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The Body as Me and Mine: The Case for Property Rights in Attached Body Parts

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According to a long-standing orthodoxy in the common law, the body is *res nullius*—nobody's thing. Recently, this orthodoxy has been challenged. Courts have begun to allow for property in body parts. Yet the law still insists that the body as a whole is *res nullius*; body parts must be separated from the body to become ownable. I call the prevailing view, according to which separation from the body is morally transformative, the "Separation Thesis." In this article, I argue that the law should recognize property rights in (some) attached body parts, too. To do this, I develop several candidate rationales for the Separation Thesis, but ultimately expose them as wanting. If separation from the body is not morally transformative, and we can have property rights in detached body parts, then we can have property in our bodies. This view—that less than the entirety of my body is me, and the rest is mine—is also normatively attractive. It readily explains why certain non-biological objects that fulfill bodily functions can become a part of our persons, such as wheelchairs and prosthetics. This view also grounds a right to the parts of our bodies that are not necessary to our existence as separate agents, such as hair. Other accounts struggle to substantiate the biological source's claim to such body parts because they resist the idea of property in the body. Finally, my account captures both the proprietary *and* personal wrongs a tortfeasor commits when she excises a body part from another's body without their consent. All of this implies that we can have personal rights to things outside of the body and property rights to parts of our bodies. This scrambles the intuitive alignment of "person" with "body," and "property" with "the outside world."

Selon une orthodoxie de longue date de la common law, le corps est *res nullius* — une chose qui n'appartient à personne. Récemment, cette orthodoxie a été remise en question. Les tribunaux ont commencé à admettre que les parties du corps puissent faire l'objet d'un droit de propriété. Pourtant, le droit maintient que le corps dans son ensemble est *res nullius*; les parties du corps doivent être séparées de l'ensemble du corps pour être susceptibles d'être possédées. Je nomme « thèse de la séparation » le point de vue dominant selon lequel la séparation du reste du corps est moralement transformatrice. Dans cet article, je soutiens que le droit devrait également reconnaître des droits de propriété sur certaines parties du corps qui demeurent solidaires de l'ensemble du corps. À cette fin, je développe plusieurs justifications possibles pour la thèse de la séparation, mais je démontre finalement qu'elles sont incomplètes. Si la séparation du reste corps n'est pas moralement transformatrice et que nous pouvons avoir des droits de propriété sur des parties détachées du corps, alors nous pouvons avoir des droits de propriété sur notre corps. Cette idée, selon laquelle je suis moins de l'entièreté de mon corps et j'en possède le reste, est également normativement attirante. Elle explique facilement pourquoi certains objets non biologiques remplissant des fonctions corporelles, comme les fauteuils roulants et les prothèses, peuvent devenir une partie de notre personne. Elle peut également servir à établir des droits sur les parties de notre corps qui ne sont pas nécessaires à notre existence en tant qu'agents distincts, tels que les cheveux. D'autres cadres analytiques peinent à justifier la revendication de la source biologique sur de telles parties du corps, parce qu'ils rejette l'idée selon laquelle le corps peut faire l'objet de droits de propriété. Enfin, ma théorie permet d'expliquer les préjudices sur la propriété et la personne que causerait l'auteur d'un délit en retirant une partie du corps à une autre personne sans son consentement. Tout ceci suppose que nous pouvons avoir des droits personnels sur des choses externes à notre corps et des droits de propriété sur des parties de notre corps. Ceci ébranle la correspondance intuitive de « la personne » avec « le corps » et des « biens » avec le « monde extérieur ».

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Introduction

The legal maxim, "no one is to be regarded as the owner of his own limbs," has a long pedigree in the common law, and in Roman law before that.[1] On this view, the body is *res nullius*—nobody's thing.[2] In the common law, this rule has its origins in eighteenth and nineteenth century criminal prosecutions concerning the treatment of corpses.[3] The rule has since transcended those origins; it has been consistently applied in civil disputes concerning body parts, even where these disputes concerned the separated body parts of living persons. Recently, however, this long-standing legal orthodoxy has softened. Courts have begun to allow for property in body parts. But the law still insists that the body as a whole is *res nullius*; body parts must be separated from the body to become *res*.[4] I call the view that separation is morally transformative in this way the "Separation Thesis."

This prompts (at least) two interesting questions. Why think that separation from the body is normatively transformative in a way that the law should track? And what would be gained or lost by allowing for property in attached body parts? In this paper, I argue that the law has good reason to recognize property rights in (some) body parts, attached or not. In doing this, I reject the Separation Thesis. Others have argued that personal rights[5] may stretch beyond our bodies to include objects such as

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1 This Roman maxim, *Dominus membrorum suorum nemo videtur*, comes from Ulpian (see Dig 9.2.13 (Ulpian)). The House of Lords affirmed this maxim in *R v Bentham*, [2005] UKHL 18 at para 14 [*Bentham*]. This view also has robust support among philosophers and legal theorists, as we will see below.

2 See *R v Kelly*, [1999] 2 WLR 384, QB 621 (UK); *Yearworth v North Bristol NHS Trust*, [2009] EWCA Civ 37 at 29–31 [*Yearworth*]. See also Imogen Goold, "Why Does It Matter How We Regulate the Use of Human Body Parts?" (2014) 40:1 J Medical Ethics 3. The common law presumes that everything ownable has an owner (see Oliver Wendell Holmes, *The Common Law* (Cambridge, MA: Harvard University Press, 2009) at 214; Henry Sumner Maine, *Ancient Law* (London, UK: Oxford University Press, 1959) at 213). Thus, to say that a thing is nobody's is to say that the thing is unownable.

3 See e.g. *R v Sharpe*, [1857] 169 ER 959, in which the accused faced a charge of theft, amongst other offences, for digging up the body of his mother in order to bury it alongside his father's corpse. The court held that the law "recognises no property in a corpse," and instead found criminal liability on the grounds that Sharpe had removed a body from its grave. Similar results were reached by the courts in *R v Price*, [1884] 12 QBD 247 and *R v Lynn*, (1788), 2 TR 733, [1788] 1 Leach 497 (UK).

4 See *Yearworth*, *supra* note 2. This view also has support in the academic literature. See e.g. Margaret Jane Radin "Property and Personhood" (1982) 34:5 Stan L Rev 957 at 966 [Radin, "Property and Personhood"].

5 To be clear, a personal right is one's legally-protected right to one's *person*. This paradigmatically consists of the body (though I will argue that our bodies and our persons are not co-extensive). Personal rights are protected by the tort of battery. This right can be contrasted with our right to property, which paradigmatically consists of things (real

prosthetics and wheelchairs.[6] Here, I argue that there is a second frontier between personhood and property, viz., *within* our bodies. There can be property in body parts, and personal rights in things outside the body. All of this scrambles the intuitive alignment of our persons with our bodies, and property with the "outside world."

I proceed as follows. In Part I, I canvass the best arguments for the Separation Thesis: first, that tangible property must be possessable to be ownable, and that only separated body parts can be "possessed"; second, that property is essentially alienable, and body parts are inalienable until separation; third, that owners and what they own must be distinct, meaning that owners cannot own parts of themselves; and fourth, that only those body parts that have no ability to reunify with the body become property upon separation. The prospect of reunification (or lack thereof) is thus revealed by separation. I argue that, on closer scrutiny, none of these arguments succeed. If separation from the body is not morally transformative, and we can have property rights in detached body parts, then we can have property in our bodies. In other words, less than the entirety of my body is me, and the rest is mine. In Part II, I argue that this position is also normatively attractive because it grounds a right to the parts of our bodies that are not necessary to our being separate moral agents, and explains why certain "artificial objects" that fulfill bodily functions can become a part of our persons. In Part III, I turn more directly to private law. I show that this view lucidly captures both the proprietary *and* personal wrongs one commits when one excises a body part from another's body without their consent. As a result, this account offers a clearer way to address legal disputes concerning body parts than the existing jurisprudence, a claim I develop in Part IV.

I. Separation and Separability

I have discerned and developed four credible arguments for the proposition that something of normative significance occurs when a body part is detached from the body, such that the body part can thereby become the subject of a property right.[7] Let me preface my discussion by clarifying

property and chattel). Property rights are protected by torts such as trespass and conversion. These rights differ analytically in the common law tradition in a number of ways which I will elaborate as the article unfolds (in Part III in particular). The chief difference is that property rights are essentially alienable while personal rights are essentially inalienable.

6 See Christopher Essert, "Thinking Like a Private Lawyer" (2018) 68:1 UTLJ 166 at 184–85 [Essert, "Thinking Like a Private Lawyer"].

7 I use the terms "normative" and "moral" significance interchangeably to describe whether there should be a change in the *kind* of right one has over a body part after

what exactly these arguments must show. At present, the law insists that I cannot own my body part *until* that body part is separated from me.[8] The law also makes separation a sufficient condition for ownership of a body part; once separated, something "ownable" comes into being.[9] In this way, as Christopher Essert helpfully analogizes, the law treats the separation of a body part from a whole body as akin to the birth of a wild animal or a meteor hitting earth.[10] So, we are in search of an argument that will explain why actual separation from the body is both necessary and sufficient for property in body parts.[11] My primary purpose in developing these arguments is to show that they do not actually vindicate the Separation Thesis.[12] At the same time, discussing these arguments will yield

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separation (personal or proprietary), and the *fact* that one has a right to that body part after separation.

8 See *Bentham*, *supra* note 1.

9 See e.g. *CC v AW*, 2005 ABQB 290, where the court held that Mr. A.W.'s sperm, which was given as a friendly act to a lover to help her conceive, was a gift that made the sperm her property. To make a body part giftable is to regard that body part as property. The court held that the sperm—now a part of fertilized embryos under storage—are "chattels that can be used as [Ms. C.C.] sees fit. Mr. A.W. is not in a position to control or direct their use in any fashion" (*ibid* at para 21). See also *Lam v University of British Columbia*, 2015 BCCA 2 [*Lam*]; *JCM v ANA*, 2012 BCSC 584 [*JCM*]; *Hecht v Superior Court*, 16 Cal App (4th) 836 (Ct App 1993); *Hecht v Superior Court*, 50 Cal App (4th) 1289 (Ct App 1996); *Bazley v Wesley Monash IVF Pty Ltd*, [2010] QSC 118.

10 See Christopher Essert, *Yours and Mine* (2021) [draft manuscript on file with author] at 278 [Essert, *Yours and Mine*].

11 A word on terminology: there are important differences between ownership and the notion of property more generally—ownership is the most robust form of authority over a thing that a property regime recognizes—but nothing I say here turns on this difference. Thus, I use these terms interchangeably.

12 Muireann Quigley has made a similar argument, noting that a person's normative authority over their body parts does not stop at the limits of the body, and thus that the fact of separation should not alter those rights. She writes that there is "no moral magic" in separation (*Self-Ownership, Property Rights, and the Human Body: A Legal and Philosophical Analysis* (Cambridge, UK: Cambridge University Press, 2018) at 234–36). Quigley's positive account is that self-ownership is what grounds the normative authority to one's whole body. I follow Essert in thinking that self-ownership, often discussed in the political philosophy literature in relation to libertarianism, is a conceptual confusion (see Essert, *Yours and Mine*, *supra* note 10 at 3, n 4). Many proponents of self-ownership hold that it confers an *inalienable* right to one's person (in response to concerns about the possibility of selling oneself into slavery) or that it is actually a reflection of a fundamental right of personhood or autonomy. But in both these respects proponents of self-ownership depart from any useful reference from the concept of property. For representative examples of these approaches, see John Thrasher, "Self-Ownership as Personal Sovereignty" (2019) 36:2 Soc Philosophy & Policy 116 and Quigley, *supra* note 12 at ch 7, respectively. My point in this paper is that if one's person (or self) is something short of the entirety of one's body, then there is nothing conceptually confused about body ownership. Owning some parts of one body does not require self-ownership.

important insights useful to developing the idea that there can be property in our bodies. Seeing just how these arguments err will be worth our while.

A. Possession (Or Lack Thereof)

Why might separation make a difference? One thought is that body parts must be possessable to be ownable; but when a body part is attached to one's body, it is incapable of being possessed. In *R v. Bentham*, Lord Bingham marshals this point, writing: "One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it."[13] This argument has an intuitive ring to it. When I move my body, all of it comes along with me. I don't do anything without my body. This suggests that I do not really *possess* my body parts, including my fingers.

Let me develop the thought from *Bentham* a little further before offering a response. Possession seems conceptually different from my relationship with my body in the following respect. Possession can be contrasted with periods of non-possession. Roughly, I can only possess something if there are possible occasions where I do not possess it. In this way, the law seems to track an ontological separation between me and what I can possess, such as my pen. I am not in physical contiguity with my pen at all times, and that is precisely what makes my pen capable of being *possessed*. The occasions in which I do not possess my pen reveal this. In light of this *Bentham*-ite thought, the law's insistence on separation looks less mysterious. Separation changes a body part from *res nullius* to *res* because body parts become capable of being possessed when separated. For instance, I can hold my severed finger in (what is left of) my hand.[14] Possessing my finger in this way was impossible when my fingers were attached to my hand.

Plausible as this sounds, I think this development of *Bentham* does not vindicate the Separation Thesis. The reflections above do suggest that *separability* is a necessary condition for something to be ownable; that much in *Bentham* is true. Yet this does not mean that actual separation is

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[13] *Bentham*, *supra* note 1 at para 8. Simon Douglas has glossed Lord Bingham's holding differently, suggesting that Lord Bingham argued that one's body cannot be owned because one's body is not a "physical thing" (Simon Douglas, "The Argument for Property Rights in Body Parts: Scarcity of Resources" (2014) 40:1 J Medical Ethics 23 at 24 [Douglas, "Property Rights in Body Parts"]). I do not find this a plausible reading of Lord Bingham's point. I have tried to assemble a more authentic rendition of Lord Bingham's argument here.

[14] And it now looks like someone else could possess the finger too. This is an important, related point that I pick up in the next subsection on alienability.

the occasion at which some part of my body becomes something ownable. This is a point I will emphasize frequently in this section. Actual separation is neither necessary nor sufficient for property in body parts.

To see that separation is not a sufficient condition for the creation of a property right, notice that a body part can be detached from my body without ushering in a change in the kind of right I have over that body part. One way to put this point is that personhood need not end at the biological limits of one's body. When my finger is sliced off in a kitchen mishap, many would agree that I am the one who has the strongest claim to the finger.[15] I am the finger's biological source, after all.[16] But this does not require that my finger become ownable. We could maintain that the finger remains a part of my *person* despite separation; this is, in fact, Essert's view about the detached finger.[17] So, in general, separation underdetermines whether the right to a body part is "demoted" to a property right or remains governed by a personal right. Thus the view in *Bentham* does not tell us why separation should have moral significance as a sufficient condition for the creation of property rights in body parts.

Moreover, we should be wary of taking cues about what is ownable from the notion of possession. Recall the *Bentham* court's argument. The court couches its reasoning as a series of conceptual claims about the nature of possession which syllogistically produce the conclusion that we do not possess our fingers. Yet the notion of possession is notoriously Janus-faced; possession has both a factual and legal meaning. On a lay, factual understanding, possession is a person's relationship to a thing that is "characterised by a high degree of physical and mental control over the thing."[18] Holding a pen in my hand looks like a core case of lay, factual possession. By contrast, where a legal rule decides whether one is in pos-

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15 This is a point made by Japa Pallikkathayil and others. Though Pallikkathayil remains non-committal at times about just how far one's "bodily rights" can extend to physically separate objects, she does think the possibility of drawing some satisfying line is real (see Japa Pallikkathayil, "Persons and Bodies" in Sari Kisilevsky & Martin J Stone, eds, *Freedom and Force: Essays on Kant's Legal Philosophy* (Oxford, UK: Hart, 2017) 35 at 50).

16 Many share the intuition that the biological source of a body part has the best claim to that body part (see e.g. Arthur Ripstein, "Embodied Free Beings under Public Law: A Reply" in Kisilevsky & Stone, *supra* note 15, 183 at 189).

17 See Essert, *Yours and Mine*, *supra* note 10 at 279–80.

18 Simon Douglas, "Is Possession Factual or Legal?" in Eric Descheemaeker, ed, *The Consequences of Possession* (Edinburgh: Edinburgh University Press, 2014) 56 at 58 [Douglas, "Possession"]. Kantians might prefer the term "empirical possession" (B Sharon Byrd & Joachim Hruschka, *Kant's Doctrine of Right: A Commentary* (Cambridge, UK: Cambridge University Press, 2010) at 107–08). See also Arthur Ripstein, "Authority and Coercion" (2004) 32:1 Philosophy & Public Affairs 2 at 27 [Ripstein, "Authority and Coercion"].

session of something, then legal possession—possession in a technical sense—is at play. As Simon Douglas explains, legal possession is both broader and narrower than factual possession.[19] Legal possession can be far more expansive. Consider *Dunwich v. Sterry*, a case about a trespass action concerning a whisky barrel that had washed ashore.[20] The plaintiff held a franchise over objects washed upon the shore, and so had a property right in the barrel. The barrel was removed by the defendant. The case turned on whether the plaintiff, who had no physical proximity or even knowledge of the existence of the barrel, had "possession" of the barrel. The court found that he did, holding that his right to possess the barrel furnished him with a kind of constructive possession.[21]

Legal possession is also narrower than factual possession, in that normative considerations can drown out paradigmatic instances of physical possession. *R v. Bass* was decided at a time when criminal liability for theft required the thief to have removed the chattel from the possession of its owner.[22] Bass was given a package for delivery by his employer, but instead opened the contents and sold them at a pub. He was found liable for theft despite the fact that he had not removed the package from his employer's possession; the employer, after all, had freely placed the package in his (factual) possession.[23] The lesson emerging from all of this is that holding a thing in one's hands (or failing to do so) is orthogonal to a finding of legal possession.

This lesson in mind, let's turn back to body parts, and the finger in particular. Notice that one enjoys a high degree of physical and mental control over an attached finger. In fact this seems true *in virtue of the fact* that the finger is part of one's attached body; I have stronger physical and mental control over my finger when it is attached rather than severed.[24]

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19 See Douglas, "Possession", *supra* note 18 at 68–71.

20 See *Dunwich (Bailiffs) v Sterry*, [1831] 1 B & Ad 831, 109 ER 995 [*Dunwich*].

21 See *ibid*, as discussed in Douglas, "Possession", *supra* note 18 at 71–74.

22 [1782] 1 Leach 251, 168 ER 228 [Bass]. See also Douglas, "Possession", *supra* note 18 at 68, 70–71.

23 See *Bass*, *supra* note 22 at 228.

24 Tangentially, I think this example shows that there is something hazy about the notion of "purely" factual notions of possession. *Contra* Douglas, I think we should resist the temptation to characterize the distinction between factual and legal possession as between what is plainly "physically observable" versus what is "legal-fictional" and thus normatively charged. After all, "physical and mental control" itself has a core and peripheral meaning, and likely, a normative element too. For example, is it clear that sending out my gardeners to maintain a public square means that I am factually possessing the public square? I do not think the answer is plainly physically observable nor free of normative import (see e.g. *Hall and Others v Mayor of London*, [2010]

Put differently, an attached finger is not the type of thing that is incapable of being factually possessed because it is incapable of being physically controlled, such as the Pacific Ocean.[25] Indeed, I exercise a high degree of control over my attached finger and can deny its liberty to move apart from me. Nor is my finger akin to my reputation, which seems incapable of being factually possessed precisely because my reputation is not a physical thing. A finger has physical extension whether attached or detached.

Because factual possession does not seem to rule out possession of my attached finger, perhaps the *Bentham* court's reasoning is driven by some normative idea—and therefore some idea of legal possession—that posits that I do not possess attached body parts (because they are me). But if so, then the *Bentham* argument does not support the proposition that separation is a necessary condition for ownability. *Bentham* simply assumes that proposition. Notice that the *Bentham* argument's first and second premises—that "one could not possess something which is not separate and distinct from oneself"[26] and "an unsevered hand or finger is part of oneself"[27]—*assume* that the finger is a part of me and not mine when it is attached to my body. In this way *Bentham* does not offer an argument for the Separation Thesis, but rather uses the Separation Thesis as a premise in an argument aimed at a conclusion about possession. There is no *a priori* reason to believe that I cannot possess my finger, unless we are already committed to the view that the body is entirely *res nullius*.[28]

EWCA Civ 817). For Douglas's discussion of the actual case, see "Possession", *supra* note 18 at 62.

25 As Nozick puts the point, albeit in his discussion of John Locke's labour-mixing theory of acquisition, if I pour my can of soup into the ocean, I don't thereby come to own the ocean (or even possess it). I just lose my soup (see Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) at 137). Similar is John Donne's observation that "a man does not become proprietary of the sea, because he hath two or three boats, fishing in it" (John Donne, "Sermon CLVI: Preached to the Virginian Company, 1622" in Henry Alford, ed, *Works of John Donne*, vol 6 (London, UK: John W Parker, 1839) 225 at 234).

26 *Bentham*, *supra* note 1 at para 8.

27 *Ibid.*

28 Another option is to hold that the finger is not in my possession while it is attached to my body, but that I nonetheless own it. I am inclined to think that in cases where normative possession is stretched, as it was in the *Dunwich* case (*supra* note 20), the law is effectively showing us that there is nothing metaphysically distinctive about possession for the purposes of ownership. Possession follows ownership, not vice versa. For further discussion on the relationship between possession and ownership, see Thomas W Merrill, "Ownership and Possession" in Yun-Chien Chang, ed, *Law and Economics of Possession* (Cambridge, UK: Cambridge University Press, 2015) 9 and the papers in that volume generally.

B. Alienability

The next important idea that might substantiate the Separation Thesis is that property is essentially alienable: property must be capable of being someone else's.[29] The fact that property is essentially alienable can be turned into an argument against permitting property rights in body parts in two ways. First, to say that property is essentially alienable means, amongst other things, that who owns what property is a totally contingent fact. The fact that I own this particular MacBook is simply a feature of the fact that I entered into particular market transactions. I could have owned another MacBook, or no MacBook at all. Property law does not link me to any particular object of property. Put differently, no property has anyone's name on it, *a priori*. This might be grounds to resist the notion of property rights in body parts precisely because it seems like every body part does have someone's name on it (i.e., the name of the person whose body it is). Only when a body part is separated from one's person do we introduce the necessary alienability for the body part to become ownable. Second, unlike the ease with which we alienate most property, alienating body parts is much more difficult. Perhaps this, too, militates against acknowledging property rights in body parts until they are separated. Let me take these arguments in turn.

James Penner's discussion is a useful point of departure for the first idea. Penner explains that "if one stands in the relationship of owner to a thing, then it must be possible for someone else to own it as well."[30] My jacket is mine today, but could be yours tomorrow. This is relevant to the Separation Thesis in the following way. One might contend that body parts that are separated from us are thereby shown to be only contingently associated with us. When we cut hair, we appear to divorce it from its source body, and thus introduce the relevant sense of contingency over who *might* own the hair, even if it is clear that the biological source *presently* owns the hair—suddenly the possibility of someone else owning my hair seems to come online. In sum, separation creates alienability, which in turn creates ownability.

This argument, again, does not challenge my contention that separation is itself normatively inert and that all the action is in separability. In fact, it may support that contention. Modern medicine has made previously unreachable caverns of the body vulnerable to excision. As Muireann Quigley puts the point, "Advances in medicine and the biosciences mean that a huge variety of biomaterials—from blood to tissue samples to

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29 See Essert, *Yours and Mine*, *supra* note 10 at 263–64.

30 JE Penner, *The Idea of Property in Law* (Oxford, UK: Oxford University Press, 1997) at 124 [Penner, *Idea of Property*].

whole organs—are both separable and regularly separated from persons."[31] These developments mean that body parts meet the requirement for property under what Penner calls his "Separability Thesis":

> Only those "things" in the world which are contingently associated with any particular owner may be the objects of property; as a function of the nature of this contingency, in theory nothing of normative consequence beyond the fact that the ownership has changed occurs when an object is alienated to another.[32]

Accordingly, this first branch of the alienability idea—the contingency of who owns what—does not show that separation from the body is of unique moral importance. Rather it confirms that all the moral action is in *separability*, because that is what secures alienability.

Let me turn to the second gloss on the alienability idea, which concerns the *process* of alienation. One might argue that, even today, alienating my hair to you remains much easier than giving you my kidney. I can just snip off my hair and hand it to you, but some comparatively involved medical procedure is required to excise my kidney (or at least to do so safely).[33] This might, then, militate for the proposition that I cannot own my kidney. Is it a problem for the existence of property in my kidney that my kidney cannot be alienated *as easily* as my hair? Again, I don't think so. Suppose I want to sell you my still-embedded kidney. Is it true that I must excise the kidney from my body in order to make you its owner? Because of current surgical realities, if you wish to physically possess your newly-acquired kidney, or implant the kidney in your body were one of your own kidneys to fail, that would indeed require me to undergo a medical procedure. But here too it is just *separability* that matters. We have no reason to think that property in my kidney only begins when it is actually separated from my body.[34] Now consider a further development of

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[31] Quigley, *supra* note 12 at 245.

[32] Penner, *Idea of Property*, *supra* note 30 at 111. It is no accident that Penner calls this his "*Separability* Thesis" rather than "Separation Thesis."

[33] It is worth noting that "properly performed kidney extraction ... carries a low 0.03 per cent risk of death, mainly from the general anesthesia" (Nir Eyal: "Is the Body Special? Review of Cécile Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person*" (2009) 21:2 Utilitas 233 at 234).

[34] We might offer an analogy with subsurface rights here. Recall the traditional maxim, *cujus est solum ejus est usque ad coelum et ad infernos*, which holds that a surface owner of land has title all the way to the heavens and to the deepest depths of the earth. The branch of this rule that deals with subsurface rights was affirmed in a famous case concerning the Great Onyx Cave (see *Edwards v Sims*, SW (2d) 619 (Ky Ct App 1929) at 620). In this case, Lee successfully sued Edwards in trespass for running tours to the Cave, which stretched partly beneath Lee's land, but had an opening only on Edwards' land. The comparative difficulty of Lee accessing the Cave (for Lee had no opening to it on his land) did not figure in a determination of whether Lee had title to the portions of

this example that prompts a different, more normatively charged worry. Suppose that one day, you want the still-embedded kidney to be sent to your home in New York City (say, in order to sell the kidney to a third party). I live in Toronto. This might prompt the concern that in virtue of your property right, you enjoy a derivative right to order me to New York or to give you the kidney on demand. Thus, your property right in my kidney might balloon into a power over my body that resembles slavery, or at least some gratuitous and unwarranted authority over my body.

This warrants two responses. First, notice that any derivative control conferred by your owning my kidney is not unlike an analogous situation involving a non-bodily chattel. Suppose I sell you my shirt while I am wearing it. I decide to keep the shirt on until further notice because you express no interest in taking it right away. When you call me to deliver the shirt to you by mail, I will have to take the shirt off, and in the process, contort my body in certain ways. Here too the process of delivery, and thus your right to initiate that process, derivatively involves some further control of my body. But this seems innocuous.

Second, and crucially, to say that one could own another's kidney is not to say that the law should place no limits on the delivery rights of kidney purchasers. The right to alienate a kidney could be restricted to highly specific circumstances, such as when the surgery could be done safely, and perhaps only while we are in the same city. Strictly speaking, your purchase of the embedded kidney need not include the right to order immediate excision and delivery of the kidney without notice.[35] The situation might be different with hair, precisely because it is far more easily removed and delivered than a kidney. Perhaps the purchase of hair could indeed include the right to demand that I cut my hair and mail it to you immediately. The law invariably moulds ownership around the character-

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the Cave beneath his land. At common law, a grant of title to Blackacre grants title to the mineral rights below, irrespective of the owner's ability to access any mineral deposits therein (see *ibid*). Similarly, we might reason that the fact that bodily organs are "buried" in the body is not a reason to deny that they are property. Interestingly, while the branch of the rule concerning property rights above land has been qualified to include only the zone necessary for "actual use and enjoyment," as in *Didow v Alberta Power Ltd*, 1988 ABCA 257, there is comparatively less authority on the extent of subsurface rights, and thus little discussion on the limits of such rights. For more on vertical boundaries in land, see Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters, 2018) at 109–22.

35 If you buy a boat in my marina, you have no special right to demand delivery right now, nor demand the boat *in specie* should I breach the contract. A failure to deliver the boat is remedied with damages. For discussion on whether specific performance might be available in contracts for the sale of body parts, see note 80, *below*.

istics of the things it makes the subject of property rights, and body parts would not be unique in this respect.[36]

Let me offer a related clarification. Imagine you want to take your newly acquired kidney along on a bike ride. This is ordinarily within the rights of a chattel owner. Can you, therefore, order me to get on a bike? I don't think so. If I am still wearing what is now your shirt, and you want the shirt to go on a bike ride, your right does not include the authority to order *me* onto a bike. You *do* have the right to ask that the shirt be put in your possession, and thus, you have the right to initiate the delivery process such that you (or your agent) can take the shirt on a bike ride. Something analogous goes for body parts. Buying my hair or my kidney does not furnish you with the right to order my entire person onto a bike (and much less so to forcibly take what is yours).

In closing this discussion of alienability, I want to acknowledge that *something* of note happens upon separation that implicates alienability. Separation from the body is likely to be a highly communicative act—one that signals that a body part is regarded by its source as property, and could potentially be for sale. For example, if I snip off my hair and hold it in my hands, others are more likely to think that I am willing to part with my hair. The ordinary state of affairs, where I simply walk around with my hair attached to my head, does not have this social resonance. As we saw in our discussion of possession, my property is not always physically contiguous with me. And so, holding my snipped-off hair in my hand suggests that the hair could be in someone else's hands instead, which in turn evokes ideas of alienability, and thus ownability. In sum, there is a chain of social meaning linking separation, possession, alienability, and ownability. But none of this proves that I cannot own my hair until it is snipped off my head; this simply demonstrates why we (erroneously) tend to believe that separation is normatively significant.

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[36] Nor does this run afoul of the portion of Penner's Separability Thesis that requires that "nothing of normative consequence beyond the fact that the ownership has changed occurs when an object of property is alienated to another" (Penner, *Idea of Property*, *supra* note 30 at 111). It is true, of course, that when I own my original kidney and want it to be excised, I can do this without having to notify anyone else. When *you* own "my" kidney, you would probably have to notify me prior to excision to receive it in your (factual) possession. This asymmetry is not the result of a difference between *my* ownership of the kidney and *your* ownership of the kidney, but is simply the result of the fact that "notifying myself" is meaningless. This is no different than the situation where you buy the shirt I am presently wearing, but leave the shirt with me, and only later decide that you want it in *your* closet. While you might have to notify me in such a situation, notification is meaningless if your shirt is in *your* closet already.

C. Owners as Distinct from Their Property

Another closely related idea—and our next candidate rationale for the Separation Thesis—is that there must be a distinction (or metaphorically, a "separation") between an owner and what she owns. As Penner helpfully explains: "If a relationship is a property relationship, there must be an owner and there must be something owned, and these two cannot be the same things."[37] This thought warrants further development in the context of body parts. Penner makes this point in the midst of a discussion of slavery, so he is concerned about a *wholesale* rendering of the body as property. Because, by definition, that which is property can be owned by someone else, Penner is concerned about the dramatic case in which I have somehow sold the entirety of my body. This is indeed an impermissible concession of normative authority over my person, because, after all, we are embodied. If every part of my body is someone else's, then there isn't anything of *me* left over. This is another concern about slavery, but from a different angle than the one we saw above. Here the concern is that giving the "it-is-up-to-you"[38] power of property to someone else over the *entirety* of our bodies looks a lot like slavery (or just *is* slavery).

I think we can acknowledge Penner's idea that there must be a difference between an owner and what they own, without also affirming that this two-part relationship cannot exist in the same human body. That is, Penner has presented us with the limiting case of the line between persons and property, where every square inch of my body is someone else's. In such a case, it is indeed plausible that no person remains, and thus that there is no meaningful "separation" between my person and my property. But this does not show that, short of a total sale of my body parts to another, I cannot own some specific square inch of my body. One can remain an owner—that is, a person—while owning some of one's attached body parts.[39] So, Penner's claim about the distinction between owners and their property does not actually require a break in physical contiguity with the whole body for a body part to be ownable. Penner's

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37 Penner, *Idea of Property*, *supra* note 30 at 124. See also Larissa Katz, "Property Law" in John Tasioulas, ed, *The Cambridge Companion to the Philosophy of Law* (Cambridge, UK: Cambridge University Press, 2020) 371 at 374, 376 [Katz, "Property Law"]; Douglas, "Property Rights in Body Parts", *supra* note 13 at 24. Note that Penner's point here is a narrow one about the difference between property owners and what they own. This is not Penner's view of the essential components of property in general, which requires an owner, a thing, *and* at least one other person, because property is a relationship *between people* with respect to things.

38 I borrow this phrase from Arthur Ripstein, "Property and Sovereignty: How to Tell the Difference" (2017) 18:2 Theor Inq L 243 at 254.

39 I will have more to say about why some parts of our bodies invite treatment as property in Part II.

remark is best understood as a point about two distinctive normative relationships to our bodies, ownership and personhood, and how the former cannot *entirely* oust the latter in the same human body.[40]

D. Detachment and the Prospect of Reunification

A final argument for the Separation Thesis suggests that detached body parts undergo changes in their characteristics when they are detached. These changes ostensibly explain why a personal right morphs into a property right upon separation. Essert, following Japa Pallikkathayil, offers this argument for the sliced-off finger, writing that the finger "might be re-attached to me, and thus once again [becomes] part of the integral whole that is my person."[41] For Essert, detached fingers and kidneys do not enter the realm of property, at least as long as they are reattachable. Essert sees a continuity in the source's claim to fingers and kidneys because separation does not negate the possibility of reunification. But notably, hair falls on the other side of the ledger for Essert.[42] He writes that hair cutting is the creation of *res*, akin to the birth of a wild animal.[43] Accordingly, for Essert, if I gathered my detached hair to create a wig to put on my head, the wig would seem to be "mine" rather than a part of "me."[44] This argument draws its plausibility from physical facts about the nature of the body parts in question: hair cannot be reattached in such a way that it forms a "part of the integral whole that is my per-

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[40] It is also worth flagging a more provocative option in the conceptual space. One might also deny that the existence of personhood and property within the body is a zero-sum game. Perhaps my hair could be part of my person *but also my property*, simultaneously. What Penner's remark shows us is, again, the limiting case where every square inch of my body is now the property of someone else. But insofar as some parts of my body remain cordoned off from property—that is, that are my person alone—it may be argued that the remaining parts of my body could simultaneously be *me* and *mine*. This would be compliant with Penner's remark above. However, I do not endorse this view, because it has serious difficulties of its own. First, this view must explain why certain parts of our bodies should enjoy the protection of two kinds of rights, and in particular, why the parts of the body that are cordoned off from property are more important to my status as an individual agent and yet protected by fewer rights (i.e., just a personal right). Moreover, there is a fundamental contrast between personal and proprietary rights; personhood is fundamentally inalienable, while property is essentially alienable (see Essert, *Yours and Mine*, *supra* note 10 at 263–79). This conceptual difference suggests that the same thing cannot be governed by both rights simultaneously. See further the discussion in Part III, *below*.

[41] Essert, *Yours and Mine*, *supra* note 10 at 225. See also Pallikkathayil, *supra* note 15.

[42] See Essert, *Yours and Mine*, *supra* note 10 at 225.

[43] See *ibid* at 226.

[44] See *ibid*.

son."[45] Presumably this is because detached hair cannot grow again.[46] So, one virtue of this account is that it seems to avoid pointing to anything mysterious about the transition from attachment to detachment.[47]

An influential German case concerning stored sperm seems to have settled on a similar view.[48] Commentators, such as Niall Whitty, have endorsed the theory emerging from the case as "practical, coherent and morally satisfying."[49] Whitty offers a helpful summary of the rules laid down by the case:

> (i) A separated body part is, in law, a "thing" susceptible to ownership. On separation, the right of the person with respect to his or her own body is transformed into a right of property in the separated body part.
>
> (ii) A body part destined to be returned to the original body and to perform its natural function thereafter (e.g. a bone-graft or skin-graft or an ovum after IVF) is not a thing susceptible to ownership. It is however protected by the person's right of personality.

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45 *Ibid* at 225.

46 Actually, this is not accurate of all hair. Modern hair transplant techniques allow some grafted hairs to grow again when reattached. A prosthetic, by contrast, is not constituted by biological tissue at all. For the purposes of my argument here I will assume Essert is right about these facts about hair, as I am interested in showing how reunification arguments in general are not convincing, apart from the contingent empirical facts about particular body parts.

47 See Pallikkathayil, *supra* note 15 at 48. Essert's view might also draw loose support from historical doctrines concerning the transformation of property. Though the analogy is not exact, the Roman and Scots doctrine of specification (*specificato*) concerns the situation where a new thing is created from prior materials, such that the thing cannot be reduced to its original constituents. The doctrine holds that the person responsible for this transition in the identity of the object has an ownership right to the new thing. Similarly, one might argue that separation changes the character of certain body parts, such as hair. However, I say that the analogy is not exact because specification concerns *who* owns a detached body part rather than whether the body part can be owned. For further discussion, see David Johnston, "The Renewal of the Old" (1997) 56:1 Cambridge LJ 80 at 93; Niall R Whitty, "Rights of Personality, Property Rights and the Human Body in Scots Law" (2005) 9 Ed L Rev 194 at 223, 226–27; Quigley, *supra* note 12 at 83–85.

48 See Bundesgerichtshof (BHG) [Federal Court of Justice], 9 November 1993, VI ZR 62/93, BGHZ, 124, 52, NJW 1994, 127 (Germany). This case is described in Friedrich Heubel, "Defining the Functional Body and its Parts: A Review of German Law" in Henk AMJ Ten Have & Jos VM Welie, eds, *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Berlin: Springer Science + Business Media Dordrecht, 1998) 27. English law, particularly the court in *Yearworth*, *supra* note 2 at paras 20–22 seems to have considered the German view and rejected it, finding stored sperm to be property instead. A similar approach is followed in Canadian law (see *JCM*, *supra* note 9; *Lam*, *supra* note 9).

49 Whitty, *supra* note 47 at 224.

> (iii) A body part permanently separated but destined to be united with another person's body (e.g. donated blood or tissue) is also legally a thing susceptible to ownership.
>
> (iv) Sperm stored in order to perform a function typical of the body––procreation—by the subject, but at the same time destined to be received by another's body, is in the same position as an ovum after IVF mentioned in (ii) above. It is not a thing susceptible to ownership. The body forms a functional unit extending even to separated parts which are therefore also protected by the right of personality to the same extent as the body itself.[50]

The German court appears to suggest that sperm's prospects for bodily reunification means that sperm is not *res*. This lends credence to the idea that separation is indeed morally transformative when it threatens the possibility of reunification, as it does for hair. Perhaps this provides a principled way of substantiating the Separation Thesis after all.

I want to note something curious about the German court's view which will be helpful to my main response. Sperm was held to be protected by rights of personality even while outside the source's body, because sperm was removed for the purpose of eventual unification with *a* body for the purposes of fertilization. But, of course, the person whose body is to receive the sperm is not the source of the sperm. So, it is not the prospect of reunification with *my body* that matters for my personal right, but rather the prospect of reunification with *some* body. In the ordinary course, sperm fulfilling its biological function in procreation involves sperm becoming part of another person. However, it is not obvious how this idiosyncrasy adjudicates between allocating a personal or property right. As the German court itself noted, donated blood is destined to be united with another person. Yet blood receives asymmetric treatment from the court; according to the German approach, blood destined for another's body is my property, but sperm destined for another's body is me.[51] So, separation vis-à-vis reunification is not doing the moral work here.

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[50] *Ibid.*

[51] It is also worth noting that blood and sperm were mainstays in the commodification debate not so long ago. Many Western academics argued that these biomaterials should not be ownable (see e.g. Richard M Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (London, UK: George Allen & Unwin, 1970); Elizabeth Anderson, "The Ethical Limitations of the Market" (1990) 6:2 Economics & Philosophy 179 at 198). Contemporary commodification theorists have shifted their focus to extolling a no-property approach to organs such as kidneys (see e.g. Debra Satz, *Why Some Things Should Not be For Sale: The Moral Limits of Markets* (Oxford, UK: Oxford University Press, 2010) ch 9). For a contrasting position in the commodification debate, see generally Jason Brennan & Peter M Jaworski, *Markets Without Limits: Moral Virtues and Commercial Interests* (New York: Routledge, 2016). I tend to think that these attitudes about commodification are highly temporally and culturally contingent. We need

Now to my main response. Essert and Pallikkathayil (and German law) seem to regard the prospect of reattachment as morally weighty. On this view, hair's inability to remain in a whole with our bodies once detached means that property is created, rather than a personal right preserved.[52] Kidneys and fingers are unlike this, as are prosthetics. This produces a curious asymmetry between Essert's treatment of hair and prosthetics. Just like detached hair, a prosthetic arm will never be able to form a biological unity with its user. But Essert (rightly) suggests that a prosthetic is a part of my person, and remains this way when I put the prosthetic on my nightstand. So, when you interfere with my prosthetic while I am sleeping, you have battered me, (i.e., committed a personal, rather than proprietary, wrong).[53]

To be clear, Essert's view is plausibly motivated by social considerations. In an egalitarian society, the law has strong normative reasons to regard a prosthetic or a wheelchair as a part of the *person* who uses them.[54] Though they are not part of their users' natural bodies, the centrality of these objects in the lives of their users suggests they are part of their persons.[55] We should not adopt differential attitudes about those who use artificial rather than "real" limbs. Analogous concerns do not seem to arise for hair. We lose hair daily, mostly without noticing. Hair also grows back. I suspect that we bring these attitudes about the expendability of hair *to* our analysis of separation, rather than drawing any of these lessons *from* separation.[56] More broadly, social meanings associated with certain body parts and their artificial equivalents drive our analysis of separation, rather than a view about ontological change in the functional characteristics of those body parts due to separation. But if so, then biological unity is not what is doing the moral work (and nor should it).[57] As we saw with German law's treatment of sperm, the "functionali-

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only recall that life insurance, now a hardly-noticed feature of modern life, was once vehemently opposed as morally abhorrent.

52 See Essert, *Yours and Mine*, *supra* note 10 at 277–78.

53 See *ibid* at 230.

54 See *ibid*.

55 Essert, "Thinking Like a Private Lawyer", *supra* note 6 at 184."

56 We could change these attitudes about hair. Perhaps someone who has diligently gathered their detached hair into a wig and plopped it on their head could be seen to have reincorporated the hair into their person. In this way we could decline to take any cue from the fact that hair cannot form a biological unity once detached. Indeed, other cultural attitudes about hair already exist. Sikhs and Indigenous people, for example, are more likely to regard their hair as part of their person than their property.

57 In other words, a legal order must develop normatively principled default rules about the line between property and personhood within the body. Whether a body part is ca-

ty" of a body part is itself socially determined and normatively charged. All of this suggests that we have no reason to take the prospect of reunification after separation (or the lack thereof) as the acid test for property in the body.

II. The Body as Me (And My Instrument)

Thus far, I have shown that separation from the body need not change (1) the *fact* of one's normative control over a body part; or indeed (2) the *kind* of normative control one enjoys over a body part. I did this by dispelling four initially credible arguments aimed at substantiating the Separation Thesis. If the Separation Thesis is untenable and we can have property rights in detached body parts, then it is possible to have property rights in (some fraction of) our bodies. In this section, I argue that this is also normatively attractive and authentic to our pre-philosophical intuitions. I contend that less than the entirety of my body is me, and the rest is mine. The distinctive relationship of our persons to our bodies is best understood in terms of agency: we need our bodies to act in the world, and to be capable of developing and executing plans without dependence on other agents. And yet, we do not need the entirety of our bodies to achieve this.

Let's work our way to this conclusion with an intuitive starting point. Embodiment has an important role in our being the persons we are and maintaining independence from other agents. We act through our bodies, so my control over my body is a precondition for acting in the world. This is what Pallikkathayil dubs the "body as means" view.[58] But, Pallikkathayil argues that this does not capture the unique relationship I have to my body. After all, I also need "air to breathe, food to eat and water to drink in order to function as [an agent]."[59] This motivates Pallikkathayil to dispense with the "body as means" view and instead endorse Arthur Ripstein's view of the relationship between our persons and our bodies, according to which our bodies are, rather, *us*. Ripstein writes that "your person can never be physically separated from you" and that "your person is your body."[60] This is what Pallikkathayil calls the "body as identity"

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pable of being restored to biological unity with the body upon separation is not a fact that must inform these rules.

58 See Pallikkathayil, *supra* note 15 at 51.

59 *Ibid.*

60 Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) at 177 [Ripstein, *Force and Freedom*]. In a very similar sentence in his later book, *Private Wrongs*, Ripstein writes that "your body can never be physically separated from you" (Arthur Ripstein, *Private Wrongs* (Cambridge, MA: Harvard University Press, 2016) at 40 [Ripstein, *Private Wrongs*]).

view.[61] She adds, in support of the "body as identity" view, that the body has a unique role in constituting our separateness from other persons because "you need some kind of foothold in the world in order for the question of independence from other agents to even arise."[62] The body is this foothold for Pallikkathayil.

All of this is relevant because Pallikkathayil suggests that this relationship between our persons and our bodies shows that nothing short of the totality of our bodies is the subject of our personhood. While she is willing to acknowledge indeterminacy in the outer limit of our persons—as between our bodies and the external world (when we use a wheelchair for example)—she resists what she calls the "radical" indeterminacy associated with identifying persons with something less than the totality of their bodies.[63] Pallikkathayil notes that the temptation of this radical view comes "from the thought that agency is possible with much less than your whole body."[64] For example, I do not seem to need *both* of my kidneys to act as an agent.[65]

Yet Pallikkathayil rejects the "radical" view. As far as I can tell, she gives two distinct reasons for doing so. First, Pallikkathayil contends that identifying persons with less than the totality of their bodies would be to slip back into regarding the body as one of many possible instruments for embodied agency. The thought here is that we have begun to ask, "how much of this body do I really need to act as an agent anyway?" We thereby lose sight of my body's distinctive relationship to my agency. Second, Pallikkathayil notes that even if we try to stay compliant with the "body as identity" view, when we try to determine what parts of my body are *me*, we will

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Notice that these two sentences are identical except "body" has been swapped in for "person." These are the same normative entities for Ripstein (and Kantians more generally). See also Larissa Katz, "Ownership and Social Solidarity: A Kantian Alternative" (2011) 17:2 Leg Theory 119 at 138.

61 See Pallikkathayil, *supra* note 15 at 52.

62 *Ibid.*

63 See *ibid.* This language of "indeterminacy" is a feature of Pallikkathayil's Kantian project. In her paper, she seeks to show that the Kantian justification for the state solves an indeterminacy problem not just over our property rights (i.e., "what must we do to *acquire* property" and "what counts as an *interference* with my property") but also over our bodily rights (e.g., do you assault when you yell loudly to startle me while I am at the edge of a cliff, causing me to tumble down?). For further discussion of this, see Arthur Ripstein, *Force and Freedom*, *supra* note 60 at 176–77.

64 Pallikkathayil, *supra* note 15 at 52.

65 We know agency with one kidney is possible because it is actual. Having just one kidney is common, both as the result of being born with genetic complications and because people donate kidneys.

invariably reel in the whole body, as it were. Pallikkathayil puts this point as follows:

> If we tried to identify you with your brain [for example], we would have in mind a living, active brain and that involves smuggling in the system in which that brain is operating. So, the answer to the question of identification cannot really be less than one's whole body.[66]

I think both of these reasons for rejecting the possibility that I am less than the totality of my body are unsatisfying. First, Pallikkathayil is misguided in assuming that capturing the distinctive relationship of our persons to our bodies means we must adopt a non-instrumental understanding of the relationship of our bodies to our agency. It does seem that my body is instrumentally related to my agency; again, I must have a body to act as an agent. However, we can still retrieve the proposition that my body enjoys a unique or distinctive relationship to my agency while maintaining the "body as instrument" view.

To see these points, note that Pallikkathayil deems the "body as means" view inadequate because it does not ground the unique "sense in which some kind of control over one's body is a precondition for independence."[67] We saw Pallikkathayil argue that air, food, and water are just as necessary to our functioning as agents as our bodies. But these examples do not threaten the "body as instrument" view; in fact, they are just further requirements for having a fully functional body. The need for air, water, and food are all *bodily requirements*, though they are not a part of my body. So quite plausibly, these can all be subsumed under the banner of *bodily rights*, not because they are themselves part of my body, but because they are requirements for having a healthy, surviving, and functional body.[68] Moreover, the "body as instrument" view can capture the sense in which the body is uniquely relevant, albeit as an instrument, to agency. The *other* instruments we come to use in acting as agents—cars, planes, knives, forks, clothes, pens—will always be used through the prism of our bodies. These objects stand in more distant locations on the

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66 Pallikkathayil, *supra* note 15 at 52.

67 *Ibid.*

68 Indeed, you would wrong me profoundly by, say, extracting the oxygen out of the office from which I am writing this article. And you would wrong me without touching my body. In fact, there are other entities that are vital to bodily functions that are probably neither me nor mine, such as the microbiome—the trillions of fungi and bacteria—which are vital to the body's operation. These bodily flora and fauna are as crucial as oxygen, and happen to be inside our bodies, though they may not be a "part" of our bodies, *strictu sensu*. Yet, if you had some science-fiction way of extracting these entities from my body without touching me, you would nonetheless severely wrong me.

causal chain with my agency. Their use is mediated by my body.[69] All of this is compliant with the "body as instrument" view.

Pallikkathayil's second argument has two premises: (1) capturing the distinctive relationship of my body to my independence as an agent requires endorsing the "body as identity" view; and (2) my independence as an agent requires that *all* of my body is my person. I think the first premise is false on the basis of what I suggested above, though I will cast more doubt on it below. I think the second premise is also dubious. Recall that we are in search of an account of the body's role in our status as separate and independent *agents*. True, independence does require some notion of me as a person, distinct from you as a person. And so we must identify some portion of my body (including, possibly, all of it) as me rather than someone else. But it is not the case that I must have *these fingers*, *this hair*, or *this kidney* to be a separate person. I would be the same moral agent, capable of the same embodied activities, even if I received a kidney from my cousin, used a finger I bought from a stranger in Paris, and wore an abandoned wig of someone else's hair I found in Seoul. While someone else (who is decidedly less of a Sorites paradox!) might have these body parts as part of their person, I might merely have them as things I own. This is perfectly consistent with the idea that they remain important for my agency, and my moral equality as a separate person. (I also might have less hair or one less kidney, and nonetheless remain the same person, distinct from other persons.) So while these body parts are useful to me, as my fork is, they are not a necessary site in the map of my identity. In part, this is because they are fungible—not in an economic sense, but in that they are interchangeable or even removable without violence to my separateness as a person. Thus, Pallikkathayil's transition from the plausible proposition, "whatever part of the body we identify as me is part of a system of bodily unity," to the conclusion, "therefore the whole body is me," is a bit too hasty. *Contra* Pallikkathayil, agency and identity come apart in the body; they are not co-extensive.

I suspect that Pallikkathayil and others are resistant to the idea of my person being less than the totality of my body because they take a binary view of the issue: either some part of my body is me or I have no claim to that part of my body. This is implicit in Pallikkathayil's argument that identifying the entire body with one's person is the only way to resist the idea that the state can forcibly redistribute one's organs while we are alive.[70] She writes that the situation changes when one dies, presumably because one's person no longer exists. The state can legitimately maintain

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69 This is important to substantiating the idea that I have a better claim to my body than some other person. For further discussion, see 587–89 and note 72, *below*.

70 See Pallikkathayil, *supra* note 15 at 52–53.

an opt-out program for organ donations from our corpses. As I suggested already, Pallikkathayil's search for a *unique* relationship to our bodies is motivated by a "personhood-or-nothing" view of our right to our bodies; she does not explicitly consider the possibility that our right to our bodies could also be filled in by something else, such as property.[71] On the view that only my identity can ground a right to my body, when my person is shown to be something less than every nook and cranny of my body, my claim to the rest of my body looks mysterious.

As I have put the point before, the parts of my body that are not me are nonetheless mine. One allure of this view should be immediately apparent: while granting the plausible argument that the entirety of my body is not necessarily me, proprietary rights step in to ground my right to the remainder of my body.[72] And notice that the instrumental relationship of my body to my agency does not dilute the thought that my body is the *most important* instrument I use. As I said above, other, non-bodily instruments are used through my body. Insofar as embodiment remains an important part of being a separate agent, the parts of the body that secure this agency have a normative priority over those that do not.[73] This is

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71 This is in part because Pallikkathayil has a Kantian conceptual scheme. She writes that if we were to have inalienable rights to things like air, this "would represent a new category of rights in the Kantian scheme and would not be best understood as property rights" (*ibid* at 36, n 4). My aim here is to show that, independent of any allegiance to Kant's own original view, there is no reason to suppose that property cannot exist in *parts* of our body, even if not the totality of it, because our rights to certain parts of our bodies would be alienable.

72 To be clear, I don't think this settles the issue of whether organs can be redistributed. It could still be the case that the state can redistribute parts of my body that are mine. My point is just that my view vindicates the intuition that I have a *better* claim to the entirety of my biological body than some arbitrarily selected individual, even if my body is not entirely my person. G.A. Cohen famously denied that anything of normative significance came with being born with particular body parts. Cohen discussed redistribution of body parts, such as eyes to the blind, to elucidate this claim (see GA Cohen, *Self-Ownership, Freedom, and Equality* (Cambridge, UK: Cambridge University Press, 1995) at 70–71, 243–44). For further discussion about the permissibility of redistributing body parts, see Cécile Fabre, *Whose Body is it Anyway?: Justice and the Integrity of the Person* (Oxford, UK: Oxford University Press, 2006). One difficult constraint on implementing any justified scheme of redistribution of body parts, as Cohen and Fabre suggest, is doing so in a manner that respects the personal rights of the person whose body parts are being culled. If the government of Ontario tried to do something analogous to impounding my car, to my hair, the close contiguity of my hair to the parts of my body that are my person means that Ontario cannot really just dispatch an official to yank off my hair without thereby wronging *me* (more specifically, without battering me—more on this in Part III, *below*). Any justified state scheme would have to stamp out such possibilities (or at least minimize such risks to an acceptable level, which is probably very close to nil). That is likely to be a difficult task.

73 At the risk of getting science-fictional for a moment, one might be tempted to argue that the contingency is deeper still: given recent talk of "mind-uploading," should we

also why my right to (much of) my body is more fundamental than my right to my oft-used fork.[74]

However, notice that certain parts of my body are indeed akin to my fork. We regard a not-insignificant fraction of our bodies as we do our forks. That is, I can lose my fork and use another, or indeed stop using forks entirely. Similarly, I can lose my hair or constantly cut it off to sell wigs, and yet remain a separate agent. (Indeed, commercial wig production using human hair is a venerable practice, at least as old as the Egyptians.)[75] Similarly, I can extract one of my kidneys without comprising my bodily integrity and remain capable of self-directed motion. Such body parts invite treatment as property.

To sum up these rather abstract arguments, I think that the body matters for personhood, as Pallikkathayil urges. But, as it happens, the biological unity required for agency implicates something less than the whole of the natural body. This conclusion is consistent with the view that the physical unit that contains our identity as embodied persons has deep

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regard even our brains, or *any* part of our bodies as essential to our persons? This evokes Hart's famous example of the world in which human beings are encased in invulnerable shells (see HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71:4 Harv L Rev 593 at 622–23). As Hart says there, I think if such remarkable developments came to pass, we would indeed have to revamp our notions of legal personhood (to say the least). In such a world, we would no longer be concerned with embodied personhood at all. The view I am proposing is orders of magnitude less radical, because it still affords an indispensable role to embodiment.

74 The difference in the importance between personal and proprietary rights is how our law captures this difference (and, as it happens, how Kantians do this, as well).

75 See Essert, *Yours and Mine*, *supra* note 10 at 276. However, I do not want to be seen as minimizing the idea that our hair could have a fundamental role to play in our identities should we wish, even if the law were to regard hair as property. Orthodox Sikhs, for example, do not cut their hair because they see the body in its natural form as an expression of the divine will (see e.g. Jasjit Singh, "Head First: Young British Sikhs, Hair, and the Turban" (2010) 25:2 J Contemporary Religion 203 at 205–07). Surely we could give further examples of how ownership does not capture the subjective attitudes of particular persons toward their body parts. But all of this is orthogonal to the claim I am making here. My point is just that whatever biological unity grounds legal personhood, it is something short of the entirety of the physical body. A private, subjective assessment alone will not shift one's hair from one's property to one's person for the purposes of private law. Nor am I suggesting that having a property right in something invariably implies less regard for it than a personal right. For example, many would regard a wedding ring as deeply personally significant (see Radin "Property and Personhood", *supra* note 4 at 959). The respect individuals can have for a body part likewise cuts across these categories. For further discussion of the relationship between the objects of property and their role in personhood, see Lisa M Austin, "Person, Place, or Thing? Property and the Structuring of Social Relations" (2010) 60:2 UTLJ 445.

(and perhaps unique) moral significance.[76] It just turns out that the physical integrity that is constitutive of one's independence as an agent is not the totality of one's body.

This position also provides a framework within which to answer questions like: "How do I know my hair, but not my brain, is mine and not a part of me?" My suggestion is that those body parts implicated in my separateness as an agent are me, but that the remainder of the body is mine. Categorizing some specific body parts will be difficult, as categorizing particulars always is. But, importantly, this reorientation means that we will approach the task of categorizing particulars with the right question in mind. It is not the act of separation from our biological bodies that is of significance. Rather, it is our moral and political commitments about personhood that should guide us in determining whether some particular body part is a part of our persons or merely something that we own. This method is unabashedly normative. Rather than policing a morally arbitrary distinction between attached and unattached body parts, we will acknowledge that what counts as crucial to our agency is a normative question—albeit the right normative question.

More pointedly, this position also wards off a moral misstep made by the prevailing, no-property-in-the body orthodoxy.[77] We risk endorsing a kind of biological parochialism by insisting that the entire natural body, and nothing else, constitutes our person. On the view that my person and my body are co-extensive, a wheelchair must be confined to the domain of property, while all of my body, including those parts I part with regularly, such as my hair and nails, are part of my person. The line between these categories is not written in the metaphysical fabric of the world. We can carve the distinction between personhood and property in our bodies normatively, just as we should do with objects in the "external" world. Accordingly, one feature of my view is that it allows us to recognize the importance of embodiment, but discard the biological parochialism. Where prosthetics, wheelchairs, and other non-biological things take up agency functions, in that they fulfill the (bodily) functions necessary for my being an independent agent, they are plausibly assimilated into my person. This allows us to explain why, despite not being biological, such objects can nonetheless become a part of me. There is a stencil of personhood required for agency, and this stencil can be filled by both biological and artificial body parts.

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[76] For more on this thought, see Victor Tadros, "Ownership and the Moral Significance of the Self" (2019) 36:2 Soc Philosophy & Policy 51 at 69.

[77] To be clear, Essert's view, which readily acknowledges that *more* than our bodies might be part of us, does not suffer from this defect (see Essert, *Yours and Mine*, *supra* note 10 at 282–83).

Moreover, the view I offer here is an important corrective to the idea that there is something grotesque about allowing for property rights in body parts because the biological body is sacrosanct. This idea has exerted a powerful grip on thinking about property rights and body parts generally, and the commodification literature in particular. Such worries are at least as old as Ronald Dworkin's remark that we should maintain "a prophylactic line that comes close to making the body inviolate, that is, making body parts not part of social resources at all."[78] We can make Dworkin's concern a bit more concrete. For example, many would abhor the idea of allowing people—particularly disadvantaged people—to pledge their body parts as collateral for a bank loan, as property treatment appears to invite.[79]

I think this concern is misguided in two ways. First, the idea that we should draw a prophylactic line around the body is both overinclusive and underinclusive. It is overinclusive because, as I have suggested, less than the totality of the biological body is a precondition for the personhood that Dworkin seeks to insulate from the whims of redistribution and market forces. Moreover, it is underinclusive, as many non-bodily objects can take up key personhood functions. First, to draw the line at the biological body alone is to exclude such objects, and fall into the biological parochialism described above. Second, if surrendering body parts to pay off one's creditors in bankruptcy proceedings is best prohibited, the law should hold the line at the level of bankruptcy law, rather than generally denying that body parts are ownable.[80] There may be a host of compelling policy rea-

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78 Ronald Dworkin, "Comment on Narveson: In Defense of Equality" (1983) 1:1 Soc Philosophy & Policy 24 at 49. For sources in the commodification literature, see generally Anderson, *supra* note 51; Titmuss, *supra* note 51; Satz, *supra* note 51; Brennan & Jaworski, *supra* note 51. Courts have also been exercised by such concerns. In his concurring opinion in *Moore v Regents of the University of California*, 51 Cal (3d) 120 (Sup Ct 1990) [*Moore*], Arabian J wrote, "[The] [p]laintiff ... 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." (at 148).

79 See e.g. Margaret Jane Radin, *Contested Commodities* (Cambridge, MA: Harvard University Press, 1996) at 125–26, 159.

80 Penner has observed that it is a better of assessment of whether a body part is ownable to ask if the body part could be removed and sold by my trustee in bankruptcy to satisfy a debt, rather than asking whether *I* may sell the kidney (see Penner, *Idea of Property*, *supra* note 30 at 117). To be clear, I agree with Penner's *conceptual* point. I do not think there are any *prima facie*, conceptual obstacles to regarding kidneys as property. There may be normative reasons for bankruptcy law to nonetheless refuse to make body parts the subject of property for its purposes. Something similar can be said for the possibility that a contract for the sale of one's attached body parts might warrant specific performance if breached. This might prompt worrying images of the breaching party being strapped to a gurney to be forced to extricate a kidney or receive a haircut.

sons to insulate body parts from forfeiture and bankruptcy proceedings.[81] But the key point is that the body is far from unique in attracting such concerns. A Hindu made to involuntarily surrender her ancestral idol in order to satisfy a legal claim—thereby losing the object of her daily worship—will feel a loss at least equal to the loss of a body part.[82] Yet such objects are not beyond the pale of ownership simply by virtue of being intimately connected with the personhood of their owners. The same is true of body parts.

The disadvantaged are routinely separated from or deprived of property. Inequality is a relational, formal problem about some people having property and others having less (or none). However, property-based inequality is not primarily an issue about what particular kinds of property the disadvantaged rather than the advantaged have (though it is, of course, important that we all have real property rights of some kind to ward off the relational inequality inherent in homelessness).[83] Our con-

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I think this is a bit too hasty. It should be noted at the outset that breach of contract for the sale of a body part may be adequately compensated with damages, unless there was specific evidence that the body part in question was purchased because of some peculiar interest of the buyer. In addition to the long-standing requirement that the plaintiff must adduce evidence that chattels are unique, the Supreme Court of Canada has also placed this requirement on what is perhaps the paradigmatic case of specific performance: real estate contracts (see *Semelhago v Paramadevan*, [1996] 2 SCR 415 at para 22, 136 DLR (4th) 1)). Second, just as equity refuses to enforce personal service contracts, equity would likely have normative reasons to prohibit the forced extraction of body parts akin to the exception for personal service contracts. Even in civil law jurisdictions, where specific performance is the default remedy (including for a swathe of contracts that the common law hesitates to specifically enforce because of supervision concerns) courts do not enforce personal service contracts because the work in question too intimately implicates the liberty of the breaching party. This is the overlapping interpretation of the common law *and* civil law's refusal to enforce personal service contracts given by art 7.2.2(d) of the UNIDROIT Principles 2016 (where "performance has an exclusively personal character", enforcement would interfere with the personal freedom of the obligor) (see *UNIDROIT Principles of International Commercial Contracts* (Rome: UNIDROIT, 1994)). See also Stephen A Smith, *Contract Theory* (Oxford, UK: Oxford University Press, 2004) at 398–403 (arguing that the best justification for the common law's refusal to give specific performance for personal service contracts is avoiding substantial interferences with personal liberty). This is *not* because the labour involved in such contracts is inalienable; otherwise no such contracts would be permitted in the first place. Analogously, body parts could be property, and alienable as such, but perhaps are too bound up (literally) with their biological source for equity to compel specific performance for the breach of such contracts. Compelling a haircut or surgery (even a safe one) is likely a step too far from the perspective of personal liberty.

81 See Katz, "Property Law", *supra* note 37 at 374. See also JE Penner, "The 'Bundle of Rights' Picture of Property" (1996) 43:3 UCLA L Rev 711 at 807.

82 A Sikh's kirpan is another such object. There are likely many more.

83 See generally Christopher Essert, "Property and Homelessness" (2016) 44:4 Philosophy & Public Affairs 266 [Essert, "Property and Homelessness"].

cern with economic exploitation is with relational subordination, not the peculiar objects of property that the poor are deprived of, about which we may have culturally-contingent attitudes.[84]

III. Private Law, Private Wrongs, and the Body

Thus far I have tried to assemble a normatively attractive account of the relationship of our persons to our bodies. I argued that such an account does not require resisting the idea of property in the body; on the contrary, it recommends that idea. In doing this, I have been speaking only obliquely about private law's role in these subjects. I now want to show that the law can rely on the view I have assembled to countenance the personal *and* proprietary wrongs one commits when a body part is excised from another without their consent. My view is explanatorily and remedially satisfying.

Let me preface this with a few familiar reflections on what is at stake in the distinction between personal and proprietary rights. As forms of normative authority, these rights differ at a legal-philosophical level because they secure different kinds of freedom in correspondingly different ways. Personal rights are important to secure our independence from other persons, and they do this by *shielding* that interest from alienability.[85] That is, my person must always be mine lest I become someone else's slave. Property is different, and is perhaps a mirror image of personal rights, because I can lend, share, gift, or sell my property (among other things). The freedom secured by property is secured *by* alienability. When we drop down to legal doctrine, we see structural differences between wrongs to persons and wrongs to property. A battery is a "trespass to the *person*."[86] By contrast, to interfere with my property is to interfere with something I have, not me. So apart from philosophical interest, understanding the kind of rights we have in our bodies is key to understanding the relevant wrongs, and in turn the remedies the law furnishes, when our bodies are interfered with.

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84 For more on the culturally-contingent attitudes that undergird anti-commodification arguments, see generally Anderson, *supra* note 51; Titmuss, *supra* note 51; Satz, *supra* note 51; Brennan & Jaworski, *supra* note 51. For more on the idea that poverty, including one of its most unfortunate consequences, homelessness, is first and foremost a matter of relational subordination rather than material deprivation, see Essert, "Property and Homelessness", *supra* note 83.

85 See Essert, *Yours and Mine*, *supra* note 10 at 263–79. See also Ripstein, "Authority and Coercion", *supra* note 18 at 13.

86 Accordingly, the dignity of the victim is often at stake where there is a battery (see Denise G Réaume, "Indignities: Making a Place for Dignity in Modern Legal Thought" (2002) 28:1 Queen's LJ 61 at 88).

This in mind, I want to make the case for the explanatory power of my account by way of an example. Suppose you creep up behind me and snip the hair off my head without my consent.[87] I am imagining a version of this example in which you hold my hair and then snip (as a barber might). First, notice that supposing my hair is mine, rather than me, is not a barrier to my launching a claim in battery. When you touch my shirt without touching my body, this is still a battery.[88] Analogously, when you touch my hair, the fact that my hair is in physical contiguity with the rest of my person means that this is still a battery. So my account does not sacrifice access to the tort of battery in virtue of finding property in the body. But, to return to the main thread, notice that when you snip my hair off my head, you also *take* my body part away from me. You leave with something that I now correspondingly lack. My account vindicates this intuition in a satisfying way, unlike proponents of the view that there is no property in the body. On the view that the hair on my head is mine, you are also liable in conversion—a proprietary wrong. All of this is consonant with the moral reality of the situation, which consists in a plurality of wrongs.[89] You have both done something to *me* and taken something that is *mine*.

Essert—whom I have conscripted as the spokesperson for the prevailing no-property-in-the-body orthodoxy—may insist that his account can also explain the plurality of wrongs that occurs in the hair-snipping case. That is, Essert holds that you batter me when you snip my hair off my head, but that this happens to be a peculiar battery such that the hair becomes *res* upon separation. Essert might add that there are strong reasons to suppose that, as a default norm of acquisition, the biological source is the owner of the newly ownable, severed hair. On this view, too, when you run away with my hair after snipping it off, I have a claim in

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87 Similar facts were at issue in the old English case of *Forde v Skinner*, [1830] 4 C&P 239, 172 ER 687, where a woman's hair was cut against her will to "take [her] pride down" (at 687). The defendants were found liable for battery.

88 See Essert, *Yours and Mine*, *supra* note 10 at 266; Essert, "Thinking Like A Private Lawyer", *supra* note 6 at 184; Scott Hershovitz, "The Search for a Grand Unified Theory of Tort Law" (2017) 130:3 Harv L Rev 942 at 949; *Restatement (Second) of Torts* §18, comment c (1977).

89 Tort law has a serious interest in accurately capturing the wrongs that occur when a defendant incurs tort liability (see Scott Hershovitz, "Treating Wrongs as Wrongs: An Expressive Argument for Tort Law" (2017) 10:2 J Tort L 1). Notice that I have only attributed one kind of right to the fact that I own certain parts of my body. The tort of battery itself supplies the additional wrong in question when my body, albeit a part that is mine, is interfered with. This, I think, addresses any concern that my accounts bootstraps gratuitous rights. This concern does cut against the provocative view that I briefly flagged, but rejected, in Part I.c, note 40, *above*, on which a particular body part is *both* me and mine.

both battery and conversion. In this way, Essert's view can reach the same result as the view I have offered.

However, I think Essert's explanation is less appealing. There is something normatively undesirable about the idea that the same act that we in one breath call a battery, should be what ushers in the transition to a property right (even if that property right is said to vest in the source by default). Notice that in conceptualizing the wrongs that occur during the snipping incident, Essert's view—and any view committed to the Separation Thesis in some form—allows the tortfeasor to unilaterally, by her act, change the status of my right to a part of my body. One might respond that this is not particularly troubling, because the law will suffer a tortfeasor doing something analogous in other contexts. For example, if you break my irreplaceable and irreparable statue into two, I now own two pieces of property rather than one. As a tortfeasor, you have created an "extra" property right.

But I think this situation is different for two reasons. First, there is no change in the *kind* of right I hold in the statue. It is still property that I am left with. By contrast, in the snipping incident, the nature of the right is being changed—and arguably, demoted—from a personal to a proprietary right.[90] This is the kind of transition that the right-holder should decide. This principle is authentic to the Weinribian idea of symmetry between right and remedy, and the normative continuity of the right despite its violation.[91] Your taking my hair *is* the reason I am owed a proprietary remedy. The alternative explanation—that you battered me, and just *happened* to create property in the process—lacks the continuity between right and remedy, though it claws its way to the same result.[92]

Second, in the case of the bisected statue, the law cannot ignore the empirical reality that two distinct things have been created. In fact, to do so would be to lose sight of the peculiar wrong that occurs when you break my statue into two.[93] In the hair-snipping incident, by contrast, the empirical reality can sustain two different normative interpretations. Either my hair has been converted from me to mine *or* the hair simply remains mine. As we saw above, separation underdetermines the choice between the continuity of a right and its transformation. So the explanation gen-

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90 Here I am donning Essert's view, *arguendo*.

91 See Ernest J Weinrib, *Corrective Justice* (Oxford, UK: Oxford University Press, 2012) at 84. See also Ripstein, *Private Wrongs*, *supra* note 60 at 7–8.

92 I am not suggesting that we should read the right off the remedy; that would get the conceptual order backwards. Rather, my point is just that allowing for property in the body allows us to avoid an undesirable implication that a prior commitment to the Separation Thesis creates in seeking to explain the moral reality of the situation.

93 A bisected statue has a defect, unlike a stack of paper split into two piles.

erated by my account is the preferable one; it explains the moral wrongs for the right reasons, and does so without commitment to any normatively undesirable upshot.

For the sake of offering a complete picture, I want to make one final observation about the taxonomy of bodily wrongs. Again, let me do so by way of an example. Suppose you yank my hair while it is on my head, but do not succeed in ripping it off. More generally, this raises the issue of what view private law should take when you yank (or pull or twist) my bodily property without inducing separation. No doubt you are liable in battery, as we have seen above. The interesting question is whether there is additionally a conversion here, as there was when you cut off my hair and ran away with it. Conversion is a difficult tort to characterize and distinguish from its conceptual and historical property-tort cousins. Recent work by Simon Douglas suggests that conversion concerns the intentional exercise of exclusive control over another's chattel, as if the chattel were one's own.[94] The tortfeasor need not derive a benefit from an impermissible exercise of control or take possession of the chattel.[95] So perhaps you are liable in conversion in virtue of the hair yank, just as you would be if you yanked on a shirt I was wearing. However, I think the main obstacle to regarding both these yanks as conversions is the "exclusivity" requirement, viz., that at some point, the defendant was the only person controlling the chattel.[96] This is where conversion gets its "*property*-wrongness": the tortfeasor excludes the owner as if she herself owned the chattel. In both examples, it's not clear that I have ever been deprived of control of my chattels, because they still remain *on* my person in both cases. To analogize to another example, if you try to wrest an apple that I own out of my grip without touching my hand, you batter me because you thereby force my hand to move without my consent.[97] However, I am inclined to say that there is no conversion if you do not succeed in removing my apple from my hand, because there is no moment where you are in exclusive (factual) control of the apple. In fact, the situation is best characterized as a struggle for such control. Something analogous, I think, goes for the situation in which you yank my hair. You are not liable in conver-

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94 See Simon Douglas, "The Nature of Conversion" (2009) 68:1 Cambridge LJ 198 at 199 [Douglas, "Conversion"]. Conversion remains an undertheorized tort. Conversion is often overlooked in torts casebooks and first-year law school syllabi.

95 See *ibid* at 209–11.

96 See *ibid* at 212.

97 See Essert, *Yours and Mine*, *supra* note 10 at 2; Ernest J Weinrib, "Ownership, Use, and Exclusivity: The Kantian Approach" (2018) 31:2 Ratio Juris 123 at 129.

sion, unlike when you snip off my hair and thereby take exclusive control of it when the hair falls into your hands.[98]

IV. Rejecting the Jurisprudence of the Separation Thesis

In addition to offering a satisfying conceptual taxonomy of bodily wrongs, my account also offers a principled way forward in the face of scattered doctrinal developments concerning separated biomaterials. A series of well-known cases takes the following form: S undergoes some medical procedure, during which T excises some body part or bodily tissue from S's body.[99] Without S's authorization, T subsequently makes some use of the body parts (e.g., for lucrative scientific research) or damages them somehow. Such disputes have served as occasions for courts to pronounce on whether S has property in their body parts. The resulting answers are mixed, and the doctrine is beset by a series of difficulties.[100]

Moore v. Regents of the University of California is perhaps the best-known case of this kind. John Moore was a patient at the University of

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98 There is some degree of contingency associated with which particular torts a system of private law chooses to stand in for "property wrong" and "personal wrong." One might say that there is a trespass to chattel from grabbing my hair. I am open to this possibility, though I am unsure if there are good reasons for regarding trespass to chattel as a separate tort from conversion. If trespass is indeed a separate wrong, then perhaps you commit a trespass when you grab the hair on my head. But if so, this is no different than the situation where you touch my shirt in a way that is also a harmful and offensive; that would also be a battery and a trespass. Similarly, in some (anomalous) jurisdictions, there is only a conversion when the plaintiff has made a demand that the property be returned, which is then refused. Only then is there a conversion; dispossession does not yet suffice (see *Fletcher v Pump Creek Gas & Oil Syndicate*, 266 P 1062 at 1064–65 (Wyo Sup Ct 1928)). These jurisdictions seem to follow the original, historical understanding of the tort that other jurisdictions have since evolved beyond (see Douglas, "Conversion", *supra* note 94 at 199). Yet, even in such jurisdictions, courts have sometimes held that demand and refusal is not a separate element of the tort, but rather merely serves the evidentiary function of demonstrating the conversion (*Coleman v Francis*, 129 A 718 (Conn Sup Ct Err 1925)). My use of conversion here assumes that it is the primary "property-wrong" tort, just as battery is the primary "personal-wrong" tort. Any principled system of private law must have both of these *kinds* of torts. Beyond this essential, formal structure, there are a variety of contingent ways a legal order might carve up the conceptual space of private wrongdoing with particular torts. My point about the taxonomy of bodily wrongs is just that there are some ways of wronging people with respect to their bodies that are fundamentally proprietary, as well as personal.

99 See Simon Douglas & Imogen Goold, "Property in Human Biomaterials: A New Methodology" (2016) 75:3 Cambridge LJ 478 at 484 [Douglas & Goold, "Property in Human Biomaterials"].

100 *Cf Yearworth*, *supra* note 2; *Moore*, *supra* note 78; *Greenberg v Miami Children's Hospital Research Institute Inc*, 264 F Supp (2d) 1064 (SD Fla 2003); *Washington University v Catalona*, 490 F (3d) 667 (8th Cir 2007).

California Los Angeles (UCLA) Medical Center, and had samples of his blood, sperm, and other bodily tissue extracted for the purposes of diagnosing his hairy-cell leukemia.[101] Moore came to see Dr. David W. Golde at UCLA because Dr. Golde was one of a handful of physicians in the world who was then conducting research on this distinctive cancer. The periodical sampling of bodily tissue was part of the routine monitoring of the patient by the treating oncologist. But unbeknownst to Moore, the physicians at the UCLA Medical Center, including Dr. Golde, took a special, non-therapeutic interest in Moore's body parts. Dr. Golde quickly realized that Moore's genetic material could be used for important scientific research. He conducted gratuitous excisions of Moore's tissue to establish a cell line from Moore's T-lymphocytes, representing these procedures to Moore as medically necessary.[102] Eventually, Dr. Golde registered a patent in the cell line along with another co-inventor.[103] Moore sued.

While giving effect to Moore's claims for breach of fiduciary duty, the Supreme Court of California held that Moore lacked the requisite property interest in the cells needed for a conversion action. Yet the court was prepared to hold that Dr. Golde had acquired a property right, arguing that he had done the work of converting mere biological material into the "factually and legally distinct" patented cell line.[104] This troubling asymmetry is difficult to justify. Why should the source be barred from a property right while a third party tortfeasor has access to such a right?[105] The asymmetry in *Moore* gets its impetus from a prior commitment to the Separation Thesis.

One might attempt to substantiate the asymmetry by arguing that Dr. Golde effectively created something "new." As we saw just a moment ago, the majority in *Moore* made a version of this argument. The court held that the patented cell line was both "factually and legally distinct" from Mr. Moore's bodily tissues, because Dr. Golde had, by his efforts, *converted* (excuse the pun!) Moore's cells to a patentable cell line, an arduous and intellectually-charged task.[106] After all, Moore cannot have had

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101 See *Moore*, *supra* note 78 at 125–26.

102 See *ibid* at 125–27.

103 See *ibid* at 127.

104 *Ibid* at 141.

105 Mosk J made a similar point in dissent, arguing that the majority's finding that the scientists had "invented" the cell line stands in stark contrast to their holding that Moore, the biological source, had no property interest in his own tissue (see *Moore*, *supra* note 78 at 168).

106 *Ibid* at 141–42.

a *patent* in his own unmodified cells,[107] any more than I can have a patent in a fistful of dirt that I gather up in my garden.

This rejoinder misses the mark. My contention is not that the asymmetry between Dr. Golde's *patent*—a creature of statute—and Moore's lack of a patent is impossible to justify. *That* asymmetry may, *in toto*, be defensible, precisely because merely "naturally-occurring" substances, such as Moore's cells, cannot be the subject of a patent. The asymmetry I am pointing to is a more general one, namely the asymmetry between the fact that Dr. Golde walked away with *a* property right, while Moore, simply in virtue of being unfortunate enough to be the biological source of the cells, was found to have *no* property right, and thus no proprietary remedy. Whether a patented cell line is qualitatively distinct from "mere" cell tissue is a distinct issue. My argument does not turn on the truth or falsity of that proposition.

One might contend that it was not separation, but some later event after separation that transformed Moore's cells into Dr. Golde's property, namely, Golde's work in altering the cells into a cell line. This looks like a way of reaching the *Moore* court's result without endorsing the Separation Thesis. However, this reimagined justification also fails. *Ex hypothesi*, if this objection is not committed to the Separation Thesis, Moore must have owned his tissue right until the moment it was converted into something new—cell lines—by Dr. Moore. The ancient Roman doctrine of accession, received into American common law, provides that a new thing made from the property of another that is of a "different species" than the original constituents becomes the property of the labourer, as long as compensation is provided for the value of the original constituents.[108] However, this doctrine is only available where the improver is innocent and has not acted in bad faith.[109] Dr. Golde would not have been entitled to invoke the doctrine to ground his right in the cell lines even if he had indeed fashioned something new from Moore's cells. Dr. Golde had breached his fiduciary duties, after all.

The *Moore* court's effort to deny Moore a remedy was premised on the erroneous assumption that whatever property right existed could only have come into existence after separation from Moore's body. The majority weaponized this assumption to find that only the patented cell line "ex-

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[107] See *ibid*, citing *Diamond v Chakrabarty*, 447 US 303 at 309–10 (1980).

[108] See "Accession on the Frontiers of Property", Note, (2020) 133 Harv L Rev 2381 at 2383–84.

[109] See *Wetherbee v Green*, 22 Mich 311 (Sup Ct 1871). For more discussion on accession and other historical doctrines related to the transformation of property, see *supra* notes 47, 108.

isted" after separation. If we acknowledge that Moore had a property right before separation, we can in turn see that Dr. Golde's property right did not pop into existence from thin air, as if Dr. Golde had somehow worked upon a freshly landed meteor from space. Dr. Golde's cell line was a descendant of Moore's cells, and thus, any purported property right held by Dr. Golde had to be traced to Moore's extant property right. In other words, Dr. Golde did not convert some *res nullius* into his *res*; he purported to seize Moore's *res* by his own efforts. That, he could not have done. Jettisoning the Separation Thesis sharply crystallizes the issue in *Moore*.

Consider another difficulty with the prevailing orthodoxy. If we cling on to the Separation Thesis in supposing that separation creates something ownable, as the law presently does, it does not immediately follow that *I* own my body part when that body part becomes detached. To repurpose an example from the previous section, it is not obvious that I own my hair when my hair is snipped off by you.[110] In the ordinary course, first possession is the norm of acquisition that applies to something that was once *res nullius*, and is now entering the world of property for the first time.[111] But this looks morally arbitrary, if not downright unjust, in the case in which you are the one who has snipped off my hair without my consent, and thereby come to possess it. In the face of this, we might appeal to a *sui generis* norm of acquisition for body parts, one that gives priority to the biological source. Yet even this suggestion is not free from controversy. Echoing the ideas that carried the day in *Moore*, courts and commentators have suggested that those who have "created" a "new thing" by extracting a body part—such as a doctor taking a blood sample or removing tissue—should thereby have title to that body part.[112]

On my account, we avoid having to determine whether a personal right continues uninterrupted *despite* separation, or if the right is transformed to property *because* of separation. If property in particular body parts exists prior to separation, then we know (1) *if* someone owns a body part after separation; and indeed (2) *who* owns that body part. There is no need to resort to norms of acquisition—and to partake in the controversy this invites—because my view renounces any metaphysical commitments concerning separation. And this best accords with the intuitive position—

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[110] See Douglas & Goold, "Property in Human Biomaterials", *supra* note 99 at 499.

[111] See *ibid.*

[112] Proponents of such views are often concerned to protect and justify the intellectual property interests of biomedical researchers. Other views suggest that some third party, such as the state, could own separated biomaterials (see Douglas & Goold, "Property in Human Biomaterials", *supra* note 99 at 500). Unlike the objection I canvassed in *supra* note 98, such a view *is* committed to the Separation Thesis, because it suggests that the act of separation itself is morally transformative.

the source does not *acquire* anything upon separation. The source simply maintains something that was theirs all along.

There are disparate social meanings, as well as differing biological and functional capabilities that accompany the separation of different body parts. Thus, even having a blanket property-creation rule for all separated body parts would achieve clarity only by regularly working contrary to the reasonable expectations of legal subjects.[113] As we saw in our discussion of German law, it is not obvious whether sperm should get personal or proprietary treatment when removed from the body.

The decision of the England and Wales Court of Appeal in *Yearworth v. North Bristol NHS Trust* is plagued by similar issues, despite reaching a different conclusion than *Moore*.[114] The *Yearworth* court also endorsed the Separation Thesis. As in *Moore*, the *Yearworth* court awarded the plaintiffs *a* remedy, but failed to award *the* remedy that best vindicated the plaintiffs' claims. The plaintiffs were a number of men who were diagnosed with cancer and wished to protect their sperm from the punishing side effects of chemotherapy.[115] On the suggestion of doctors, the men agreed to deposit their sperm in a storage facility.[116] Sometime later, a mishap in the storage facility's temperature controls resulted in their sperm being permanently damaged and rendered the sperm unsuitable for reproductive purposes. Unlike in *Moore*, the plaintiffs couched their actions in negligence for psychiatric injury and mental distress (i.e., personal, rather than proprietary, wrongs). Only in the alternative did they contend that their property rights were infringed. Counsel for the plaintiffs argued that the mere fact of ejaculation should not make a difference to the availability of a finding of *personal* injury, as would have been the finding had the sperm been damaged while still in the scrotum.

The court acknowledged that the plaintiffs' position aligned with German law's approach to detached sperm.[117] Despite this, the court held that "it would be a fiction to hold that damage to a substance generated by a person's body, inflicted after its removal for storage purposes, constituted a bodily or 'personal injury' to him."[118] The court was not explicit

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113 The idea that the law must be consonant with the pre-legal expectations of legal subjects to be efficacious and legitimate is a kind of Fullerian thought. See Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969); Gerald J Postema, "Implicit Law" (1994) 13:3 Law & Phil 361.

114 See *Yearworth*, *supra* note 2.

115 See *ibid* at paras 3, 5.

116 See *ibid* at para 5.

117 See *ibid* at paras 20–21.

118 See *ibid* at para 23.

about exactly what it found fictional about the German position, but it appears that the court thought that one's person was co-extensive with *only* one's attached body parts.[119] The court instead held that the men had property in their sperm, which in turn allowed them to claim negligence damages.[120]

Yet, despite awarding the men a remedy, the court failed to redress the distinctive wrongs the men were alleging, which sounded in personal, rather than proprietary, terms. As we have seen, there are a host of reasons to suppose that separation does not invariably transform personal rights to property rights. The plaintiffs' argument, that they retained personal rights over the sperm *despite* separation, went essentially unanswered by the court, which is in turn a symptom of the court's inability to escape the Separation Thesis. I see no principled reason for the law to continue to assign such importance to separation from the body and the *res nullius* rule, particularly in light of the doctrinal difficulties that hound this commitment, and the rewards that come with rejecting it.

Conclusion

Where does this leave us? It remains true that our relationship to our persons differs in important ways from our relationship to our property. On an intuitive picture, my person is my body, and the outside world is merely the realm of the things that I can own. Yet there are problems with this picture. For one, some have persuasively argued that my right to my person can stretch beyond my body, and into the world. I have argued for a kind of symmetry: the frontier between our persons and our property is reproduced at a second locus, namely, *within* our bodies. While some of my body is me, parts of my body can also be mine.

These are perhaps startling results. I have suggested that our legal persons are both more and less than our bodies; things can become parts of our persons, and parts of our bodies can be our things. Yet this is just what it is to be embodied free beings living in a spatial reality populated by persons and things, and overlaid by law. The law can make these categories porous, and we can use the law to traverse their borders.

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[119] In this way, the *Yearworth* court is susceptible to an accusation of biological parochialism, as described in Part II.

[120] See *Yearworth*, *supra* note 2 at para 60.