and slavery frequently appear in scholarship addressed at this issue, a consideration of ownership in the context of the Thirteenth Amendment follows.¹⁹⁸

C. Ownership and the Thirteenth Amendment

Margaret Radin and Madhavi Sunder have observed, “The Thirteenth Amendment forms the backdrop of [cases like *Moore*]. Our nation’s long and bitter history of subjugating an entire racialized group of people to slavery offered a devastating critique of commodification—here, the *reduction of*

¹⁹⁸ See Radin & Sunder, *supra* note 22.

persons to things.”¹⁹⁹ Although Radin and Sunder were speaking specifically about concerns attendant to human body commodification (an issue that is addressed *infra* at Part III), the idea that designating a living body as “property” evokes specters of slavery that periodically appeared in the literature surrounding property of the body.²⁰⁰ As such, it is sensible to address here the question of whether the practice of owning bodies is tantamount to (or shares disturbing similarities with) the practice of owning people. An initial (and perhaps dispositive) set of answers to this question was offered in the preceding section, which addressed distinctions among the concepts of “person” and “body.”²⁰¹ However, another set of answers lies in an exploration of the concept of “ownership” within the context of a living human body.

To adequately address this species of concerns about ownership of the body, we must first identify the terms and tools we bring to the task. What does it mean to own oneself?²⁰² Different scholarly communities take this question to mean different things, and because there is a risk of speaking past one another when we use phrases like “self-ownership,” some points of clarification are in order. Phrases such as “self-ownership” and “property in the person” assume distinct meanings within different scholarly communities.²⁰³ Three scholarly communities in particular have been concerned with the relationship between ownership and the human body: political theorists, analytic philosophers, and property scholars. When used in a property law context, as here, the phrase usually takes on quite a literal meaning: the question asks do we own the corporeal entity—the physical artifact—that is

¹⁹⁹ *Id.* at 9 (emphasis added).

²⁰⁰ See, e.g., HARDCASTLE, *supra* note 10, at 64 (“The starting point for any analysis of the common law in respect of living persons lies with the legal treatment of slaves Although the early common law considered that slaves could be regarded as chattels, English law thus moved to recognise that a living person should not be considered to be property. . . . [T]his fundamental premise has indelibly influenced the development of the law concerning separated bodily materials.” (footnotes omitted)); Halewood, *supra* note 99, at 132 (“Two hundred years of legal chattel slavery in the Americas makes plain the potential for collision of the market with human freedom, centered precisely on the human body—yet, of course, the discourse of self-ownership was central and instrumental in liberal abolitionist discourse.”).

²⁰¹ Another answer lies in the understanding that *slavery* connotes ownership by one person of another person, not ownership of one’s self. The abomination of slavery lies in the subjugation of one human being to the will of another. Therefore, an understanding that we each own our own bodies (and cannot own the body of another) should situate our bodies well outside the scope of the practice of slavery.

²⁰² See *supra* note 200.

²⁰³ E.g., Carole Pateman, *Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts*, 10 J. POL. PHIL. 20, 20 (2002) (describing the concept of “property in the person” as central to an understanding of important contemporary institutions and practices as they relate to libertarianism).

our living human body?²⁰⁴ The use of the term “own” in this context is a term of art peculiar to our intellectual community, as discussed above, and in this context the term “self” connotes not a metaphysical definition of the self (or self-identity) but instead we refer here to our physical body.²⁰⁵

At first blush then, as a general matter, we in the property law community are not immediately or primarily concerned with a broader set of political rights that may follow from (or, for some, define) self-ownership, such as the right to own one’s labor.²⁰⁶ Nor are we immediately and primarily concerned with understanding the concept of the “self” as it relates to the human body.²⁰⁷ Instead, we are immediately and primarily concerned with the right to exert dominion over and retain an interest in the biological capacities and physical artifact of our corporeal bodies.²⁰⁸

Political theorists, on the other hand, are generally concerned with a broader set of rights when they engage with the concept of “self-ownership.”²⁰⁹ Most often when political theorists talk about self-ownership they are talking about owning one’s own labor.²¹⁰ For example, G. A. Cohen uses the phrase to stand for the principle that “each person enjoys, over herself and her powers, full and exclusive rights of control and use, and therefore owes no service or product to anyone else that she has not contracted to supply.”²¹¹ Cohen takes

²⁰⁴ See, e.g., Guido Calabresi, *Do We Own Our Bodies?*, 1 HEALTH MATRIX 5 (1991). Calabresi’s discussion of whether we own our bodies is predicated on the assumption that a *body* connotes a physical artifact rather than a metaphysical self.

²⁰⁵ Cf. *id.*

²⁰⁶ See, e.g., HARDCASTLE, *supra* note 10, at 1. Hardcastle begins with the question: “Do you own your body?” *Id.* For Hardcastle, this clearly refers to the physical body and its component parts.

²⁰⁷ See, e.g., *id.* at 12–19 (discussing legal ownership of aspects of the human body).

²⁰⁸ See, e.g., *id.*

²⁰⁹ See Harris, *supra* note 107, at 65 (“Body ownership rhetoric presupposes a background in which a property institution reigns over various material, monetary and ideational resources and applies the terminology of that institution to the human body. Its point is to provide dramatic support for the bodily-use freedom principle.”).

²¹⁰ See *id.* (“The history of western political philosophy includes a tradition of self-ownership invocations which . . . seek to provide one kind of justificatory argument for property institutions Beginning with the premise of self-ownership, they move to the conclusion that every individual has a natural right to own the fruits of his or her labour.”). In contrast to these thinkers, Harris identifies what he describes as the “spectacular *non sequitur*” implicit in the argument that self-ownership necessitates the “bodily-use freedom principle” (or the right to own one’s labor). *Id.* at 71. He observes, “From the fact that nobody owns me if I am not a slave, it simply does not follow that I must own myself. Nobody at all owns me, not even me.” *Id.* He further notes, “Since the abolition of slavery, human beings have . . . been removed from the property agenda. Only the speculations of philosophers have sought to keep them there.” *Id.*

²¹¹ COHEN, *supra* note 150, at 12.

this principle of “self-ownership” as a foundational tenet of libertarianism,²¹² while some Marxist scholars view the same principle foundational to Marxist political theory.²¹³

Similarly, when analytic philosophers speak of self-ownership they are also not usually thinking of the alienability of the physical capacities or physical artifact of our bodies.²¹⁴ Instead, analytic philosophers are most often talking about the concept of the “self” as it relates to the body—a question that is situated in their discipline within the mind–body problem described above.²¹⁵

So the term “self-ownership,” as used here, means the right of exclusive use of one’s body where that right is backed by the force of law. Thus, “self-ownership” here means nothing more or less than owning one’s body, and as described in the preceding section, “self-ownership” in this sense can only be vested in the person who is born into the body that is owned. Self-ownership then is inalienable, and the fact of its inalienability is unalterable. This fact is true by virtue of the nature of the resource in question (the living human body) rather than by virtue of a potentially alterable legal construct. Therefore, even when the laws of the United States permitted slavery, a slave owner could not own the body of a slave in the sense that “ownership” is used here.

This point is important because it illustrates a distinction between owning a person and owning a body. Ownership of a person conveys an entitlement to curtail or exploit not only the body (e.g., in the sense of labor or sexual autonomy) of an individual, but also that individual’s time, ability, effort, and attention.²¹⁶ In this construction, the slave owner “owns” the right (backed by force of law) to override the fundamental self-ownership prerogatives of the slave (such as the right to exclude others). Correspondingly, the slave does not have self-ownership—the exclusive right to use backed by the force of law.

²¹² *Id.*

²¹³ See Pateman, *supra* note 203, at 24.

²¹⁴ Of course a number of philosophers do think and write about property as a concept, and when doing so, those philosophers make primary use of the concepts of *ownership* and the *human body*. See, e.g., DICKENSON, *supra* note 23; MUNZER, *supra* note 42; Harris, *supra* note 107; Wall, *supra* note 178.

²¹⁵ Questions associated with the self as it relates to the body are sometimes cast as a type of identity problem: wondering what are the necessary and sufficient conditions for a future or past being to be you. PARFIT, *supra* note 154. Derek Parfit, for example, examined the relationship between the self (what constitutes one’s identity?) and the body through a series of thought experiments, each predicated on a scenario in which all or some of one’s physical self is altered, divided, or destroyed. See *id.*

²¹⁶ Slavery was described by emancipated slave Garrison Frazier in the following way: “Slavery . . . is receiving by the irresistible power the work of another man, and not by his consent.” IRA BERLIN, *GENERATIONS OF CAPTIVITY: A HISTORY OF AFRICAN-AMERICAN SLAVES 2* (2003) (emphasis omitted).

Yet this right to use remains inalienable—it cannot be transferred to the slave owner, because it is not possible to use the body of another in a manner that is consistent with ownership of the body. In this framework then, a slave owner can direct, coerce, and compel a person to do certain things with his body (such as labor) or to endure certain things that are done to it (such as beating). But the slave owner cannot, quite literally, direct the slave’s body to respond to commands, nor can he live within the body of another. The abomination of slavery then destroyed the possibility of self-ownership in a slave, but that right of self-ownership was not transferred to the slave owner. It was, instead, destroyed.

However, the critique that holds that body-ownership shares disquieting similarities with slavery implicates more than merely the transfer of legal ownership rights. The critique makes reference to the fact that slaves were treated (and legally regarded) as “chattel”—personal property similar to, for example, livestock.²¹⁷ Treating human beings as chattel is, of course, horrifically dehumanizing, and the human–chattel dichotomy served as a means of normalizing, justifying, and compartmentalizing the horrors of slavery.²¹⁸ Just as Nazis used dehumanizing rhetoric to normalize and justify the atrocities they committed against Jews (e.g., describing Jews as subhuman and as vermin and swine), so too did those who participated in (or tolerated) the practice of slavery use the dehumanizing rhetoric of “property” or “chattel” to distinguish slaves from people and thereby normalize the institution of slavery.²¹⁹ Thus, because of the rhetorical power of the human–chattel dichotomy and the atrocities it served, identifying people as property can be a deeply uncomfortable designation, even where we understand that each person (or, more accurately within this analysis, each *body*) is the property of only himself or herself to the exclusion of all others.

To assuage this discomfort, it is important to focus on the notion of “to the exclusion of all others,” as it is not to be regarded lightly. An exclusive and inalienable property interest is among the strongest—indeed it is arguably *the* strongest—protection that our legal system is capable of providing. We need not characterize this interest as some rhetorical kin to the debasement of “mere

²¹⁷ See Radin & Sunder, *supra* note 22 (identifying a discursive injury attendant to identifying people as things that is connected to our national history with slavery).

²¹⁸ See Lolita Buckner Inness, *A Critical Legal Rhetoric Approach to In Re African-American Slave Descendants Litigation*, 24 ST. JOHN’S J. LEGAL COMMENT. 649, 672 (2010) (exploring the impact of various discursive approaches to slavery).

²¹⁹ See *id.*

chattel,” but we can instead understand it to be an inalienable interest that is an essential aspect of our very humanness (one must be a natural person to “own” a human body and each natural person owns one human body only).

III. CONSEQUENTIALIST CLARITY: ON COMMODIFICATION

A final species of objections that frequently accompanies proposals to extend our concept of property to include the human body concerns the commodification of the human body.²²⁰ “Commodification,” when used in this context, means (roughly) to transform an entity that has use value (people can make valuable use of the entity) into an entity that has both use and exchange value (i.e., an entity that can be traded in some type of market context).²²¹ In the context relevant here, anti-commodification scholars worry that including the human body within our concept of property transforms the body into an entity that can be traded in some form of *legal* market (as opposed to, for example, a black market).²²² Another way of saying this is that those who oppose denoting the human body as property are concerned that the denotation of “property” will render the human body alienable in some way that it is not alienable absent the denotation.

Anti-commodification scholarship has been concerned with the issue of human body alienability for decades.²²³ Scholars such as Margaret Radin,

²²⁰ Radin and Sunder have broadly summarized these concerns in the following way:

[T]he topic of commodification is reduction of the person (subject) to a thing (object). Viewed in terms of society as a whole, the inquiry is who would be the subjects of commodification—controlling the terms of the sale—and who would be its objects—turned into mere commodities in a global trade?

Radin & Sunder, *supra* note 22, at 8.

²²¹ Martha M. Ertman & Joan C. Williams, *Freedom, Equality, and the Many Futures of Commodification*, Preface to RETHINKING COMMODIFICATION, *supra* note 19, at 1, 2–3. Although I use the term *anti-commodification scholarship* to denote those writings that are concerned about the prospect of human body alienability in unfettered markets, few so-called anti-commodification scholars favor *non-commodification*—the position that “contested commodities” (such as sexual services, babies, and body parts) should be completely removed from commercial exchange. Instead, many of these scholars advocate some form of a limited or highly regulated market in contested commodities. See, e.g., RADIN, *supra* note 165.

²²² It is unfortunately necessary to simplify the multidimensional anti-commodification critique for the limited purpose of the discussion that is relevant here. For a fuller treatment of the issue of human body commodification, see generally RETHINKING COMMODIFICATION, *supra* note 19, and RADIN, *supra* note 165. In contrast there are those who argue that commodification of the human body (and its products or constituent parts) would produce more good than bad. See generally Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (serving as the canonical article advancing this position).

²²³ RADIN, *supra* note 165.

Martha Ertman, Joan Williams, and others have been thinking and writing for years about the implications of a world in which everything—babies, body parts, sexual service, even people—is for sale.²²⁴ In a literal sense, this world already exists: human trafficking for sexual service and domestic servitude is epidemic in many parts of the world,²²⁵ and robust black and “gray” markets exist for the purchase of organs²²⁶ and babies.²²⁷ Yet some anti-commodification scholars are concerned that by creating unfettered legal markets in these “contested commodities” we would aggravate—or perhaps worse, justify—existing exploitations of people (particularly poor and disenfranchised people) by forcing (through economic coercion or other duress) relatively disempowered people to render their bodies or body parts to satisfy the demand of the relatively empowered.²²⁸ Another related and perennial concern is that commercial markets would exacerbate (or, again, perhaps justify) radical inequities in the distribution of life-saving body parts along racial, ethnic, geographic, and socioeconomic lines.²²⁹ A final thread of this critique deals with the social construction of the human body (rather than the distributive consequences) and holds that making the human body available to legally sanctioned commercial markets lowers the dignity status of the human body and, consequently, devalues the concept of personhood.²³⁰

²²⁴ See generally *id.*; Ertman & Williams, *supra* note 221 (discussing the sale of babies and bodies in our society).

²²⁵ See Karen E. Bravo, *On Making Persons: Legal Constructions of Personhood and Their Nexus with Human Trafficking*, 31 N. ILL. U. L. REV. 467, 469–70 (2011); see also Ertman & Williams, *supra* note 221, at 1 (describing sex trafficking markets in which young girls and women are “purchase[d], trick[ed], or abduct[ed] . . . from impoverished areas of Mexico or eastern Europe” and forced to “engage in as many as twenty fifteen-minute sessions of sex a day”).

²²⁶ See MICHELE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS 185–86 (2006).

²²⁷ See Ertman & Williams, *supra* note 221, at 1 (describing “gray” markets “in which American parents pay to adopt third world children” and “brokers often bribe, coerce, or trick birth mothers into giving up their [babies]”).

²²⁸ See DEBRA SATZ, WHY SOME THINGS SHOULD NOT BE FOR SALE 199 (2010) (“[C]ritics raise the legitimate concern that kidney markets might actually worsen existing inequalities based on class. Such markets could expand inequality’s scope by including body parts in the scope of things that money gives a person access to.” (emphasis omitted)). Satz went on to observe that a well-regulated market in kidneys (or other organs) could theoretically address these inequities through various mechanisms. *Id.*

²²⁹ See *id.*; see also K. A. Bramstedt & Jun Xu, *Checklist: Passport, Plane Ticket, Organ Transplant*, 7 AM. J. TRANSPLANTATION 1698, 1698 (2007) (describing “transplant tourism” in which wealthy, first-world citizens circumvent domestic prohibitions against organ buying by purchasing organs from impoverished third-world citizens); Michele Goodwin, *Altruism’s Limits: Law, Capacity, and Organ Commodification*, 56 RUTGERS L. REV. 305, 349 (2004) (noting that “[w]ith regard to kidney transplantation, the waiting time for Black Americans is 74% longer than for Whites”). *But see* GOODWIN, *supra* note 226 (contesting the view that markets in body parts would exacerbate racial inequities).

²³⁰ Peter Halewood summarized this concern in the following manner:

A related and particularly cogent version of this latter thread of the critique has been offered by Michael Sandel, who holds that some entities, like the human body, are inherently morally significant, and that market valuation inherently corrupts that moral significance.²³¹ For Sandel, “certain moral and civic goods are diminished or corrupted if bought and sold for money.”²³² The problem, for Sandel, is one of incommensurability; the very process of setting a monetary value for aspects of the human body assumes that the value of the body can be translated into an exchangeable unit.²³³ This process, along with its underlying assumption, denies the moral importance of the human body.²³⁴

Each of the evils that these different aspects of the anti-commodification critique would avoid turn on a common axis: the market alienability of the human body. Alienation (which means literally to separate) in this context means to place in a commercial market, and in declining to identify a property interest in the human body the *Moore* court is perceived by some scholars to have succeeded in protecting the human body from at least this kind of commodification.²³⁵

However, these concerns are misplaced with respect to the concept of body-ownership advanced here. In support of this assertion, two points of clarification are in order. First, describing an entity as property (and, correspondingly, as “ownable”) does not increase that entity’s capacity to be traded in a market exchange. In fact, in the context of the ownership right in a living human body, the explicit designation of *property* actually makes

The commodification literature addresses the concern that we may (or may again, I should say, since commodification was brutally manifest in chattel slavery) come to own property interests in ourselves or other people and that those interests become commodities subject to market exchange in a manner which degrades or debases personhood.

Halewood, *supra* note 99, at 133–34 (emphasis omitted). Julia Mahoney has also articulated (while in the process of refuting) a version of this critique: “The fears of those who warn of the possible ill effects of market language are hard to allay, for the notion that property and market rhetoric are likely to contribute to a diminished sense of self resonates deeply.” Julia D. Mahoney, *The Market for Human Tissue*, 86 VA. L. REV. 163, 206 (2000).

²³¹ See Sandel, *supra* note 19, at 122–27.

²³² *Id.* at 122.

²³³ *Id.* at 124.

²³⁴ *Id.* at 123.

²³⁵ See Margaret Jane Radin, Transcribed Remarks, *Cloning and Commodification*, 53 HASTINGS L.J. 1123, 1128–29 (2002) (noting that the *Moore* court objected to calling Moore’s cells property and later noting that secular ethicists prefer the Kantian argument that “emphasizes respect for personhood, saying that if something is a person it’s not an object, and we have to treat it as an end not a means”). However, Radin noted that *Moore* represents a case of “incomplete commodification,” which can bring to bear its own undesirable consequences. *Id.*

commodification of the body less possible because it reveals that the right of exclusive use is inalienable. Second, to make sense of commodification concerns in the context of the human body, a distinction must be drawn between alienation of the human body and alienation of the capacities of the human body. While it is true that advances in biotechnology have accelerated the degree to which the capacities of the human body are *both* alienable and amenable to commodification,²³⁶ this fact supports the need for a coherent “law of the body” that issues from the sensible premise that we own our whole and living bodies. Each of these clarifications is considered in turn below.

A. *The Conflation of “Property” and “Commodity”*

First, as described here, the property right that exists in an intact and living human body is inalienable—it is not capable, by virtue of the nature of the resource itself (the body), of being transferred to another. The right of body-ownership identified here then is inalienable. That is not to say, of course, that a whole and living body is never a commodity. Body uses such as prostitution, surrogacy, participation in pornography, and even the selling of advertising space are all instances in which an aspect—or, more accurately, *capacity*—of the living human body becomes a tradable entity, but the core of body-ownership—the right to use (and exclude)—cannot become a commodity.

Further, the fact that body-ownership is (necessarily) inalienable means that describing the human body as “property” is actually more likely to serve as a bulwark against undesirable or involuntary body commodification than it is to render the body more vulnerable to commodification.²³⁷ Of course, to say that one possesses the inalienable right to exclusively use one’s body does not mean that decisions to use the body for prostitution, surrogacy, pornography, or advertising are “freely” made. These decisions are vulnerable to economic and other forms of coercion.²³⁸ Yet the right itself remains inalienable. No one can purchase the right to stand in our shoes with respect to our capacity to determine body use.

²³⁶ See, e.g., Howley, *supra* note 5.

²³⁷ See, e.g., Halewood, *supra* note 99, at 131 (agreeing with this proposition, but for somewhat different reasons, and noting that extending the concept of “property” may have the effect of extending self-ownership to historically subordinated groups).

²³⁸ And alienation of the body’s capacities is unfortunately much more likely to involve “a paradigmatic *desperate exchange*, an exchange no one would ever make unless faced with no reasonable alternative.” SATZ, *supra* note 228, at 195.

Nonetheless, some scholars who are skeptical about the distributive and moral consequences of body commodification have noted with approval courts' universal disinclination to identify a living human body as property.²³⁹ This line of reasoning depends on the peculiarly persistent belief that the recognition of a "property right" necessarily connotes market alienability.²⁴⁰ It is a peculiar belief (at least from the perspective of those interested in property theory) because one of the most consensus-garnering and well-settled ideas in property theory is that the mere designation of "ownership" (or the assignment of a "property right") fails, in and of itself, to convey a set of known incidents.²⁴¹ Emily Sherwin has described this phenomenon:

The odd thing about this description of property rights is that it says nothing about *determinate incidents of ownership*—definite entitlements to use a benefit from an object. . . . For example, rules about title may assign to you a parcel of land . . . but your activities on that land may be subject to a vague doctrine of nuisance and changeable government controls. In other words . . . the *incidents of ownership* that give it real value are highly indeterminate.²⁴²

The right to transfer, where it exists, is an *incident* of property, not a necessary *criterion* of property.²⁴³ The right to transfer sometimes, but not always, attends a property right, and an unfettered right to transfer exists nowhere.

So objects of property are not inherently or necessarily alienable in commercial markets, yet discussions about whether we "own" our bodies often implicitly assume that to have a property interest in the body is to have some

²³⁹ See, e.g., Rao, *supra* note 13, at 459–60 (noting that the "[t]reatment of intact living human bodies as the subject of a privacy right rather than the object of property ownership provides a normatively attractive account that is also roughly consistent with our current jurisprudence").

²⁴⁰ Price, *supra* note 21, at 27 ("[T]he false equating of property rights and market alienability has often been the seat of deep rooted objections to any notion of 'property' intruding [into the context of body materials]. Commercial transfers of (most but not all) body materials are broadly condemned in legal and ethical codes. But it is a *non sequitur* to conclude that because property rights are acknowledged that commercial transfers must be permitted." (footnote omitted)).

²⁴¹ See, e.g., *id.* (noting that "it is a *non sequitur* to conclude that because property rights are acknowledged that commercial transfers must be permitted").

²⁴² Sherwin, *supra* note 41, at 1076 (emphasis added). Sherwin described modern property rights as "two-dimensional" and inherently insecure due to the lack of determinacy an owner has with respect to the use of his property. *Id.* at 1098.

²⁴³ See Wall, *supra* note 178, at 786 (noting that "it does not follow from the mere recognition and protection of an ownership entitlement that any of the remaining incidents of ownership are also recognized and protected").

right to transfer that interest in a commercial exchange.²⁴⁴ One explanation for the persistence of this belief returns us to the dominance of the bundle-of-rights conception of property discussed in Part I of this Article. If property is nothing more than entitlements that serve the function of setting a baseline for voluntary exchanges, then property rights would seem to exist *only* to set prices so that objects of property may be traded in markets.²⁴⁵ If one embraces this understanding of property rights, then the content of our property rights seems inexorably tied to commercial markets, and where this misapprehension persists, commodification worries (understandably) follow.

Commodification-based concerns about the consequences of identifying a living human body as property are also misplaced insofar as they perceive the designation of “property” to affect the alienability of the capacities of the human body. It is beyond dispute that the human body’s capacities have become increasingly alienable. Developments in biotechnology have made it possible to transfer not only body parts (i.e., organs, tissue, bone marrow), but also *capacities* of the human body.²⁴⁶ Consider, for example, the degree to which the human body’s reproductive capacity has become alienable. It was once the case that a woman who had viable eggs but could not carry a baby to term had no opportunity to genetically reproduce. However, advances in biotechnology have now made it possible for one woman to share her gestational capacity with another woman. This development, like other advances in biotechnology, has created a type of second-order value in the human body. The first-order value of a human body is the unique value it provides to the person who is born with it. For example, my body uniquely sustains my particular life. The existence of my particular body makes possible every experience I enjoy.²⁴⁷ If my body were destroyed, I would no longer exist.²⁴⁸ In other words—and this is meant in the least Cartesian sense possible—my personal identity and claim to personhood is bound up with my particular body in important ways.²⁴⁹ No one else shares the same relationship

²⁴⁴ See DICKENSON, *supra* note 23, at 14 (observing that many commentators perceive the designation of *property* as necessarily contemplating the right to transfer).

²⁴⁵ This misunderstanding is further aggravated by the fact that in Coase’s rendering of rights, a property right seems synonymous with the right to transfer. See *generally* Coase, *supra* note 47, at 8.

²⁴⁶ Even low-tech transfers in human body capacities can result in the commodification of the body’s capacities (as with prostitution, surrogacy, and pornography).

²⁴⁷ Derek Parfit illustrates this point with a series of thought experiments designed to illuminate the problem of dividing the self from one’s body. PARFIT, *supra* note 154, at 273.

²⁴⁸ *Id.*

²⁴⁹ See *generally* Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 966 (1982) (exploring the relationship of property and personhood and discussing the embodiment theory of personhood).

of *particularity* and *necessity* that I do with my own body and its constituent parts.²⁵⁰

Nonetheless, biotechnology has created second-order value in the human body. My body is valuable to others, and that value is independent of the value my body provides to me. For example, prior to the advent of in vitro fertilization technology, my uterus had the capacity to gestate an embryo, but only *my* embryo—that is, an embryo created from my own egg. This capacity of my uterus could only be accessed by my embryo, and I was the only maternal genetic parent who could make use of this capacity. In this sense, my uterus *qua* uterus was valuable only to me and my genetic offspring.²⁵¹ Now, however, my uterus *qua* uterus is potentially useful to another maternal genetic parent seeking a means of gestating her embryo. Correspondingly, a new value is vested in me: my body's capacity to gestate is useful to others and I can make use of this capacity even if I do not wish to create a genetic child. My gestational capacity has been untethered from the use my body can make of it. In this way, through the intractable march of medical advancement, the capacities of my body have become increasingly alienable.

However, although the capacities of the human body have become increasingly alienable, it does not follow that those capacities necessarily must (or can, or should) become commodities. Instead our reasoned normative judgments will continue to make those determinations about whether the human body's capacities should be valued in monetary units or exchanged in open (or regulated) markets, and the development of a "law of the body" can only hasten and support the application of those judgments to actual body-ownership problems.

The application of in rem property concepts to the increasing alienability of the human body's capacities will not determine the normative conclusions we should draw about the appropriate degree to which the human body should be commodified. However, the application of property concepts to the human body would succeed in clearing the way for a "law of the body" to emerge that

in which "the body is quintessentially personal property because it is literally constitutive of one's personhood").

²⁵⁰ Further, to elaborate on this point, my healthy heart is not fungible with other healthy hearts. The value of the healthy heart that I have far exceeds the value (to me) of any other heart I might receive. Yet if I were in need of a heart transplant, any healthy heart would do as well as any other healthy heart. Among compatible matches, there would be no one healthy heart that I needed more than any other.

²⁵¹ Actually my whole body—not merely my uterus—is put to a new use in this example, as a disembodied uterus is not (yet) capable of gestating an embryo. *See supra* note 11 and accompanying text.

would be capable of accommodating our considered judgments and normative ends in a principled and internally coherent manner.

Recall then again the three-step analytic process by which new property rights generally emerge: first, we determine that a previously “unownable” (or previously unknown) object is “ownable” (i.e., an object of property is identified); next, we determine who owns the object (i.e., the conditions of ownership are identified); and finally, we identify the scope of ownership that attends the ownership of that object (i.e., the incidents of ownership that attend this property right are identified).²⁵² In identifying the living human body as “property” and the original occupant of that body as the (first and only) “owner,” we complete steps one and two of this process. Only by completing these first two steps can we embark on step three: identifying the incidents of ownership. The task of moderating the scope of body-ownership—the various decisions that must be made regarding which incidents of ownership attend body-ownership—will be the charge of “the law of the body.” But for that doctrine to develop, these preceding conceptual matters must first be settled.

That is not to say that we can have no intuitions about the incidents of ownership that likely attend body-ownership. As discussed earlier, we can assume that, minimally, body-ownership includes the right to exclusive use because that is a necessary condition of ownership within the *in rem* model of property. We might also assume that our settled commitment to just distributive ends regarding the distribution of kidneys, for example, will not be disturbed by the identification of the whole and living body as an object of property. Because the right to transfer is not an incident of ownership in all contexts (and in no context is it an absolute right), we can assume that existing rules regarding our ability to sell our body parts will not *necessarily* give way to a radical shift in the degree to which our body is available for commercial transfer.

Thus, it is understandable that we may worry that acknowledging the “thingness” of our bodies will somehow penetrate a conceptual or metaphysical boundary that has heretofore protected our bodily integrity, or our dignity, or maybe even the sanctity of our personhood. However, once we delve a bit deeper into the meaning of “property” and “ownership,” we see that these terms of art connote only a few very specific commitments. Many

²⁵² Sherwin, *supra* note 41, at 1076.

incidents of ownership are possible, but only a few are *necessary*. The slope here is simply not as slippery as it appears from afar.

B. The Consequences of a Law of the Body

One may pause here to wonder: if identifying the human body as “property” will not necessarily bring about a radical shift in the availability of the body for commercial transfer, if it will not necessarily disrupt the distributive consequences of the status quo, and if the sole a priori incident of body ownership is an exclusive right to use (which is already protected in many ways by a patchwork of other legal mechanisms),²⁵³ why then do we need a law of the body? Consilience and coherence of doctrine are important, but are they important enough to warrant disrupting generations of strong (albeit perhaps primarily visceral) intuitions about the appropriateness of regarding the body as property?

This sensible query calls to mind a story about Chief Judge Frank Easterbrook that is relayed by Larry Lessig.²⁵⁴ In his piece *The Law of the Horse: What Cyberlaw Might Teach*, Lessig reveals that while presenting a paper at a conference on the “Law of Cyberspace” at the University of Chicago in 1996, then-Judge Easterbrook told the conference attendees “that there was no more a ‘law of cyberspace’ than there was a ‘Law of the Horse.’”²⁵⁵ Lessig credited Chief Judge Easterbrook with raising a fair criticism: if cyberlaw is conceived of as nothing more than the aggregate of the intersection of cyberlaw with different substantive areas of law (i.e., torts in cyberspace, contracts in cyberspace, etc.), then treating cyberlaw as if it were a discrete analytic area of legal thought (i.e., as though it embodied an interdependent and (relatively) internally coherent set of generally applicable legal rules, as say, we find in tort) would “muddle rather than clarify.”²⁵⁶ If to study cyberlaw is only to trace the progress of a given thing (cyberspace, or, say, a horse) as it interacts with multiple legal regimes then cyberlaw has nothing to *add*, intellectually or practically, to our existing legal discourses.²⁵⁷

²⁵³ See generally Rao, *supra* note 13 (discussing how interests that might otherwise be cast as property interests in the human body are protected in some ways by privacy- and autonomy-based legal regimes).

²⁵⁴ Lessig, *supra* note 14, at 501.

²⁵⁵ *Id.*

²⁵⁶ *Id.* at 501–02.

²⁵⁷ See *id.* at 502 (noting that then-Judge Easterbrook argued studying “general rules” was the “best way to learn the law”).

Parallels to the “law of the body” proposed here are perhaps obvious. Chief Judge Easterbrook’s admonishment should be carefully considered any time one advances the claim that a new doctrinal area has been born (or, as is the claim here, resides uncomfortably on the precipice of a long-overdue birth).²⁵⁸ How can we adduce whether recognizing a “law of the body” would *add* something—whether it would illuminate general principles or underlying concepts—or whether it would amount to little more than a consideration of an interesting subject (biotechnology and the transferability of the human body’s capacities) within well-worn doctrinal strictures?

A first pass at this query must acknowledge that it is not possible to know with certainty what a “law of the body” will become until and unless it is indeed *permitted* to become—hence the need for the conceptual and consequentialist brush-clearing that has been undertaken here. But in making a predictive case that the law of the body will, indeed, illuminate (rather than merely regurgitate existing knowledge in a new context), it is instructive to consider the Lessig–Easterbrook exchange with the benefit of hindsight. In making the case for cyberlaw, Lessig pointed to the unique features of the thing itself—the extraordinary phenomenon of cyberspace.²⁵⁹ Here, Lessig contended, was a thing unlike anything we had seen before.²⁶⁰ It shared features with other means of communication, but it was not simply a new means of communication.²⁶¹ Cyberspace’s incredible—even, one might say, revolutionary—uniqueness wrought new kinds of problems for existing legal paradigms. These were more than old problems in a new context. Instead, the context was itself *constitutive* of its regulatory parameters.²⁶² Cyberspace, which was in the process of self-creation, was concomitantly creating a new

²⁵⁸ For a fuller treatment of Chief Judge Easterbrook’s argument against the existence of cyberlaw, see Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207. Then-Judge Easterbrook wrote, “We are at risk of multidisciplinary dilettantism, or, as one of my mentors called it, the cross-sterilization of ideas. Put together two fields about which you know little and get the worst of both worlds.” *Id.* at 207.

²⁵⁹ See Lessig, *supra* note 14, at 510–11 (describing, for example, that our movements can be monitored in cyberspace in ways for which there is not a “real space” analogue). Lessig particularly observed that “code” served as the architecture of cyberspace. Code structured and constituted the Internet. As a result, the regulatory possibilities of the Internet were likewise constituted by the characteristics of code. LESSIG, *supra* note 16.

²⁶⁰ See Lessig, *supra* note 14, at 505–06 (describing the plasticity of the architecture of cyberspace, which distinguishes it from “real space”).

²⁶¹ See *id.* at 503–05 (describing the uniqueness of cyberspace).

²⁶² *Id.* at 509.

legal landscape from which would (eventually) emerge unifying principles and elucidated cyberspace-bounded concepts.²⁶³

This Article makes a similar and analogous claim about “the law of the body.” It is the uniqueness of the *thing itself*—the physical phenomenon of the human body and the multitudes it contains—that both necessitates and recommends a law of the body. The exceptional plasticity of the human body portends uses that are yet, unimagined, and it is these uses that will dictate the parameters of the legal paradigms that will (eventually) regulate and order those uses. Like the advent of the Internet, advances in biotechnology have the capacity to transform our very forms of living, and the resulting transformation will be constitutive of the concepts and principles that govern the “law of the body.” Comes the revolution, our technological practices (interrupted, as needed, by periodic reform to conform to our intuitions of justice) will ferment into legal paradigms, and new paradigms will reciprocally serve to make sense of the practices. It is these new paradigms that will (eventually) populate the “law of the body.”

And the revolution, it seems, is coming. While body commodification is not a new business, the revolution we are experiencing in biotechnology is producing something of a runaway train. Some “law of the body” is eventually coming. The question we face is whether we wish to sidestep the stumbling of our past encounters with technological sea changes and instead embrace the opportunity to shed our confusions and shape the emerging paradigm with conceptual clarity and considered judgment.

CONCLUSION

In sum, advances in biotechnology have rendered our existing framework for understanding our legal relationship to our bodies obsolete. A “law of the body” is long overdue, yet the development of the law of the body has been stalled by a misapprehension of the nature of property rights, conceptual confusions about “bodies” and “people,” and consequentialist concerns about the necessary consequences of describing the living human body as property. Clarifying the misapprehensions that have arrested the application of property concepts to the body should clear the intellectual path so that judges, lawmakers, and scholars can begin the work of shaping a “law of the body”

²⁶³ In making these descriptive claims, it would seem that Lessig was, at least principally, right: cyberspace, as it has turned out, was no horse. In focusing on the unique architectural features of cyberspace, Lessig was, indeed, identifying a transformative entity.

into a doctrine that both accommodates our existing legal commitments vis-à-vis the body and incorporates our considered judgments about the scope of ownership rights that should attend human body ownership.

