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Defending Henrietta Lacks: Justification of Ownership Rights in Separated Human Body Parts

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Defending Henrietta Lacks: Justification of Ownership Rights in Separated Human Body Parts

Arseny Shevelev* and Georgy Shevelev**

ABSTRACT

Since the time of Moore v. Regents of the University of California, *it has become a well-established and widespread view that a person, when their separated body parts are misappropriated, is forced to limit themselves to fiduciary and other non-proprietary claims against those who violate the bodily inviolability of their separated parts. Now, with the filing of a lawsuit in defense of the rights in body parts of the victim of racial discrimination, Henrietta Lacks, the judicial system has an opportunity to justify itself by adopting a different perception of rights in human body parts. This Article focuses on the fundamental similarity between separated human body parts and other property, which creates a basic possibility for them to be owned. It argues that a person has ownership of their separated body parts and provides a critical analysis of other theories of rights in the human body, which results in establishing that the concepts that do not refer to the right of ownership entail infringement of human rights and the inability to restore their interests to the fullest extent. Only a clear adherence to the idea of ownership in body parts will protect the memory of the deceased Mrs. Lacks and prevent her rights and those of her descendants from being trampled upon, while at the same time opening the way and setting a precedent for the protection of the rights of others in a similar situation.*

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I. INTRODUCTION

In 1951, a Black woman and mother of five named Henrietta Lacks came to The Johns Hopkins Hospital with complaints, having been diagnosed with cancer and having her cells removed from her body by doctors in the complete absence of her consent.[1] Although Mrs. Lacks ultimately passed away that year at the age of thirty-one, it was then that the story of this woman's social ministry began. HeLa cells—named after the first letters in Henrietta and Lacks—decisively changed the world, playing an extraordinary role in a host of medical breakthroughs that saved myriad lives.[2] Regarding Henrietta, whose impact on the world is hard to overestimate, a fascinating book was written that became a bestseller,[3] a film was made about her,[4] and she

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1. *The Legacy of Henrietta Lacks*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/henriettalacks/index.html (last visited Mar. 21, 2022) [https://perma.cc/98YE-3DHP] (archived Mar. 20, 2022) (depicting the story of Henrietta).

2. *See* Rebecca Skloot, *Cells That Save Lives Are a Mother's Legacy*, N.Y. TIMES (Nov. 17, 2001), https://www.nytimes.com/2001/11/17/arts/cells-that-save-lives-are-a-mother-s-legacy.html [https://perma.cc/ZW8W-ML98] (archived Mar. 23, 2022) (discussing the importance of HeLa cells).

3. *See generally* REBECCA SKLOOT, THE IMMORTAL LIFE OF HENRIETTA LACKS (2010). *See also Best Sellers – Paperback Nonfiction: Sunday June 10th 2012*, N.Y. TIMES, https://archive.nytimes.com/query.nytimes.com/gst/fullpage-9407E4DF133EF933A25755C0A9649D8B63.html (Jun. 10, 2012), [https://perma.cc/9R93-8QTR] (archived Mar. 20, 2022) (declaring this book to be the best-selling book in the U.S.).

4. THE IMMORTAL LIFE OF HENRIETTA LACKS (HBO Films, 2017) (with Renée Elise Goldsberry as Henrietta, and Oprah Winfrey as Deborah Lacks, Henrietta's daughter, through whose eyes her story is told).

was portrayed in a painting exhibited at the National Portrait Gallery in the hall devoted to portraits of influential people.[5]

At the same time, Henrietta's story is not only an ongoing chronicle of the celebration of her contributions, but also an example of blatant discrimination bolstered by the legal order and the living law operating through judges. From a legal perspective, Henrietta's case is first and foremost the situation of a racially discriminated-against woman who has been estranged from her own body and deprived of legitimate rights to derivative parts separated from it. Moreover, the discrimination described has not fallen into oblivion and is not in the distant annals of history but has been perpetuated and continues in its most overt forms to the present day. Big pharmaceutical companies continue to misappropriate multibillion-dollar profits from the use of unique immortal cells,[6] illegally removed from Henrietta's body without her consent, thus demonstrating their neglect of her rights to the separated parts of her body and belittling her contribution to the development of medicine. Today, Henrietta's descendants seek to defend the rights of their ancestress, suing in federal court in Baltimore against a company that skillfully took advantage of the "racially unjust medical system."[7] Indeed, it is hard to disagree that "[i]t is outrageous that [a] company would think that they have intellectual property rights to [Henrietta Lacks's] cells, . . . when her family, her flesh and blood, her Black children, get nothing."[8] Accordingly, honoring Henrietta and realizing that her case can be a lodestar for the universal recognition of a person's rights to their own

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5. *See* Ryan P. Smith, *Famed for "Immortal" Cells, Henrietta Lacks is Immortalized in Portraiture*, SMITHSONIAN MAG. (May 15, 2018), https://www.smithsonianmag.com/smithsonian-institution/famed-immortal-cells-henrietta-lacks-immortalized-portraiture-180969085/ [https://perma.cc/NT3W-49PS] (archived July 21, 2022); *Henrietta Lacks (HeLa): The Mother of Modern Medicine*, NAT'L PORTRAIT GALLERY, https://npg.si.edu/object/npg_NPG.2018.9 (last visited Mar. 21, 2022) [https://perma.cc/LQ48-A2VJ] (archived Mar. 20, 2022) (both describing a portrait of Henrietta located in the National Portrait Gallery, which, among other things, allegorically depicts that Henrietta had her immortal cells stolen).

6. *See, e.g.*, Jerry W. Shay, Woodring E. Wright & Harold Webin, *Defining the Molecular Mechanisms of Human Cell Immortalization*, 1072 BIOCHIMICA ET BIOPHYSICA ACTA 1, 1–7 (1991) (defining immortalization as the capacity of normal diploid cells to overcome senescence, that is, the loss of cell division typically seen in normal cells following continuous passaging).

7. *See* Emily Davies, *70 Years Ago, Henrietta Lacks's Cells Were Taken Without Consent. Now, Her Family Wants Justice*, WASH. POST (Oct. 4, 2021), https://www.washingtonpost.com/local/legal-issues/henrietta-lacks-family-sues-company/2021/10/04/810ffa6c-2531-11ec-8831-a31e7b3de188_story.html [https://perma.cc/C52F-7TEC] (archived Mar. 10, 2022) (quoting the filed lawsuit).

8. *Henrietta Lacks' estate sued a company saying it used her 'stolen' cells for research*, NPR (Oct. 2, 2021), https://www.npr.org/2021/10/04/1043219867/henrietta-lacks-estate-sued-stolen-cells [https://perma.cc/6CPX-VL2L] (archived March 22, 2022) (citing the family's attorney, Ben Crump).

body,[9] we wish to devote this Article to the justification that the rights to the separated body parts belong to the source of the parts in question, explaining, *inter alia,* the legal nature of these rights.

Henrietta's earthshaking story is the finest proof and culmination of the truth that the human body has always been under the scrutiny of law. Although this fact is obvious, its recognition is only a relatively recent phenomenon. The human body used to be concealed and even dissolved in the person themselves, becoming inaccessible to the direct perception of the law, which, due to the peculiarities of legal technique permeated by the behavioral paradigm, discussed the human mainly as a person (i.e., an addressee of commands, orders, and commandments). Although, in reality, there is no doubt that the state, which formed law, was interested not in the person of the human, but in their body,[10] which is a source of physical and intellectual strength and, therefore, a valuable resource that can be consumed by the state. In this sense, the law's regulation of the human body is a secret of Polichinelle (an open secret) dating back hundreds and thousands of years. However, it should be noted that the law regulated the human body as a whole, and the law was not interested in the separated parts of the body, which it did not pay attention to. There is an understandable reason for this: only recently, due to the development of science, have the separated parts of the body ceased to be perceived as something useless—having, at best, a value for anatomical research.[11]

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9. *Cf. Henrietta Lacks: Science Must Right a Historical Wrong*, 585 NATURE 7, 7 (2020) (calling for a transition to a fair system of use of biomaterials based on consent); Carne Wolinetz & Francis Collins, *Recognition of Research Participants' Need for Autonomy: Remembering the Legacy of Henrietta Lacks*, 324 JAMA 1027, 1028 (2020) (declaring that it is time to "establish[] a Henrietta Lacks biospecimen consent policy").

10. Our stated thesis is admirably supported by the crime of maim, which once existed in England, for which a person was liable even if they caused harm to themselves. For harm to the body to create the crime of maim, one of three conditions had to be met, 1 WILLIAM OLDNALL RUSSELL & JAMES W.C. TURNER, RUSSELL ON CRIME 624–25 (James W.C. Turner ed., 12th ed. 1964), the most important and revealing of which was the infliction of so much damage on a man's body that he became incapable of fighting (or his capacity to fight was seriously impaired). *See* 1 WILLIAM HAWKINS & JOHN CURWOOD, TREATISE OF THE PLEAS OF THE CROWN 107 (8th ed. 1824); JAMES F. STEPHEN, DIGEST OF THE CRIMINAL LAW 165 (Herbert Stephen & Harry Lushington Stephen eds., 6th ed. 1904). It is not difficult to see why the crime is designed in such a way that the assault is directed only to the man and concerns even the harm done by the victim himself—the punishment for this crime protects the interests of the State in the most efficient exploitation of the bodies of English men, which, according to the absurd and naive belief of thinkers of the past, were more important than those of others, and therefore subject to increased protection even against the very person existing in the body.

11. *See, e.g.*, 1 RICHARD WEYL, VORTRÄGE ÜBER DAS BGB FÜR PRAKTIKER 181 (1898) (Ger.) (speculating on the utility of ownership in separated body parts in the context of conducting anatomical research).

Separated body parts have acquired a significant economic value,[12] and this is due to the possibility of using body parts for medical and cosmetic purposes.[13] The stated value of severed body parts, as well as the extensive involvement of severed body parts in economic circulation, requires a clear definition of the legal status of such body parts, as well as the rights arising in relation to them. In order to fulfill this purpose, we will consider the concepts of proprietary rights in separated body parts in Part II. Part III will consider the personality rights, that is rights which derive from the very personality of the human from whom the body parts have been severed and which are designed solely to protect the interests of that human as a person, and other rights over these body parts that have been proposed in the literature or case law.[14]

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12. *See, e.g.*, Ingrid Schneider, *Körper und Eigentum - Grenzverhandlungen zwischen Personen, Sachen und Subjekten*, *in* KONFIGURATION DES MENSCHEN 41, 41 (Ellen Kuhlmann & Regine Kollek eds., 2002) (Ger.).

13. There is a demand for bodily substances of all kinds and in all kinds of industries. *See, e.g.*, Walter Gropp, *Wem Gehört die Plazenta? - Überlegungen zur Vermarktung eines der "Grenzüberschreitung" Dienenden Organs*, *in* GRENZÜBERSCHREITUNGEN: BEITRÄGE ZUM 60. GEBURTSTAG VON ALBIN ESER 299, 300–01 (Jörg Arnold et al. eds., 1995) (Ger.) (reporting that human placenta is widely used in the cosmetics industry); Thomas Harks, *Der Schutz der Menschenwürde bei der Entnahme fötalen Gewebes – Zur Bedeutung des Zusammenfallens von pränatalem und postmortalem Grundrechtsschutz*, *in* 2002 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 716, 716 (Ger.) (reporting that some medical procedures related to rejuvenation may use stem cells extracted from embryos). It should be noted that the demand for biomaterials does not stand still. *See* Marie-Xavière Catto, *Des Éléments du Corps Humain Disponibles pour l'Industrie Pharmaceutique?*, *in* 15 CAHIERS DE LA RECHERCHE SUR LES DROITS FONDAMENTAUX: LE CORPS HUMAIN SAISI PAR LE DROIT: ENTRE LIBERTÉ ET PROPRIÉTÉ 55, 63 (Aurore Catherine et al. eds., 2017) (Fr.) (correctly pointing out that the need for human organs and tissues by medical organizations and industry is only increasing over time); *see also* CHRISTIAN KOPETZKI, ORGANGEWINNUNG ZU ZWECKEN DER TRANSPLANTATION 14 (1988) (Austria); CARL FRANTA, DIE GESCHICHTLICHE ENTWICKLUNG DES TRANSPLANTATIONSRECHTS 44–45 (2005) (Austria) (each emphasizing that there is not only a private but also a public interest in the use of separated body parts, for example, in transplant operations).

14. We cannot agree with the view that it is correct to ignore the nature of the rights to the separated parts of the body, instead trying to delineate the boundaries of the rights of disposal of these parts, for this view. *See, e.g.*, Heinrich Frankena & F. de Graaf, *Grondrechten en Eigendom van Bloed. Het NCAB-rapport over Grootschalig AIDS-onderzoek*, *in* 3 TIJDSCHNFT VOOR GEZONDHEIDSRECHT 54, 56–57 (1990) (Ger.). This view is joined by many proponents. *See, e.g.*, Donald Hubin, *Human Reproductive Interests: Puzzles at the Periphery of the Property Paradigm*, 29 SOC. PHIL. & POL'Y 106, 116–18 (2012); Neil Maddox, *Property, Control and Separated Human Biomaterials*, 23 EUR. J. HEALTH L. 1, 2 (2016) (each claiming that having ownership of the body does little to clarify what rights a person has with respect to their body); *see also* Barbro Bjorkman & Sven Hansson, *Bodily Rights and Property Rights*, 32 J. MED. ETHICS 209, 213–14 (2006) (believing it is correct to pay attention not to the right granted to organs, but to the remedy provided to the individual). In our view, it is the nature of the right to organs that predetermines the boundaries of the disposition of the right and the means of its protection. Evasion from defining the nature of the right is tantamount to constructing this right from scratch. The latter option, due to the enormity of the required time expenditures, is clearly less preferable.

II. THE CONCEPT OF OWNERSHIP IN SEPARATED BODY PARTS

Conditio sine qua non of the right of ownership, as we know, is property. In this connection, the presentation of the concept of ownership in separated body parts begins with the proof of their recognition as belonging to the regime of property (discussed in subpart A), but, since in our time not all things have the same capacity to be the object of ownership, we cannot disregard the perception of body parts as things *sui generis*, having a special nature and a different regulation of the regime of ownership (discussed in subpart B). This Part concludes with the procedure for determining who owns the parts separated from the person's body discussed in subpart C.

A. *The Recognition of Separated Body Parts as Property as a Necessary Prerequisite for the Emergence of Ownership: Fluctuations in Case Law*

The most common view is that all parts of the body, from the moment of detachment, become property that can be owned.[15] This

15. This is the opinion in many countries of the continent. *See* Hermann Dilcher in: STAUDINGER BGB, 12th ed. 1978, § 90 recital 15 (Ger.); 2 JOHANNES WESSELS & THOMAS HILLENKAMP, STRAFRECHT BESONDERER TEIL 34 (36th ed. 2012) (Ger.); Jan Zopfs, *Der Tatbestand des Diebstahls - Teil 1*, 5 ZEITSCHRIFT FÜR DAS JURISTISCHE STUDIUM [ZJS] 506, 507 (2009) (Ger.); EVA BRITTING, DIE POSTMORTALE INSEMINATION ALS PROBLEM DES ZIVILRECHTS 64–65 (1989); Jörg Fritzsche in: BAMBERGER/ROTH BGB, 2d ed. 2007, § 90 recital 30 (Ger.); Karl Gareis, *Das Recht am Menschlichen Körper*, *in* FESTGABE DER JURISTISCHEN FAKULTÄT ZU KÖNIGSBERG FÜR IHREN SENIOR JOHANN THEODOR SCHIRMER ZUM 1. AUGUST 1900 59, 90 (1900) (Ger.); Andreas Hoyer in: SK-StGB, 2007, § 242 recital (B)4 (Ger.) (each is a German author); *see also* Bernhard Eccher in: KBB ABGB, 3d ed., § 285 recital 2 (Austria); Heinz Krejci, *Wem gehört die Nabelschnur?*, 2001 RDM 67, 68–70 (Austria); Peter Steiner, *Zu den Rechtlichen Rahmenbedingungen der Forschung an Humansubstanzen*, 2002 RDM 173, 175–76 (Austria); Christian Kopetzki, *Die Verwendung Menschlicher Körpersubstanzen zu Forschungszwecken*, *in* FESTSCHRIFT FÜR MANFRED BURGSTALLER ZUM 65 601, 609–10 (Christian Graf & Ursula Medigovic eds., 2004) (Austria) (each supporting the same approach in Austria). The view that ownership in a severed body part is possible has also been expressed in the Netherlands. *See* Henricus Leenen, *Recht op Eigen Lichaam*, *in* 2 TIJDSCHRIFT VOOR GEZONDHEIDSRECHT 1, 5 (1978) (Neth.); J.H.S. van Herten, *De Rechtspositie van Lichaam, Lijk, Stoffelijke Resten, Organen en Niet-menselijke Implantaten*, *in* 5689 WEEKBLAD VOOR PRIVAATRECHT, NOTARIAAT EN REGISTRATIE 157 (1984) (Neth.); CHARLES PETIT, LICHAAM EN LIJK ALS VOORWERPEN VAN RECHTSBETREKKING, RECHTSGEREELDS MAGAZIJN THEMIS 431 (1950) (Neth.); Anna M.L. Broekhuijsen-Molenaar, Civielrechtelijke Aspekten van Kunstmatige Inseminatie en Draagmoederschap 17 (1991) (Ph.D, dissertation, Leiden University) (Neth.); HENRICUS J.J. LEENEN, J.K.M. GEVERS & JOHAN LEGEMAATE, HANDBOEK GEZONDHEIDSRECHT. RECHTEN VAN MENSEN IN DE GEZONDHEIDSZORG 53 (2007) (Neth.); Johanna van der Steur, Grenzen van Rechtsobjecten. Een Onderzoek naar de Grenzen van Objecten van Eigendomsrechten en Intellectuele Eigendomsrechten 211–22 (2003) (Ph.D. dissertation, Leiden University) (Neth.). In France, there is also an extensive list of advocates stating that a severed body part becomes a thing. *See* Erika Sabathié, La Chose en Droit Civil § 659, at 608 (2004) (Ph.D. dissertation, University of Paris II) (Fr.); Rémy Libchaber, *Biens*, *in* RÉPERTOIRE DE DROIT CIVIL § 79, at 15 (2002) (Fr.); XAVIER

position has a fairly simple but logical justification; the fact that the whole human body is not an object of the right of ownership[16] does not mean that the separated body parts will not be an object of the right of ownership as well.[17] In essence, such an argument is a part of the broader thesis that all objects of the material world are property if they are not the subjects of rights, and such a thesis was merely applied to detached parts of the body.[18] Note that law did not immediately

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LABBÉE, CONDITION JURIDIQUE DU CORPS HUMAIN, AVANT LA NAISSANCE ET APRÈS LA MORT 270 (2012) (Fr.); FRÉDÉRIC ZENATI-CASTAING & THIERRY REVET, MANUEL DE DROIT DES PERSONNES § 271 (2006) (Fr.); Xavier Dijon, Le Sujet de Droit en son Corps: Une Mise à l'Épreuve du Droit Subjectif § 4 ¶ 985, at 674 (1982) (Ph.D. dissertation, Université de Namur) (Fr.); ANDRÉ DECOCQ, ESSAI D'UNE THÉORIE GÉNÉRALE DES DROITS SUR LA PERSONNE 31 (1960) (Fr.); Michelle Gobert, *Réflexions sur les Sources du Droit et les Principes d'Indisponibilité du Corps Humain et de l'État des Personnes*, 91 CIV. REVUE TRIMISTRIELLE DE DROIT CIVIL [RTD CIV.] 489, § 24 (1992) (Fr.). In France, it is also emphasized that separation allows the acquisition of ownership in a thing. *See, e.g.*, Grégoire Loiseau, *Le contrat de don d'éléments et produits du corps humain. Un autre regard sur les contrats réels*, 39 RECUEIL DALLOZ 2252, 2252 (2014) (Fr.); FLORENCE BELLIVIER & CHRISTINE NOIVILLE, CONTRATS ET VIVANT § 78 (2009) (Fr.). In Italy it is also widespread to qualify property rights to separated parts of the body, and the formulation that the human body is a whole from which various parts that are things can be separated is very typical. *See* Ferrando Mantovani, *Furto*, *in* DIGESTO DELLE DISCIPLINE PENALISTICHE § 4 (1991) (It.). In common law countries, see, e.g., Celia Hammond, *Property Rights In Human Corpses and Human Tissue: The Position in Western Australia*, 4 UNIV. NOTRE DAME AUSTL. L. REV. 97, 113 (2002) (Austl.); Bernard Dickens, *The Control of Living Body Materials*, 27 UNIV. TORONTO L.J. 142, 183–84 (1977) (Can.); Thomas B. Smith, *Law, Professional Ethics and the Human Body*, SCOTS L. TIMES 245, 245 (1959) (Scot.); REMIGIUS N. NWABUEZE, BIOTECHNOLOGY AND THE CHALLENGE OF PROPERTY: PROPERTY RIGHTS IN DEAD BODIES, BODY PARTS, AND GENETIC INFORMATION 110 (2007) (Eng.). In Scotland, too, ownership can unambiguously extend to detached parts of the body. *See* Kenneth G. C. Reid, *Body Parts and Property*, *in* NORTHERN LIGHTS: ESSAYS IN PRIVATE LAW IN HONOR OF DAVID CAREY MILLER 249 *passim* (Aberdeen Univ. Press 2015).

16. *See generally* Arseny Shevelev & Georgy Shevelev, *Proprietary Status of the Whole Body of Living Person*, 86 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT (forthcoming Oct. 2022) (on file with authors) (arguing for the impossibility of the right of ownership in its customary sense with respect to the whole human body).

17. These are the famous words of Rudolf von Jhering. *See* RUDOLF VON JHERING, L'ESPRIT DU DROIT ROMAIN § 61, at 362 (vol. 4, Octave de Meulenaere trans., Librairie A. Marescq 1878) (Fr.) (stating that if there is no ownership in the human body, it does not follow that this regime is not applicable, for example, to hair separated from the human head); *see also Ex Parte C* [2013] WASC 3, 7 (Austl.) (expressing the same view in Australia).

18. This was correctly pointed out by the famous Australian judge, James Edelman. *See* James Edelman, *Property Rights to Our Bodies and Their Products*, 39 UNIV. W. AUSTL. L. REV. 47, 55 (2015) (claiming that it is a general rule decisive in qualifying separated body parts as objects). *See generally* AUREL DAVID, STRUCTURE DE LA PERSONNE HUMAINE, ESSAI SUR LA DISTINCTION DES PERSONNES ET DES CHOSES (1955) (Fr.); Jean-Christophe Galloux, Essai de Définition d'un Statut Juridique 230–32 (1988) (Ph.D. dissertation, Université de Bordeaux) (Fr.); ANTONIO BORRELL MACIÀ, LA PERSONA HUMANA 28 (1954) (Spain); Bertrand Lemennicier, *Le Corps Humain: Propriété de l'Etat ou Propriété de Soi?*, 13 REVUE DROITS 111, 111 (1991) (Fr.); Lori Andrews, *My Body, My Property*, 16 HASTINGS CTR. REP. 28, 28 (1986) (each adhering to the same justification of ownership in separated body parts).

conclude that the detachment of a part of the body from a person allows it to be given the character of property, which is at the same time an object of proprietary rights. In the early stages of the development of law, cases where separation, even if not by itself but in conjunction with other factors, transformed the part separated from the person into an object were of revolutionary and incommensurable importance.

One of the first, and in our opinion, major cases to guide the determination of the substantive status of a human body part was *Doodeward v. Spence*,[19] where detachment played a decisive role. Despite the fact that this case concerned the acquisition of ownership in parts of the body of a deceased person, it should be noted that it may well be applied *mutatis mutandis* to parts of the body of a living person.[20] Arguments to the contrary are excessively oblique and formalistic,[21] since they wish to apply this case only to the cases with the exact fact patterns but not similar ones. Therefore, they cannot become a guiding precedent that serves as an answer to the question whether ownership in a part of the human body may be acquired. In this case, Judge Griffith, in characterizing the possibility of acquiring ownership in a corpse, emphasized that the common law purpose of a corpse's existence is its burial, and only by changing its purpose, such as through work and skill, does it become subject to ownership.[22] The essence of this work and skill exception was summarized in the recent *Re Cresswell* case which requires that (1) the person claiming rights *in rem* over the dead body shall legally possess it, (2) the person has done some work on the dead body or parts of it, and (3) the body, as a result of the work, has acquired attributes which it did not have before the work was done.[23]

But why exactly is burial the purpose of a corpse's existence? Burial reflects the traditional Christian view of the natural state of the

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19. *See Doodeward v Spence* (1908) 6 CLR 406, *passim* (Austl.).

20. *See, e.g.*, *S v Minister for Health* [2008] WASC 262 (Austl.) (Simmonds, J.) (as to whether the rules for taking sperm from the dead, including those for its ownership, are the same as those for the living); *see also Human Tissue and Transplant Act 1982* (WA) pt. III § 22 (Austl.); *Ex Parte M* [2008] WASC 276 ¶¶ 5, 7 (Austl.); *In Re H, AE* [2012] 113 SASR 560 ¶ 3 (Austl.). Justice Gray equates the regime of sperm removal from a deceased person with the regime of sperm removal from a nearly deceased person. Therefore, the rules for taking sperm from the dead could well sometimes be applied to taking it from the living. This approach, being uniform and not separating without good reason the modes of acquiring title to parts of the living and dead body, is solely commendable.

21. *See, e.g.*, *Roblin v. Pub. Trustee for the ACT* [2015] ACTSC 100 (Austl.) (arguing that *Doodeward* and similar cases cannot be applied as authority in cases like the case before the judge, that is, where a body part (in this case, semen) is taken before the person dies).

22. *Doodeward*, 6 CLR at 411 (Austl.); *see also Re Organ Retention Grp. Litig.* [2005] QB 506 (Austl.) (demonstrating that so-called work and skill exception is still actively used in case law to this day as justification for a position taken in *Doodeward* judgment).

23. *Re Cresswell* [2018] QSC 142, § 113 (Austl.).

dead body, which, being created from the earth, is to be returned to the earth—to its original position.[24] But if the natural state of the corpse is to be returned to the earth, what is the analogue for the separated parts of the human body? It seems that these parts, designed to serve the human and their purposes, also have a natural purpose to return to their original position (i.e., to reunite with the person, so until they change their purpose, they also cannot be an object of ownership).

Thus, both in the case of dead and living bodies, body parts can only be property insofar as they cease to serve the purpose of returning to their original position and acquire some other purpose. It was correctly noted in *R v. Kelly*,[25] which was essentially aimed at interpreting *Doodeward*, that body parts can become property insofar as they have "a use or significance beyond their mere existence."[26] Judge Griffith suggests acquiring property by the "exercise of work or skill so dealt with a human body or part of a human body in its lawful possession that it has acquired some attributes differentiating it from a mere corpse awaiting burial."[27] Thus, the emphasis should not be on the part relating to the application of work and skill, but on the part that distinguishes the non-negotiable body parts from the negotiable because they have changed their purpose. Of course, it is quite possible that Judge Griffith was an ardent supporter of the labor theory of property which could have determined his decision, but it seems most plausible that labor is only one way of giving a new purpose of existence to the body. The mere detachment of a body part, without labor subsequently being applied to it, would also satisfy the criteria for the origination of ownership.[28] However, even those cases which continue to emphasize work and skill are commendably freed from the formalistic implications of this theory. For example, the separation of a body part from a person already allows the process of labor to be recognized as having taken place,[29] and thus the body part to be

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24. *See* Lori B. Andrews, *Harnessing the Benefits of Biobanks*, 33 J.L. MED. ETHICS 22, 25 (2005); Natalie Ram, *Assigning Rights and Protecting Interests: Constructing Ethical and Efficient Legal Rights in Human Tissue Research*, 23 HARV. J.L. & TECH. 119, 126 (2009) (both reporting an interesting fact that if a Jew has had a limb amputated, the orthodox demand that it be buried with the body at the end of their life, thereby wishing to return the whole body, separated or not, to its original position, that is, to the ground).

25. R. v. Kelly [1998] 3 All ER 741, 750 (Eng.).

26. *Id.*

27. *Id.* at 746 (quoting *Doodeward*, 6 CLR at 413–14).

28. Thus, in *James v Seltsam Pty Ltd.* [2017] VSC 506, *passim* (Zammit, J.) (Austl.), the judge considered whether the separated lung was property in order to determine whether she was entitled to authorize orders to remove tissue from the lung for purposes of medical examinations. Affirmatively resolving the issue of ownership, *Id.* ¶ 62, the judge assesses the *Doodeward* rule and points out that work and skill exception was clearly not intended as a necessary (or sufficient) condition for recognizing ownership in a detached body part. *Id.* ¶ 64.

29. *See, e.g.*, *In re Application by Vernon* [2020] NSWSC 608, ¶¶ 70, 73 (Austl.) (where Judge Rothman interprets the work and skill rule from the *Doodeward* case to

recognized as having acquired new qualities, although, in fact, *Doodeward* was clearly referring to the need, at least, for conservation to be recognized as sufficient labor.

In this context, the judgment of Master Sanderson in *Roche v. Douglas*, which held that a part of the human body separated from it is no less a property than the vessel in which it lies, looks very reasonable.[30] The French court in the *Daoud* case was of the same opinion,[31] emphasizing that a severed finger could be confiscated same as the casket in which it lay. It is by giving a part of the body a new purpose (whether through application of work or simple separation) that it undergoes a magical transformation from a non-negotiable object, not subject to commercialization,[32] into a simple market unit,

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mean that any removal of sperm from the body, as work that makes sperm distinct from the body itself, makes sperm property, even before cryopreservation of sperm). This distinction departs from the earlier decision, as pointed out, for example, in recent case law. *See Noone v Genea Ltd.* [2020] NSWSC 1860, ¶ 43 (Austl.). It is also found in the doctrine that Justice Griffith's words in *Doodeward* do not suggest any significant effort to convert human body parts into property. *See* Adam Johnstone, How Does the Common Law Look at (a) the Body and (b) Property as It Might Relate to the Body or Body Parts, Cells or Cellular Information? 33 (Dec. 2010) (LL.M. thesis, Univ. New Eng.). Thus, the rule of work and skill comes as close as possible to the rule of detachment (the simple separation of a part from the human body, without *specification*).

30. *Roche v Douglas* [2000] 22 WAR 331, ¶ [24] (Austl.). *See also Pecar v Nat'l Austl. Trs. Ltd.* (Unreported, Supreme Court of NSW, Bryson J., Nov. 27, 1996) (Austl.) (making a similar conclusion).

31. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Avignon, Sept. 24, 1985, Gazette du Palais, 1986, 1, juris., 91 [hereinafter *The Daoud Case*]. For description of this case, see JEAN-PIERRE BAUD, L'AFFAIRE DE LA MAIN VOLÉE, UNE HISTOIRE JURIDIQUE DU CORPS 21 (1993) (Fr.) (reporting that case is the first where, by virtue of the separation of a body part, ownership in it was recognized) and Philippe Bertin, *Un doigt de droit, deux doigts de bon sens*, 1986 GAZETTE DU PALAIS 96 (Fr.) (stating that this case confirms the possibility of a property qualification of separated body parts).

32. The French National Ethics Committee apparently actively supports work and skill exception. *See* CCNE, AVIS SUR LA NON-COMMERCIALIZATION DU CORPS HUMAIN (1990) (saying in the context of the non-commercialization of the body that human organs and tissues derived from research are not parts of the human body, but are "work and its result"); *see also* CCNE, AVIS SUR LES PROBLÈMES POSÉS PAR LE DÉVELOPPEMENT DES MÉTHODES DUTILISATION DE CELLULES HUMAINES ET DE LEURS DÉRIVÉS 9 (1987) (reiterating this position). In Belgium we find a similar passage in a national ethics committee. *See* AVIS 43 DU 10 DÉCEMBRE 2007 RELATIF À LA PROBLÉMATIQUE DE LA COMMERCIALISATION DE PARTIES DU CORPS HUMAIN 4 15 (2007), https://www.health.belgium.be/sites/default/files/uploads/fields/fpshealth_theme_file/avis_43_commercialisation_nv.pdf [https://perma.cc/BS7B-JHV2] (archived Mar. 13, 2022) (attempting to balance between the non-commercialization of body parts and the need to meet modern circulation requirements). According to this committee, human body parts which have undergone transformation can be in circulation, as they are already other things and there is no violation of the principle of non-commercialization of body parts. In Austria, the prohibition against profiting from the sale of organs also does not apply to the sale of goods created from organs (e.g., medical devices). *See* Christian Kopetzki, *Das Organtransplantationsgesetz (OTPG) 2012*, *in* HIRNTOD UND ORGANTRANSPLANTATION 35, 53 (Wolfgang Kröll & Walter Schaupp eds., 2014) (because the processing of the organ

quietly circulating according to the rules of economic turnover.[33] Looking at it with a sober eye, though, it is rather difficult to detect the transformation of a non-negotiable object into a negotiable one, just as it is difficult to imagine the origin of living beings from inanimate ones.

Although many consider a severed body part property and an object of ownership, this is by no means the only, and not necessarily the predominant, understanding. For ideological or economic reasons, there are solutions and approaches which try to throw a spanner in the wheel of the theory which treats separated parts of the body as property. For example, one might look to the famous case of *Moore v. Regents of the University of California*.[34] Moore, a patient with spleen cancer, came in for an operation to remove his spleen. The doctor who performed the surgery realized that the spleen was extremely valuable scientific material.[35] Subsequently, along with another researcher, the doctor isolated and patented a cell line of exceptional economic value. The patent was subsequently transferred to the Regents of the University of California.[36]

Of course, no one was going to share the proceeds from the patient with Moore, whose spleen played a crucial role in the cell line patent. Moore filed a suit for conversion against a wide range of people, beginning with the doctor and ending with the Regents of the University of California. Most judges, however, did not consider the tort of conversion. Judge Panelli pointed out that the concept of informed consent encompasses instances of a doctor's personal interest in a procedure,[37] adding that a doctor cannot be guided by his own interests in treating a patient.[38] Accordingly, the judge concluded that the doctor had breached his fiduciary duties to Moore and entered judgment against him on that basis.

At the same time, the tort of conversion claim was not satisfied. The judge pointed out that "[t]he laws governing such things as human tissues, transplantable organs, . . . deal with human biological materials as objects *sui generis*, regulating their disposition to achieve policy goals rather than abandoning them to the general law of personal property."[39] After such a passage, it is clear that Moore's claim could not have been granted by the court, since the tort of conversion

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loses the qualifying characteristics of the organ that would make it subject to the regulations of the organ trade prohibition).

33. *See* Grégoire Loiseau, *Pour un Droit des Choses*, 44 RECUEIL DALLOZ 3015, 3015 (2006) (Fr.); Galloux, *supra* note 18, at 229 (on the transformation of non-negotiable objects into negotiable ones).

34. 51 Cal. 3d 120 (1990).

35. *See id.* at 126–27.

36. *See id.* at 127.

37. *Id.* at 130 (with the judge basing his thesis on the decision of Cobbs v. Grant, 8 Cal. 3d 229, 245 (1972)).

38. The court cited a similar position from Magan Med. Clinic v. Cal. State Bd. of Med. Exam'rs, 249 Cal. App. 2d 124, 132 (1967).

39. *Moore*, 51 Cal.3d at 137 (Panelli, J., concurring).

requires either possession or ownership,[40] and there is no place for ownership in the context of the special status of separated body parts.[41] The judge reasoned that he did not want to extend conversion to such objects because conversion is a tort of strict liability as opposed to a breach of fiduciary duty.[42] Application of the tort might lead to a situation in which researchers would be liable for organ research irrespective of their culpability regarding their awareness of the donor's consent to the disposal of the organ.[43] As the court has aptly observed, extending strict liability to the researcher would entail that the researcher would be "[p]urchasing a ticket in a litigation lottery" in carrying out the research.[44]

This decision, of course, cannot be called completely out of the ordinary, because it was rendered at the end of the twentieth century and is based on the rather well-known common law no-property rule, under which human parts are not recognized as property.[45] However, if one pays attention to the reasoning of the decision, especially to its economical part, there may be serious complaints about the ideological impartiality of the court. In essence, the court offers a variation of the radically collectivist approach in which researchers and pharmaceutical corporations, acting ostensibly in the interests of

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40. *See* Del E. Webb Corp. v. Structural Materials Co., 123 Cal. App. 3d 593, 610–11 (1981); Gen. Motors Acceptance Corp. v. Dallas, 198 Cal. 365, 370 (1926).

41. Note that the work and skill exception, through which body parts are transformed and become property, did not apply in *Moore*.

42. *See* Byer v. Canadian Bank of Com., 8 Cal. 2d 297, 300 (1937) (quoting Poggi v. Scott, 167 Cal. 372, 375 (1914)); City of Los Angeles v. Superior Ct., 85 Cal. App. 3d 143, 149 (1978).

43. *See Moore*, 51 Cal.3d at 144. In addition, Judge Panelli pointed out that California courts have previously refused to hold drug manufacturer strictly liable, lest the drugs cease to be manufactured altogether. *See* Brown v. Super. Ct., 44 Cal. 3d 1049, 1063 (1988).

44. *Moore*, 51 Cal.3d at 146.

45. Common law courts have long been reluctant to grant ownership in human-derived biomaterials. *See* JESSE WALL, BEING AND OWNING: THE BODY, BODILY MATERIAL, AND THE LAW 1 (2015). The rule of no-ownership in human body parts also came and was reinforced in Scotland. *See* Robson v. Robson (1897) 5 SLT. 351, 353 (Scot.); *see also* Thomas L. Muinzer, *Book Review: Heather Conway, The Law and the Dead*, 25 MED. L. REV. 505, 510 (2017) (Eng.); IMOGEN GOOLD, KATE GREASLEY, JONATHAN HERRING & LOANE SKENE, PERSONS, PARTS AND PROPERTY: HOW SHOULD WE REGULATE HUMAN TISSUE IN THE 21ST CENTURY? (2014) (Eng.); *cf.* ROHAN HARDCASTLE, LAW AND THE HUMAN BODY 203 (2007) (Eng.); Jonathan Brown, Corpus vile or Corpus Personae?: The Status of the Human Body, its Parts and its Derivatives in Scots Law 14 (2020) (PhD dissertation, University of Strathclyde) (Scot.) (each stating that in describing the state of the common law, it is difficult to reach definite conclusions, as it is rather piecemeal and controversial on the issue of recognition of rights to body parts). In fairness, let us note that the no-property rule is not immutable. The Australian Law Reform Commission, for example, has pointed out that over time the position from no-property has changed towards recognizing property rights in limited form in tissue samples that have been commercially developed, such as cell lines. *See* AUSTRALIAN LAW REFORM COMMISSION, ESSENTIALLY YOURS: THE PROTECTION OF HUMAN GENETIC INFORMATION IN AUSTRALIA, REPORT 96, ¶ 20.13 (2003).

science and society, are given priority rights over someone else's separated body parts.

Even at the time of the *Moore* case, the scientific community was inordinately concerned that they could not, if the court ruled in Moore's favor, use discarded tissue and blood samples.[46] But the point is that they have never been prohibited from using discarded tissues and this prohibition may hardly be dogmatically or pragmatically justified. However, not every body part or biomaterial separated from an individual's body is discarded. This conceptual distortion is precisely fatal and could lead to the overnight collapse of the hard-won principles of American individualism, turning any part of the human body, once separated, into the commercial domain of research centers. Immanuel Kant, the author of the categorical imperative, considered as a guiding maxim that human beings shall be treated "as ends, not as mere means."[47] In America, people were once seen as means, and this resulted in the fierce Civil War in which progressive democratic values won, at great cost to society.[48] And lest this triumph become like a Pyrrhic victory in its senselessness, we must not allow Henrietta Lacks and her body to be perceived as mere means. By guaranteeing her rights, the court will restore historical justice,[49] and this case, coming as landmark, will be the guiding star for all subsequent cases in the United States and beyond.

The *Moore* court is not alone in its neglect of the interests of individual patients. For example, Italian courts have modified the general rule that ownership in separated body parts accrues to the patient. In cases where the separation of parts is performed during treatment by clinics or institutes with scientific and research purposes, Italian courts argue that recognizing patient ownership would be

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46. *See* Malcolm Gladwell & Michael Specter, *Court Rules on Rights to Human Tissue*, WASH. POST (July 23, 1988), https://www.washingtonpost.com/archive/politics/1988/07/23/court-rules-on-rights-to-human-tissue/e2b85bce-7e26-41be-8aeb-01dfb3710493/ [https://perma.cc/XZM7-2EZ7] (archived July 1, 2022) (quoting the words of a council member of the American Society for Cell Biology saying that "it [the decision in favor of Moore]'s going to cause incredible difficulties and escalate the price of research").

47. IMMANUEL KANT, FUNDAMENTAL PRINCIPLES OF METAPHYSIC OF MORALS 260 (Thomas Rings trans. 1952).

48. *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 854 (1988) (recalling that the Civil War's "cost in American lives was as great as in all of the nation's other wars combined through Vietnam"); J. David Hacker, *A Census-Based Count of the Civil War Dead*, 57 CIV. WAR HIST. 307, 348 (2011) (concluding that about 750,000 people died in the Civil War).

49. *Cf.* RUDOLPH VON JHERING, THE STRUGGLE FOR LAW 2 (John J. Lalor trans., 1915) (1872) ("[d]efend[ing] legal rights [of particular persons], . . . [we] contribute [. . .] [our] mite towards the realization of the idea of law on earth."); *see also* James Harrington Boyd, *Socialization of the Law*, 22 AM. J. SOCIO. 822, 825 (1917) (quoting von Jhering's words with approval); LORENZO INFANTINO, IGNORANCE AND LIBERTY 19–20 (2003) (invoking this passage and applying it in a general philosophical and historical perspective).

contrary to the purpose of scientific research on separated body parts.[50] Many scholars, engaged in an ongoing debate about whether organs and other body parts are a social resource,[51] have concluded that severed body parts are *bonus communis*[52] (i.e., that ownership in those parts should be transferred, after separation, to persons such as researchers and hospitals).[53] Some proponents of this approach do not hide the fact that they want to expropriate severed body parts for social purposes.[54] For our part, we consider the expropriation, including that made by not granting rights, of organs from ordinary people unacceptable. There is no basis for regarding human body parts as common property.[55] Equally, there is no reason to give preference to researchers and large pharmaceutical corporations who earn enough to share with patients the payment for the use of their body parts, their property.

Paradoxically, but if property is common, why do the benefits of its use belong to private persons and not to the state as a whole? This selectivity delivers yet another blow to human individualism, not least in the case of Henrietta Lacks. Indeed, being between Scylla and Charybdis, if choosing the lesser of two evils, it is better that Thermo Fisher's revenues as well as that of their predecessors belong, if not to the Henrietta Lacks's family, then to the whole American nation.

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50. Trib. Milano, 7 aprile 1966, Temi, 1966, 303; Trib. Napoli, 14 gennaio 2005, Dir. giur., 2008, 300.

51. For more on this discussion, see generally Robert Truog, *Are Organs Personal Property of a Societal Resource?*, 5 AM. J. BIOETHICS 14 (2005); Walter Glannon, *The Case Against Conscription of Cadaveric Organs for Transplantation*, 17 CAMBRIDGE Q. HEALTHCARE ETHICS 330, 335 (2008).

52. *See* IRMA ARNOUX, LES DROITS DE L'ÊTRE HUMAIN SUR SON CORPS 136 (2003) (Fr.); Jean-Christophe Galloux, *Ébauche d'une Définition Juridique de l'Information*, 29 RECUEIL DALLOZ 229, 229 (1994) (Fr.) (each author making reference to article 714 of the French Civil Code, which assumes that there are things that do not belong to anyone—air, sea water, etc.); *cf., e.g.*, Pierre Delvolvé, *L'Utilisation Privative des Biens Publics*, 2 REVUE FRANÇAISE DE DROIT ADMINISTRATIF 229, 229 (2009) (Fr.); Erwan Royer, *Bien 1519 Public: une Marchandise comme une Autre?*, 363 JURIS. ADMIN. 15 (2007) (Fr.); *see also* JUDITH ROCHFELD, LES GRANDES NOTIONS DU DROIT PRIVÉ 238–39 (2011) (Fr.) (each pointing out that even if the separated parts of the body are not public property, they must be used in the most beneficial way for society).

53. *See* Loane Skene, *Proprietary Rights in Human Bodies, Body Parts and Tissue*, 22 LEGAL STUD. 102, 123–27 (2002) (U.K.); Loane Skene, *Arguments Against People Legally "Owning" Their Own Bodies, Body Parts and Tissues*, 2 MACQUARIE L.J. 165, 165, 175 (2002) (Austl.); *cf.* Jasper Bovenberg, Commentary, *Whose Tissue Is It Anyway?*, 23 NATURE BIOTECHNOLOGY 929, 929 (2005); Charlotte H. Harrison, *Neither* Moore *nor the Market: Alternative Models for Compensating Contributors of Human Tissue*, 28 AM. J.L. & MED. 77, 77 (2002) (each, in regard to the rights of researchers, noting that there is a double standard that researchers can benefit from the use of tissue, but the sources of that tissue cannot).

54. *See, e.g.*, Maria C. Cherubini, *Tutela della Salute e c.d. Atti di Disposizione del Corpo*, *in* TUTELA DELLA SALUTE E DIRITTO PRIVATO 94 (Francesco Busnelli & Umberto Breccia eds., 1978) (It.).

55. *See* Michael Morley, *Increasing the Supply of Organs for Transplantation Through Paired Organ Exchanges*, 21 YALE L. & POL'Y REV. 221, 254 (2003) (arguing that no one has justified why there should be common ownership in donor organs).

Recognizing Thermo Fisher's profits from the exploitation of Henrietta Lacks's cells as public property, while in our opinion not the most appropriate solution, would underscore the national character of Henrietta Lacks's exploit, which belongs to everybody and nobody at once.

Ownership granted to patients can meaningfully protect their rights and limit the proliferation of those questionable commercial practices so vividly portrayed in *Moore*.[56] In the absence of ownership rights, only alternative means of protecting patients' rights, such as claims for breach of fiduciary duty, can be used. These are often illusory,[57] futile, or capable of producing an appropriate effect only in a limited number of cases.

For example, it was impossible to find a breach of fiduciary duty by a physician-researcher in *Greenberg v. Miami Children's Hospital Research Institute*,[58] where the defendant physician isolated and patented a gene sequence related to Canavan disease from tissue provided by the plaintiffs. The physician-researcher was not the plaintiffs' direct physician and could not have been bound by fiduciary duties to them.[59] The disappointing conclusions reached in *Greenberg* demonstrate the need to protect the rights of organ and tissue donors by granting them a property right that would fill the gaps in the legal regulation protecting their rights,[60] thereby eliminating situations in

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56. A similar consequence of donor ownership has previously been highlighted in the literature. *See* Remigius N. Nwabueze, *Biotechnology and the New Property Regime in Human Bodies and Body Parts*, 24 LOY. L.A. INT'L & COMP. L. REV. 19, 45 (2002); Bernard Dickens, *Living Tissue and Organ Donors and Property Law: More on* Moore, 8 J. CONTEMP. HEALTH L. & PROBS. 73, 92 (1992).

57. In his dissenting opinion in *Moore*, 51 Cal.3d at 120 (1990), Judge Mosk pointed out the illusory nature of remedies based on breach of fiduciary duty, *Id.* at 179, because to establish this breach it is necessary to prove a connection between the injury to the plaintiffs and the breach of the duty to inform by the doctor (citing Patricia Martin & Martin Lagod, *Biotechnology and the Commercial Use of Human Cells: Toward an Organic View of Life and Technology*, 5 SANTA CLARA COMPUTER & HIGH TECH. L.J. 211, 222 (1989)). To protect Moore's interests, the judge even allowed his patent right to be recognized even though he was not the discoverer of the cell line, for without his cells, the patent simply would not exist. *Moore*, 51 Cal.3d at 169. A similar opinion to that of the judge was expressed in Mary Danforth, *Cells, Sales, & Royalties: The Patient's Right to a Portion of the Profits*, 6 YALE L. & POL'Y REV. 179, 197 (1988). However, regarding such a thing, it is noted that even if severed human body parts were a prerequisite to obtaining a patented achievement, it would be quite difficult to satisfy the parts donor's claim for patent rights. *See* Dianne Nicol, *Property in Human Tissue and the Right of Commercialisation: The Interface between Tangible and Intellectual Property*, 30 MONASH UNIV. L. REV. 139 (2004) (Austl.).

58. Greenberg v. Mia. Child.'s Hosp. Rsch. Inst. Inc., 264 F. Supp.2d 1064, 1071 (S.D. Fla. 2003).

59. *See id.* at 1070; *see also* Gail Javitt, *Why Not Take All of Me? Reflections on The Immortal Life of Henrietta Lacks and the Status of Participants in Research Using Human Specimens*, 11 MINN. J.L. SCI. & TECH. 713, 742 (2010) (correctly describing this circumstance as significant).

60. *See* NWABUEZE, *supra* note 15, at 38–41; HARDCASTLE, *supra* note 45, at 1 (2007) (both discussing similar purpose for granting ownership).

which it would be unclear how to protect infringed rights.[61] Attempts to find the protection of patients' interests in physicians' fiduciary duties seem all the more futile and in need of replacement, given that not all legal systems are inclined to recognize the emergence of a fiduciary duty for doctors.[62] Consequently, the very fact of the failure of other ways to protect the rights of people whose body parts have been separated requires giving the body parts the status of an object with the possibility of recognizing ownership in them.

B. *Borderline View: Separated Body Parts are Things, but* Sui Generis *Things?*

It seems to us correct to believe that there is no serious reason in the current law-in-force to object to granting separated body parts the status of property and objects of proprietary rights.[63] However, by recognizing the separated parts of the body as things, we admit that many will, nonetheless, petition for their recognition as *sui generis* things, explaining recognition by the specificity of the things in question.[64] Such an approach may impose some limitations on the status of these things and on the possibility of having rights over them in principle; it is very likely that the distinctive feature of these things, such as their derivation from the human body,[65] would render the parts of the body non-negotiable.

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61. *See, e.g.*, United States v. Arora, 860 F. Supp. 1091 (1994) (recognizing ownership in cell lines which were wrongfully destroyed; stating that, unless cell lines were recognized as movable property upon which an action of conversion could be asserted, it would be difficult to imagine on what basis the rights to cell lines that had been stolen or destroyed could be protected).

62. *See, e.g.*, Gerald Dworkin & Ian Kennedy, *Human Tissue: Rights in the Body and Its Parts*, 1 MED. L. REV. 293, 308 (1993) (on the absence of this duty in England); Sidaway v. Bethlem Royal Hosp. [1985] 1 All E.R. 643 (Eng.); Mclnerney v. MacDonald, [1992] 93 D.L.R. 4th 415 (Can.) (on the absence of mentioned duty in Canada).

63. *See* WALL, *supra* note 45, at 25; Simon Douglas, *Property Rights in Human Biological Material*, *in* PERSONS, PARTS AND PROPERTY: HOW SHOULD WE REGULATE HUMAN TISSUE IN THE 21ST CENTURY? 89 (Imogen Goold et al. eds., 2014). *Contra* Imogen Goold, *Sounds Suspiciously Like Property Treatment: Does Human Tissue Fit within the Common Law Concept of Property?*, 7 UNIV. TECH. SYDNEY L. REV. 62, 62 (2005) (Austl.) (averring that, at the conceptual level, recognition of ownership in detached parts will cause few difficulties).

64. *See* Jean-Christophe Galloux, *De Corpore Jus, Premières Analyses sur le Statut Juridique du Corps Humain, ses Éléments et ses Produits selon les Lois n° 94-653 et 94-654 du 29 juillet 1994*, LES PETITES AFFICHES, Dec. 14, 1994, at 18–24 (Fr.); Jean Savatier, *Les Prélèvements sur le Corps Humain au Profit d'Autrui*, LES PETITES AFFICHES, Dec. 14, 1994, at 8 (Fr.).

65. *See, e.g.*, Xavier Dijon, Le Sujet de Droit en son Corps: une Mise à l'Épreuve du Droit Subjectif 132 (1982) (Ph.D. dissertation, Université Catholique de Louvain) (Belg.); STÉPHANIE HENNETTE-VAUCHEZ, DISPOSER DE SOI? UNE ANALYSE DU DISCOURS JURIDIQUE SUR LES DROITS DE LA PERSONNE SUR SON CORPS 342 (2004) (Fr.) (both reporting that, in France, body parts, from the moment of separation, are no longer the human body, but also cannot be called ordinary objects since they continue to retain a connection with the person from whom they originated).

For example, the Swiss Supreme Court considered that non-negotiability to entail not only the impossibility of alienating the thing but also the absence of ownership over it.[66] We would address to the court a quite logical question: if ownership is impossible for a non-negotiable thing, is it a thing at all?[67]

Although there are other, more rational and farsighted positions in the regulation of non-negotiable things,[68] which allow for the absence of certain rights of the owner (including the right to alienate the thing),[69] it should be noted that the non-negotiability of severed body parts is an obvious anachronism and a relic of the past.[70]

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66. *See* Tribunal fédéral [TF] [Federal Supreme Court] June 5, 1996, 122 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] IV 179, 3c/aa; Tribunal fédéral [TF] [Federal Supreme Court] Apr. 3, 1998, 124 ARRÊTS DU TRIBUNAL FÉDÉRAL SUISSE [ATF] IV 102, 2; *see also* ALEXANDRE DOSCH & DOMINICQUE SPRUMONT, LE STATUT JURIDIQUE DU MICROBIOME HUMAIN 59 (2020) (Switz.).

67. *Cf., e.g.*, MONIKA WECK, VOM MENSCH ZUR SACHE?: DER SCHUTZ DES LEBENS AN SEINEN GRENZEN 195 (2003) (Ger.); NORBERT JANSEN, DIE BLUTSPENDE AUS ZIVILRECHTLICHER SICHT 14–15 (1978) (Ger.) (according to the functional approach to things, advocated by each of these authors, if there can be no ownership in an object, then it cannot be recognized as a thing).

68. The French Court of Cassation pointed out that the fact that the thing was not in circulation did not invalidate the qualification of its seizure as theft ("la circonstance que la chose qui aurait été soustraite serait une marchandise illicite et hors commerce, est sans influence sur la qualification de vol", *translated* "the fact that the thing that would have been withdrawn would be an illicit and untradable good has no bearing on the qualification as theft"). Cour de cassation [Cass.] [supreme court for judicial matters] crim., Nov. 5, 1985, Bull. Crim., No. 85-94.640; *see also* DEBORAH AUGER, DROIT DE PROPRIÉTÉ ET DROIT PÉNAL 93 (2005). This applies, for example, to narcotics. *See* Grégoire Loiseau, *Typologie des Choses hors du Commerce*, 1 REVUE TRIMESTRIELLE DE DROIT CIVIL 47, 50 (2000) (Fr.). Theft presupposes that the property is someone else's, and therefore presupposes ownership in it. *See R v Waterhouse* [1911] NSW 4 (Austl.), which was fully supported by the Australian Supreme Court, *Waterhouse v The King* [1911] HCA 20, in which the court stated that the non-negotiability of opium and the prohibition to possess it did not affect the fact that it could be owned by the person prohibited from possessing it, and therefore the subject of theft. The same logic is followed in *Anic, Stylianou & Suleyman v R* [1993] SASC 4159 (Austl.). *Contra Lenard v The Queen* [1992] 57 SASR 164, 172 (White, J.) (Austl.) (deducing from the non-negotiability of things (in this case, drugs) the impossibility of owning them and of stealing them).

69. *Cf.* People v. Walker, 33 Cal. App. 2d 18, 20 (1939) (stating that if one recognizes ownership as a bundle of rights (as court does in Union Oil Co. v. State Bd. of Equal., 60 Cal.2d 441, 447 (1963), then even if ownership is stripped of many elements, it will continue to be ownership). The classification proposed by Margaret Radin, according to which there is property alienable, partially alienable, and inalienable, would also apply here. MARGARET RADIN, CONTESTED COMMODITIES 20 (1996).

70. A similar thesis is advanced, for example, by Jean-Christophe Galloux, *Réflexions sur la Catégorie des Choses hors du Commerce: l'Exemple des Éléments et des Produits du Corps Humain en Droit Français*, 30 LES CAHIERS DE DROIT 1011 (1989) (Fr.); *see also* Philippe Ducor, *Statut Juridique des Parties Détachées du Corps Humain: Une Approche Anatomique et Fonctionnelle*, 135 REVUE DE DROIT SUISSE 251, 255 (2016) (Switz.). Note that if separated body parts were indeed non-negotiable, they could not, among other things, be donated for medical and research purposes, which is clearly not the case. On this argument, see AUDE MIRKOVIC, DROIT CIVIL, PERSONNES, FAMILLE 65 (3d ed. 2010) (Fr.); Anne-Blandine Caire, *Le Corps Gratuit: Réflexions sur le Principe de*

Ownership in severed body parts is likely to indeed entail their introduction into circulation and their commercialization,[71] which many speak of with undisguised disgust.[72] But commercialization is not in itself a socially harmful phenomenon, and it may even be recognized as a socially useful phenomenon.[73] The commercialization of separated body parts must therefore be recognized not as an obstacle to the recognition of ownership in them, but as an influential incentive to do so. Only the recognition of ownership will enable the potential hidden in the separated parts of the body to be realized to the fullest extent.

Continuing the discussion of the special status of severed parts of the body, we think it appropriate to refer to the Scottish case of *Holdich v. Lothian Health Board*,[74] which presents an interesting approach to the relationship between the special status of severed parts, the ability to own them, and to apply remedies specific to ownership. The circumstances of this case are standard for sperm storage disputes. A man undergoing treatment for cancer, which can cause loss of fertility, deposited sperm in order to preserve his ability to conceive in the future, but the sperm subsequently perished through the defendant

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Gratuité en Matière d'Utilisation de Produits et d'Éléments du Corps Humain, 5 REVUE DE DROIT SANITAIRE ET SOCIAL [RDSS] 856, 868 (2015) (Fr.).

71. *See* Shawn Harmon, *A Penny for Your Thoughts, A Pound for Your Flesh: Implications of Recognizing Property Rights in Our Own Excised Body Parts*, 7 MED. L. INT'L. 329, 330 (2006); KENYON MASON & GRAEME T. LAURIE, MASON AND MCCALL SMITH'S LAW AND MEDICAL ETHICS ¶ 14.13 (8th ed. 2011); Paul Matthews, *The Man of Property*, 3 MED. L. REV. 251, 272–73 (1995). *Contra* Margaret Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1903 (1987) (indicating that commercialization is not a necessary feature of the recognition of ownership in a thing).

72. *See, e.g.*, Harrison, *supra* note 53, at 89; Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, 11 SOC. PHIL. & POL'Y. 259, 286 (1994); Caroline Banwell, *Should I Have Property in My Body?*, UNIV. COLL. LONDON JURIS. REV. 1 (1994) (each advocating that commercialization would allegedly entail an inadequate perception of the value of the human body). Claims to prevent the commercialization of body parts may take the form of an outright prohibition of ownership in those parts. *See* PAOLA D'ADDINO SERRAVALLE, ATTI DI DISPOSIZIONE DEL CORPO E TUTELA DELLA PERSONA UMANA 129 (1983) (It.).

73. *See* Helga Kuhse, *Il Corpo Come Proprietà, Ragioni di Scambio e Valori Etici*, *in* QUESTIONI DI BIOETICA 65, 71 (Stefano Rodotà ed., 1993) (It.) (supporting the sale of organs by humans to save the lives of others); *see also* Julian Savulescu, *Is the Sale of Body Parts Wrong?*, 29 J. MED. ETHICS 138, 138–39 (2003); Leonardo de Castro, *Commodification and Exploitation: Arguments in Favour of Compensated Organ Donation*, 29 J. MED. ETHICS 142, 142–46 (2003); Stephen Wilkinson & Eve Garrard, *Bodily Integrity and the Sale of Human Organs*, 22 J. MED. ETHICS 334, 335 (1996) (all asserting that, in light of the severe shortage of human biomaterials, the creation of a biomaterials market is of vital importance). Thinking along the same lines, some authors correctly suggest that the circulation of separated body parts is social rather than commercial. *See* Philippe Steiner, *La Transplantation d'Organes: un Nouveau Commerce Entre Êtres Humains*, 1 REVUE DU MAUSS 455 (2010) (Fr.); Philippe Steiner, *Le Don d'Organes: Une Affaire de Famille*, 59 ANNALES HSS 255 (2004) (Fr.); Caire, *supra* note 70, at 869.

74. Holdich v. Lothian Health Bd. [2013] CSOH 197, 2014 SLT 495 (Scot.).

custodian's fault, which led to the lawsuit.[75] One of the grounds for the man's claim against the custodian was breach of the storage contract, and for this purpose the plaintiff's lawyers developed the thesis of ownership in sperm.[76]

The court did not base its decision on ownership in sperm because it found that this concept faced some difficulties. Lord Stewart approached the issue of whether there was a storage contract in a rather unexpected and original way. He pointed out that anything to which possessory remedies are applicable can be subject to a storage contract, and he included semen in that category of "things."[77] Lord Stewart went on to point out that such an approach "[p]uts the emphasis on the *res* as an object rather than as property."[78] Combined with Lord Stewart's other words that "[p]ossessory remedies . . . are available for . . . bio-matter separated from the body: but that fact of itself does not make the object[s] of the remedies property,"[79] the separated body parts acquire a unique status. Not being property, the separated body parts are protected, to a large extent, with identical remedies. Let us note that the special status of biomaterials, as described by Lord Stewart, is too amorphous and casuistic, and is suitable, at best, for the purpose of justifying the existence of a storage agreement, and, moreover, applicable only in Scotland.

The meaninglessness of the special status in this case is further compounded by the fact that Lord Stewart has provided no intelligible justification as to why biomaterials have a special status precluding recognition of ownership in them. Strictly speaking, the admission of a storage agreement for biomaterials, as well as possessory remedies against infringement of rights to them, indicates that biomaterials are the subject of ownership,[80] while there are no other rights that could extend to such a thing other than ownership.[81] Apparently, the judgment of special status is only a spectacular veil designed to conceal

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75. *See id.* ¶ 2.

76. In proving that semen may be an object of property, the *Holdich* plaintiffs cited 1 JAMES DALRYMPLE (LORD STAIR), THE INSTITUTIONS OF THE LAW OF SCOTLAND, lib. II. § 29 (Edinburgh, John More ed. 1832); GEORGE BELL & WILLIAM GUTHRIE, PRINCIPLES OF THE LAW OF SCOTLAND §§ 1285–89 (10th ed. 1899); Murray Earle & Niall Whitty, *Medical Law*, *in* THE LAWS OF SCOTLAND: STAIR MEMORIAL ENCYCLOPEDIA, REISSUE § 346 (2006); JOHN ERSKINE, AN INSTITUTE OF THE LAW OF SCOTLAND, tit. II.i.1 (1871).

77. *Holdich*, ¶¶ 52, 75.

78. *Id.*

79. *Id.* ¶ 49.

80. The application of remedies characteristics to ownership is in itself sufficient evidence that there is ownership in the thing because the remedies have a constitutive role for the legal right. *See, e.g.*, Von Hoffman v. City of Quincy, 71 U.S. 535, 552 (1866) ("Nothing can be more material to the obligation than the means of enforcement. Without the remedy the [legal right] may, indeed, in the sense of the law, be said not to exist . . . The ideas of validity [of legal right] and remedy are inseparable.").

81. It is better that regulation be through the rules of property than that there be no law at all to regulate the separated parts. *See* Reid, *supra* note 15, at 243.

the real application of the concept of ownership to detached parts of the body.

A more prudent approach would be one that does not attempt to do the impossible—to justify the fundamental distinction between separated body parts and other things[82]—but which explicitly recognizes ownership in separated body parts, helping to protect the interests of the affected persons. Quite prominent in this direction is the case of *Yearworth v. North Bristol NHS Trust*,[83] which allowed ownership in separated body parts regardless of whether they became things under the work and skill exception. This case, which was decided long before *Holdich* described above, had similar circumstances—men undergoing treatment for cancer transmitted sperm to a cryobank for future reproductive use. As a result of the clinic's negligent actions, the sperm thawed out and died. The court believed that to prove a bailment relationship between the men and the clinic and to find liability for the clinic's negligent acts, ownership in the sperm had to be established.[84] The court found that ownership in the deposited sperm vested in the man was proper and reasonable. Although the decision does not include the general rule that any

82. *Cf.* Giuseppe Novelli & Ilenia Pietrangeli, *I Campioni Biologici, in* TRATTATO DI BIODIRITTO. IL GOVERNO DEL CORPO 1037 (Stefano Canestrari et al. eds., 2011) (correctly pointing out that the denial of the recognition of ownership in, and negotiability of severed body parts is inconsistent with the fact that these body parts are no different from other things which are objects of property rights).

83. Yearworth v. North Bristol NHS Trust [2009] EWCA (Civ) 37 (Eng.).

84. *Contra* Edelman, *supra* note 18, at 60 (stating that it is incorrect to assume that the plaintiffs could claim negligence only if they had ownership in the sperm). In support of his thesis Edelman cites, not unreasonably, the English case of Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] AC 465 and the Australian case of *Perre v Apand Pty Ltd.* (1999) HCA 36. Other authors suggest that the protection of men's rights in the *Yearworth* case through the concept of ownership in sperm was inappropriate and unnecessary (instead offering a purely tortious way of protecting their rights, although doing so *de lege ferenda*) and, moreover, entails the commodification of their sperm, which is hardly consistent with the intention of men to use that sperm to conceive children in the future. *See* Sean Cordell, Florence Bellivier, Heather Widdows & Christine Noiville, *Lost Property? Legal Compensation for Destroyed Sperm: A Reflection and Comparison Drawing on UK and French Perspectives*, 37 J. MED. ETHICS 747, 749 (2011). Thus, the very fact that the *Yearworth* case has become significant in the area of severed body part rights can be explained by happenstance.

separated body parts are subject to ownership,[85] such a rule can be inferred from the general logic of the decision.[86]

Also revealing is another American case, *Hecht v. Superior Court*,[87] in which the court recognized sperm that a man bequeathed to a woman as her property when, before committing suicide, he deposited the sperm in question in a cryobank so that she could later use it to conceive a child. Among European countries, the well-known French decisions in the *Parpalaix* and *Daoud* cases are noteworthy. The *Parpalaix* case,[88] as well as *Hecht*, dealt with the issue of posthumous fertilization of a woman. In this case, the deceased person had arranged for his sperm to be deposited in a cryobank, and upon his death, directed the cryobank to give the sperm to his wife for posthumous insemination. The court granted the widow's claim to the cryobank to release the sperm for this purpose.[89]

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85. The authors researching this case wonder whether the case involves only reproductive materials or any body parts. *See, e.g.*, Shawn Harmon & Graeme Laurie, Yearworth v. North Bristol NHS Trust*: Property, Principles, Precedents and Paradigms*, 69 CAMBRIDGE L.J. 476, 486 (2010); *cf.* NORMAN PALMER, BAILMENT 29-021 (3d ed. 2009) (interpreting the case restrictively, suggesting that the case only applies in similar circumstances, that is, when men deposit sperm for later use for their own reproductive purposes); James Lee, Yearworth v. North Bristol NHS Trust [2009]*: Instrumentalism and Fictions in Property Law*, *in* LANDMARK CASES IN PROPERTY LAW 25 (Simon Douglas, et al. eds., 2015) (reasoning that the *Holdich* case does not refer to any body parts but specifically to sperm); Luke D. Rostill, *The Ownership that Wasn't Meant to Be:* Yearworth *and Property Rights in Human Tissue*, 40 J. MED. ETHICS 14, 16–17 (2014) (moving further in limiting the scope of this case and pointing out that the court in *Yearworth* recognized property only for the purpose of satisfying a tort claim for breach of the defendant's duty of reasonable care of sperm, but not of property *per se)*.

86. *See* CLERK & LINDSELL ON TORTS ¶¶ 17–43 (Michael A. Jones et al. eds., 21st ed. 2014).

87. 20 Cal. Rptr. 2d 275 (1993).

88. Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Créteil, Aug. 1, 1984, JCP 1984, II, 20321, note S. Corone (Fr.); *see also* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Angers, Nov. 10, 1992, D. 1994. 30 (Fr.) (with similar reasoning to that of the court in *Parpalaix*).

89. In reaching its decision in favor of the widow, the court stated, as a justification, that such impregnation as posthumous "is not contrary to the laws of nature, for marriage is entered into for procreation". Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Créteil, Aug. 1, 1984, JCP 1984, II, 20321 [hereinafter the *Parpalaix* case]. Although the *Parpalaix* case continues to be of some importance in the determination of ownership in body parts, we may note with regret that the case in its original fiefdom, posthumous fertilization, has decisively lost all significance, due to the dominance of a new view which considers posthumous fertilization impermissible. After the *Parpalaix* case, biobanks began to include in the contract a clause stating that they would destroy the biomaterial upon the death of its donor, preventing posthumous insemination, and the courts, using this as one of the grounds for denying widows insemination, also added that posthumous insemination would contradict the right of the child to have a father. *See* Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Toulouse, Mar. 26, 1991, JCP 1992, II, 21807, note Ph. Pedrot (Fr.) (emphasizing the importance of the contractual prohibition of the use of the deceased's semen after his death); Tribunal of grande instance [TGI] [ordinary court of original jurisdiction] Rennes, June 30, 1993, JCP 1994, II, 22250 (Fr.). Recent court decisions have been upheld by the Council of State. *See* CE, DE L'ÉTHIQUE

Although the practice of posthumous insemination was subsequently prohibited by law in France, the courts have made exceptions to this rule in cases where its application has been excessively harsh.[90] In the *Daoud* case,[91] a prisoner bit off a phalanx of his finger in order to send it to the keeper of the seals, but it was returned to him by the hospital in a separate casket. Later, the court stated that the status of the finger was as much a thing as the box in which the finger was kept, and therefore was subject to forfeiture as much as other things.[92]

C. *Allocation of Rights of Ownership in Separated Body Parts*

In general, the concept of the right of ownership in severed body parts has gained recognition and authority in both case law and doctrine. In addition to the question of ownership in separated parts of the body, the question of the distribution of rights of ownership over these parts of the body has also arisen. The beauty of this very question of allocation is its paradoxical nature—the answer to it is, on the one hand, simple and obvious: the ownership in the biomaterials should be initially vested in their source—but, on the other hand, the justification for this answer is unsatisfactory, shaky, and sometimes

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AU DROIT. ÉTUDE DU CONSEIL D'ÉTAT, LA DOCUMENTATION FRANÇAISE, NOTES ET ÉTUDES DOCUMENTAIRES § 5, 59 (1988) (Fr.). In doctrine, see Guy Raymond, *La Procréation Artificielle et le Droit Français*, 57 JURIS-CLASSEUR PÉRIODIQUE [JCP] XX, 3114–16 (1983); GÉRARD CORNU, DROIT CIVIL. LA FAMILLE 422 (1984). As one author aptly described the practice, "with the death of the father entails the death of the child." Jacqueline Rubellin-Devichi, *Procréations Médicalement Assistées, Assistance Médicale à la Procréation: Trop de Législation?*, 1 JURIS-CLASSEUR PÉRIODIQUE [JCP] 3771, 3771 (1994).

90. For example, the transfer of gametes abroad for fertilization purposes was allowed if the widow and the deceased sperm donor had a close relationship with a foreign country. *See* Project, *Régine, Droit et genre*, 15 DALLOZ 843, 849 (2020); *see also* CE Ass., May 31, 2016, No. 396848 (Fr.) (permitting gamete transfer to Spain when the wife was a Spanish citizen and her husband was French); CAA Paris, Sept. 26, 2019, No. 19PA00839. In another case, both spouses were French citizens, but they did not use the husband's sperm while he was alive as they could conceive naturally. When the wife was pregnant, the husband died and the wife miscarried. The court held that a departure from the general rule was permissible here and it was possible to transfer sperm abroad for fertilization. *See* TA Rennes, Oct. 11, 2016, No. 1604451 (Fr.); *see also* Astrid Marais, *La Procréation Post-Mortem*, 3 RDSS 498, 502 (2018). In the absence of such a connection, the Counseil d'État (the French Council of State) has traditionally denied the transfer of gametes abroad. *See* CE, Feb. 28, 2020, No. 438852 (Fr.); CE, Feb. 28, 2020, No. 438854 (Fr.); CE, Dec. 4, 2018, No. 425446 (Fr.).

91. *The Daoud* Case, at 91.

92. See *id.* However, there is also the opposite practice, which denies proprietary status to separated parts of the body. *See* Cour de cassation [Cass.] [supreme court for judicial matters] crim., Feb. 3, 2010, No. 09-83.468 (Fr.) (concluding that body parts taken for examination in criminal proceedings cannot be returned because they cannot be owned). It is noteworthy that these parts were paraffinized before the examination, but the French courts do not seem to recognize the work and skill exception that turns paraffinized body parts into things. A similar decision is Cour de cassation [Cass.] [supreme court for judicial matters] crim., Jan. 18, 2011, No. 10-83.386 (Fr.).

quite fantastical. This Article argues that the only correct solution to the problem of the distribution of ownership rights is that they originally arise in the person from whom the parts—later to become property—have been separated.[93]

This is the only correct one, because the other solution, which is to consider the severed body part as *res nullius*, is clearly untrue, since it deprives the person from whom the body part was severed of what should belong to them.[94] However, many scholars are inclined to the latter option.[95] From the point of view of pure dogmatics, there is a

93. This solution is followed, for example, in Germany. *See* Christina Stresemann in: MÜKOBGB, 8th ed. 2018, § 90 recital 26; Paul Oertmann, *Aneignung von Bestandteilen einer Leiche*, 1925 LEIPZIGER ZEITSCHRIFT FÜR DEUTSCHES RECHT [LZ] 511; Jochen Marly in: SOERGEL BGB, 13th ed., § 90 recital 7; Frank Pardey in: GEIGEL HAFTPFLICHTPROZESS, 28th ed. 2020, Kap. 6, recital 17; Wilhelm Dallinger, *Aus der Rechtsprechung des Bundesgerichtshofes in Strafsachen*, 1958 MONATSSCHRIFT FÜR DEUTSCHES RECHT [MDR] 738, 739; Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 9, 1993, 124 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 52; Wilhelm Kregel in: RGRK-BGB, 12th ed. 1982, § 90 recital 4 (Ger.); Barbara Völzmann-Stickelbrock in: PWW BGB, 3d ed. 2008, § 90 recital 6; Peter Bilsdorfer, *Rechtliche Probleme der In-vitro-Fertilisation und des Embryo-Transfers*, 1984 MDR 803, 804; JÜRGEN GOEBEL, RAINER PASLACK & MICHAEL KRAQCZAK, BIOMATERIALBANKEN - RECHTLICHE RAHMENBEDINGUNGEN 34 (2006); HEINRICH HUBMANN, DAS PERSÖNLICHKEITSRECHT 228 (2d ed. 1967); Bundesgerichtshof [BGH] [Federal Court of Justice] June 3, 1958, 5 StR 179/58; Max Mittelstein, *Mensch und Leichnam als Rechtsobjekt*, 34 GOLTDAMMER'S ARCHIV FÜR STRAFRECHT [GA] 172, 176 (1886); JUSTUS VON OLSHAUSEN, STGB, 12th ed., recital 6; EDUARD DREHER & HERMANN MAASSEN, STGB, 2d ed., § 242 recital 2c; EDMUND MEZGER, STRAFRECHT. EIN STUDIENBUCH. BESONDERER TEIL 118 (5th ed. 1956); 1 KARL BINDING, LEHRBUCH DES GEMEINEN DEUTSCHEN STRAFRECHTS, BESONDERER TEIL 258 (2d ed. 1902); Jochen Taupitz, *The Use of Human Bodily Substances and Personal Data for Research: The German National Ethics Council's Opinion*, 3 J. INT'L BIOTECHNOLOGY L. 25, 25 (2006). Similarly, in France, see Caire, *supra* note 70, at 865; Antoine Tadros, *Le Statut du Donneur*, 15 CAHIERS DE LA RECHERCHE SUR LES DROITS FONDAMENTAUX: LE CORPS HUMAIN SAISI PAR LE DROIT: ENTRE LIBERTÉ ET PROPRIÉTÉ 45 (Aurore Catherine et al. eds., 2017). For examples from Italy, see ADOLFO RAVÀ, I DIRITTI SULLA PROPRIA PERSONA NELLA SCIENZA E NELLA FILOSOFIA DEL DIRITTO 193 (1901); 1 ADRIANO DE CUPIS, I DIRITTI DELLA PERSONALITÀ § 73 (1959); Maria Pesante, *Corpo Umano (Atti di disposizione)*, 10 ENCICLOPEDIA DEL DIRITTO 653, 667 (1962). And, in Switzerland, see VAGIAS KARAVAS, KÖRPERVERFASSUNGSRECHT 63 (2018). This position is also supported elsewhere. *See* MEDICAL RESEARCH COUNCIL, WORKING GROUP ON HUMAN TISSUE AND BIOLOGICAL SAMPLES FOR USE IN RESEARCH: REPORT OF THE MEDICAL RESEARCH COUNCIL WORKING GROUP TO DEVELOP OPERATIONAL AND ETHICAL GUIDELINES, ¶ 2.2.1 (1999) (in United Kingdom); COMMITTEE OF THE HEALTH COUNCIL OF THE NETHERLANDS, PROPER USE OF HUMAN TISSUE, NO. 1994/01E, ¶ 3.3.1 (1994).

94. For a discussion of how awarding a severed body part to the first occupant would be unjust to the source of the organs, see Niall Whitty, *Rights of Personality, Property Rights of the Human Body in Scots Law*, 9 EDINBURGH L. REV. 194, 223–24 (2005); LAWRENCE C. BECKER, PROPERTY RIGHTS: PHILOSOPHICAL FOUNDATIONS 30 (1977).

95. Separated parts of the body have been recognized *res nullius* in many countries. In France, see Jean-Christophe Galloux, *Du Droit de l'Inventeur sur ses Découvertes: à la Recherche d'un Droit Fabuleux*, 1511 REVUE DE LA RECHERCHE JURIDIQUE, DROIT PROSPECTIF 387 (1991); Marie-Angèle Hermitte, *Le Corps hors du Commerce, hors du Marché*, 33 ARCHIVES DE PHILOSOPHIE DU DROIT 323, 333 (1988) (referring to the separated body parts as simultaneously *res nullius* and *res communis*,

rational explanation: this option does not require sophisticated logical constructions capable of justifying the automatic emergence of a right of ownership in a particular person. Also, given the obsolete and archaic common law "work and skill" rule[96] (which was primarily established with respect to the dead body),[97] referring to the parts of the dead body as *nullius in rebus*, the reluctance to radically change the old order of things is highly predictable in terms of the ethics that characterizes such actions as status quo bias.[98] At the same time, the vast majority of commentators who point out that the separated body parts belong to the person from whom the parts are separated do not provide a justification for this thesis, probably believing that it does not require any explanation.[99] This diametrically opposed assertion, without any reasoning, can be qualified from the standpoint of ethics as subjective validation bias,[100] which is no less prejudicial than status quo bias.

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that is, concurrently belonging to nobody and to everyone); Michèle-Laure Rassat, *Le Statut Juridique du Placenta Humain*, 1976 JURIS-CLASSEUR PÉRIODIQUE 2777, 2777 (considering separated body parts as simultaneously *res nullius* and *res communis*). In Italy, see Massimo Dogliotti, *Le Persone Fisiche*, *in* 1 TRATTATO DI DIRITTO PRIVATO 163 (2012); 1 CESARE MASSIMO BIANCA, DIRITTO CIVILE 163, 168 (2002). In Austria, see THOMAS KLICKA *in* SCHWIMANN ABGB PRAXISKOMMENTAR, 3rd ed. 2005, § 386 recitals 1–2. For examples from common law countries, see Margaret Swain & Randy Marusyk, *An Alternative to Property Rights in Human Tissue*, 20 HASTINGS CENTER REP. 12, 12–14 (1990) (Eng.) (claiming that a separated body part, after excision, belongs to no one but becomes the property of the person who transforms it through his or her labor); Simon Douglas & Imogen Goold, *Property in Human Biomaterials: A New Methodology*, 75 CAMBRIDGE L.J. 478, 481–82 (2016) (Eng.).

96. *See Doodeward v Spence* (1908) 6 CLR 406, *passim* (Austl.).

97. *See id.* at 411 (establishing the "work and skill" rule); Dobson v. North Tyneside Health Authority [1996] EWCA (Civ) 1301 (Eng.) (confirming this rule and applying it to the case of a paraffinized brain of the deceased); *Re Cresswell* [2018] QSC 142, ¶ 113 (Austl.) (clarifying this rule and applying it to the removal of sperm from the body of the deceased); *see also* Ronald Magnusson, *Proprietary Rights in Human Tissue*, *in* INTERESTS IN GOODS 237, 237–38 (Norman Palmer & Ewan McKindrick eds., 1993) (outlining the history of this rule).

98. *See* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 1 J. ECON. PERSPS. 193, 197 (1991) (arguing that "individuals have a strong tendency to remain at the status quo").

99. *See, e.g.*, *In re Application by Vernon* [2020] NSWSC 608, ¶ 77 (Austl.) (considering the case of removal of sperm from an unconscious person and concluding that after removal the sperm continued to belong to the person from whom they were removed). The presiding judge did not explain what he meant by the phrase "continue to belong." *Id.* However, this judgment clearly required justification, because, strictly speaking, there was nothing to continue—the right to the body, of which the sperm was a part according to the court, had ceased, and the right of ownership first arose when the sperm were removed and therefore also could not continue.

100. Bertram Forer, *The Fallacy of Personal Validation: A Classroom Demonstration of Gullibility*, 44 J. ABNORMAL PSYCH. 118, 120–21 (1949) (defining this bias as a tendency to consider a statement or another piece of information to be correct if it has any personal meaning or significance). In principle, this bias functions similarly to another well-known cognitive fallacy—confirmation bias. *See generally* Raymond Nickerson, *Confirmation Bias: A Ubiquitous Phenomenon in Many Guises*, 2 REV. GEN. PSYCH. 175 (1998) (defining confirmation bias as a tendency to search for, interpret,

Some scholars, however, have tried to explain why the severed body parts belong to the person from whom they were severed. For example, many German proponents of this approach pointed out as an explanation that they were applying by analogy § 953 BGB (German Civil Code).[101] The analogy is due to the fact that proponents of this approach do not consider the body of a living person to be property, and therefore the parts derived from it cannot be called derivative parts of the property to which ownership was held, as required by this paragraph for the origin of ownership. However, this approach, which converts the personality right into the right of ownership,[102] is considered dogmatically unsound.[103] There is logic in this objection, because it is quite strange that the personality right in some unexplained (or doubtfully explained[104]) way by the authors should suddenly be converted into a right absolutely opposite in essence, the right of ownership. This is why many propose not the automatic emergence of ownership, but the emergence of an exclusive right of apprehension (*aneignungsrecht*) of the separated part of the body, which is initially considered ownerless.[105] However, this right emerges solely from the person from whom a part of the body is separated and is explained not by proprietary categories, but by the right that existed to the body before the separation of the part from it.[106] In that context, it seems difficult to detect fundamental differences from the automatic emergence of the ownership approach, so that the exclusive right to possession approach also suffers from unexplained connection between the personality right and the proprietary right which emerges in

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favor, and recall information in a way that confirms or supports one's prior beliefs or values).

101. Bürgerliches Gesetzbuch [BGB] [Civil Code], § 953. According to this section, the owner of a whole property owns its products and the constituent parts arising after their separation from the property. *See, e.g.*, FRIEDRICH HELLMANN, VORTRÄGE ÜBER DAS BGB 33–35 (1897) (Ger.) (interpreting this section of BGB).

102. The transformation of the personality right, on the basis of which a person held a whole body, into a right of ownership, on the basis of which a person owns as property a detached part thereof, has been explicitly written about by Eduard Hölder. *See* 1 EDUARD HÖLDER, KOMMENTAR ZUM BGB 206 (1900) (Ger.); EDUARD HÖLDER, BEITRÄGEN ZUR GESCHICHTE DES RÖMISCHEN ERBRECHTS 7–8 (1881) (Ger.).

103. HERMANN SCHÜNEMANN, DIE RECHTE AM MENSCHLICHEN KÖRPER 66 (1985) (Ger.).

104. It is not uncommon to seek to justify ownership in the detached part by the person from whom it was detached by the close connection existing between them and the detached part. *See, e.g.*, Jochen Taupitz, *Privatrechtliche Rechtspositionen um die Genomanalyse - Eigentum, Persönlichkeit, Leistung*, 1992 JURISTENZEITUNG [JZ] 1089, 1092 (Ger.); Krejci, *supra* note 15, at 69; FRANÇOIS RIGAUX, LA PROTECTION DE LA VIE PRIVÉE ET DES AUTRES BIENS DE LA PERSONNALITÉ 732–33 (1990) (Fr.).

105. *See* Gareis, *supra* note 15, at 90–92; Rainer Kallmann, *Rechtsprobleme bei der Organtransplantation*, 1969 ZEITSCHRIFT FÜR DAS GESAMTE FAMILIENRECHT [FamRZ] 572, 577 (Ger.) (referring to HELMUT COING *in* STAUDINGER BGB, 11th ed., § 90 recital 4 (Ger.)).

106. *See* REINHARD FRANK, STGB, 18th ed. 1931, § 242 recital III 2e (Ger.); Eberhard Schmidt in: V. LISZT LEHRBUCH DES DEUTSCHEN STRAFRECHTS, 25th ed., § 127 recitals 4, 6 (Ger.).

respect to a separated body part. Although neither the conception of automatic emergence of ownership, nor the exclusive right of possession, suffices reasonable dogmatic justification, from the practical and pragmatic standpoint, each of them could have helped Henrietta Lacks when alive, and might profit her family now. Since in each of the mentioned alternatives the ownership of the detached cells would belong to her, any illegal use of them would result in disgorgement of profits in favor of Mrs. Lacks.[107] Given the proprietary nature of the claims, they could safely be inherited by her relatives,[108] and the profits derived from the unauthorized use of the cells of Mrs. Lacks, estimated by her family at an incredible $250 billion,[109] could be claimed by her heirs.

The easiest explanation of the initial emergence of ownership in a detached body part by the source of that body part seemed to those acknowledging a proprietary right over an individual's body while alive. They contend that the detached body parts are as much the property of the person as the body in which the person is located.[110] Supporters of this theory include not only proponents of an exclusively ownership-based approach to the body, but also proponents of the imposition (*überlagerung*) theory first proposed by Professor Hermann Schünemann.[111] They argue that personality rights are fully imposed on the right of ownership, have an effect of superposition with respect to it, and this relationship between the two rights continues throughout the life of the person until the part of the body is separated from it.[112] Naturally, one who is the owner of the whole has ownership

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107. *See* Allan Farnsworth, *Your Loss or My Gain? The Dilemma of the Disgorgement Principle in Breach of Contract*, 94 YALE L.J. 1339, 1369 (stating that the proprietary harm may also be claimed in the form of disgorgement of profits).

108. *See* MD. CODE ANN., EST. & TRUSTS § 1–301 (2021) (establishing that all the property of a decedent is inheritable). Note, that this Article refers here to the Maryland law because, as far as we can understand, Mrs. Lacks was a Maryland citizen and the law of succession is not a matter of US federal law. *See* Ronald Scalise, *New Developments in United States Succession Law*, 54 AM. J. COMPAR. L. 103, 103 (2006) (reporting that [s]uccession law in the United States is a not a federal issue, but is instead an area of private law relegated to the states).

109. *See* Taylor Romine, *Estate of Henrietta Lacks Sues Biotechnical Company For Nonconsensual Use of Her Cells*, CNN (Oct. 5, 2021, 5:03 PM), https://edition.cnn.com/2021/10/05/us/henrietta-lacks-estate-sues-biotech-company/index.html#:~:text=Attorneys%20for%20the%20Lacks%20estate,the%20lawsuit%20and%20court%20docket [https://perma.cc/S7UG-92W8] (archived Mar. 22, 2022) (quoting the amount of claim from the lawsuit); *see also About*, THERMO FISHER SCIENTIFIC, https://corporate.thermofisher.com/us/en/index/about.html (last visited Sept. 7, 2022) [https://perma.cc/UD7C-W6AX] (archived July 1, 2020) (identifying the annual revenue of Thermo Fisher, the defendant in the Henrietta Lacks case, in the amount of approximately forty billion US dollars). So, in the event of losing the lawsuit, to pay the sum of claim would be difficult, but possible.

110. *See, e.g.*, FRANCESCO CARNELUTTI, TEORIA GENERALE DEL DIRITTO 206 (1940) (It.).

111. SCHÜNEMANN, *supra* note 103, at 89–90.

112. *Id.* at 86, 91–92. *But see* Shevelev & Shevelev, *supra* note 16.

in the detached part of that whole. The stumbling block of this explanation is not the manner and substance of the explanation itself, which is difficult to pin down, but the basic premise on which those who espouse this view rely, namely, that a person has right of ownership in one's body. Without further ado, such a primitive conception entails the revival of real slavery, since under these theories the person may actually alienate the very ownership in one's body to others.[113]

The solution we propose, in order to balance between the slavery as a consequence of recognition of ownership in human body and the lack of ownership in it at all, is the concept of abstract ownership in the human body and its parts. We have already debunked elsewhere the existing views on body ownership and have offered a brand new and dogmatically coherent justification of ownership in the human body.[114] This justification is reflected in a dogma named abstract ownership in the human body.[115] Abstract rights are understood as rights *in rem*, which extend directly to an abstract object,[116] and all phenomena of the material world are only a concretization of this abstract object,[117] which will not cease to exist even when its concretization changes or disappears. Replacement of the concretization of the abstract object does not change the very right that extends to the object.[118] The abstractness of the object allows it to

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113. Shevelev & Shevelev, *supra* note 16.

114. *Id.*

115. *Id.; see also* Arseny Shevelev & Georgy Shevelev, *Body Revolution in Comparative Perspective: Promoting Equality through Adoption of New Theory of Bodiliness*, 55 UIC L. REV. 615 (2022) (applying the theory of abstract right of ownership in the human body).

116. It may seem that if a right extends to an abstract object rather than to a thing, then it is not real (*in rem*). However, the right should not extend to a thing, because this right is a phenomenon of an ideal order, so the object must also be ideal, not material. The proprietary (real) character of the right extending to an abstract object is not lost if "realism of ideas" (*Begriffsrealismus*) is admitted, as suggested by Sokolowski. *See* PAUL VON SOKOLOWSKI, DIE PHILOSOPHIE IM PRIVATRECHT: SACHBEGRIFF UND KÖRPER IN DER KLASSISCHEN JURISPRUDENZ UND DER MODERNEN GESETZGEBUNG 400 (1902) (Ger.).

117. The concretization of the abstract object of the right in rem is very similar in meaning and sound to the institution of attachment, through which the floating charge, which does not apply to a particular thing, was "attached" and became a fixed charge when the debtor was in default. For the essence of attachment as a moment and process, see Alisdair MacPherson, The Attachment of the Floating Charge in Scots Law 22 (2017) (Ph.D. dissertation, University of Edinburgh); GEORGE BELL, PRINCIPLES OF THE LAW OF SCOTLAND § 2272 (4th ed., 1839); David Cabrelli, *The Case against the Floating Charge in Scotland*, 9 EDINBURGH L. REV. 407, 415 (2005); Nat'l Com. Bank of Scot. v. Liquidator of Telford, Grier Mackay & Co. Ltd. 1969 SLT 306, 313 (Scot.).

118. The change in the concretization of an object, which preserves the right that extends to an abstract object, is very similar to the institution of proprietary surrogation (*dingliche Surrogation*), with the difference however that proprietary surrogation replaces one object with another, relying on the fact that the new object has been acquired at the expense of the old. *See* Oberster Gerichtshof [OGH] [Supreme Court], 28 Feb, 2008, 8Ob139/07k (Austria); *see also* Oberster Gerichtshof [OGH] [Supreme Court],

exclude the recognition of the body of a living person as a concrete object of ownership, but at the same time the abstractness of the object does not detract from the very existence of ownership, and even allows one to make dispositions of ownership. At the same time, the peculiarity of abstract ownership in this case is that it is not conditional—it actually exists—and produces a legal effect in full measure even before the death of a person or separation of a part of their body and, in this sense, can even have a market value.

Concretization as applied to the human body works in such a way that from the moment the body or its part ceases to be the receptacle of the individual's person, that is, what is excluded from circulation—abstract ownership is as if attached to an object that has just arisen, not excluded from the economic market. This result is because ownership had an abstract connection with that object, and as soon as concrete ownership became possible on it, it automatically belongs to the abstract owner. Concretization can manifest itself, for example, at the moment of an individual's death or when their body ceases to be connected with their person. Therefore, heirs, having inherited abstract ownership (if it was not transferred to someone during the testator's lifetime), will also receive the property which concretizes it (i.e., a human body).

Having briefly described the model of abstract ownership, this Article can explain the reason for ownership of the separated body parts to be vested in the source of body parts. If a person was the abstract owner of their body, then, once the part is separated from it, the part follows the same regime of rights as the whole body from which it was separated. However, unlike the whole body, the part is no longer bound by any shackles of personality. Therefore, there is not only abstract ownership in relation to the body part, but also concrete ownership, because the absence of the burden of personality allows this detached part of the body to qualify as a property. Applying the theory of abstract ownership to Henrietta Lacks's case, at the moment when the cancer cells were separated from her, she was an abstract owner of

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16 Oct. 1968, SZ 41/136 (Austria); Oberster Gerichtshof [OGH] [Supreme Court], 16 Sept. 1986, 2 Ob 631/86 (Austria); Oberster Gerichtshof [OGH] [Supreme Court], 13 June 1991, 7 Ob 539/91 (Austria); Bernhard Eccher in: ABGB Praxiskommentar, Michael Schwimann ed., 3d ed. 2005, § 613 recital 3 (Ger.); Rudolf Welser in: Kommentar zum ABGB, Peter Rummel ed. 2000, § 613 recital 4 (Ger.); WINFRIED KRALIK, DAS ERBRECHT 192–93 (1983) (each explaining that proprietary surrogation has long been applied in this form in Austrian inheritance law). Thus, in the case of proprietary surrogation, many objects may substitute the place of a perished object as an object of right. *See* ANDREAS KLETECKA, ERSATZ-UND NACHERBSCHAFT 305 (1999) (Austria); Jan Lieder in: MüKoBGB, 8th ed. 2020, § 1127 recital 1 (Ger.); Ansgar Staudinger in: HK-BGB, 10th ed. 2019, § 1130 recital 1 (Ger.) (each on insurance compensation); Egon Weiß in: KLANG ABGB III 407, 419–20 (2d ed.) (Austria) (on compensation for expropriation); Christoph Schärtl in: BeckOK BGB, 57th ed. 2021, § 1212 recital 5 (Ger.); Christian Berger in: Jauernig BGB, 18th ed. 2021, § 1212 recital 3 (Ger.); Friedrich L. Cranshaw in: juris PraxisReport Insolvenzrecht [jurisPR-InsR] 15/2008, recital 2 (Ger.) (each on proceeds from the sale of collateral).

her body as a whole, and after that moment the cells had lost their connection with her body as a receptacle of her personality, thus becoming not only an object of her abstract ownership, but also of the concrete ownership, the conversion of which may give rise, among others, to a claim of disgorgement of profits described above.[119]

In the literature one can find another unsatisfying explanation as to why a person from whom a part of the body has been separated acquires ownership in it. In Italy, some scholars liken the parts of the body separated from a person to their fruits, and therefore the person, as the owner of that from which the fruits were separated, owns the right to the separated part of the body.[120] To put it simply, they claim that just as the apples that are separated from the apple tree are its fruits and belong to whomever owns the tree itself, so will the separated body parts, once detached from it, be owned by whomever owned the body itself, since these parts are fruits of the body as a whole. At first glance, it would seem that this reasoning is wrong at least because the fruits, unlike parts of the body, appear periodically. However, this is not true, because the fruits can also be non-periodic.[121] The problems begin when one realizes that ownership in the fruiting property is necessary. Advocates of this position try to circumvent the fact that in order to obtain rights to fruits one must own the fruit-bearing property by pointing out that one needs only the right of use, which belongs to many persons on the basis of proprietary title, and in the case of the lessee, even on the basis of contractual rights.[122] It seems to us that such an argument is unconvincing, because the recognition of a person's actual right to use their own body in the same sense as in the examples cited would mean no less recognition of the right of ownership, for the latter hardly differs particularly from the limited rights *in rem*. Humans are not apple trees or any other fruit-bearing plants, and it is inadmissible to equate a human with a fruit-bearing property.[123]

Rohan Hardcastle offers a theory worthy of consideration explaining the emergence of a person's ownership in body parts

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119. *See supra* notes 107–109 and accompanying text (discussing what Lacks and, following her death, her heirs may claim from Thermo Fisher as a tortfeasor).

120. *See* Giovanni Criscuoli, *L'Acquisto delle Parti Staccate del Proprio Corpo e gli artt. 820 e 821 c.c.*, 14 REVISTA DEL DIRITTO DI FAMIGLIA E DELLE PERSONE 272 (1985); LUCIO FRANCARIO, I BENI IN GENERALE, *in* 2 DIRITTO CIVILE (Pietro Rescigno & Nicolo Lipari eds., 2009).

121. *See* PIETRO BARCELLONA, FRUTTI, *in* ENCICLOPEDIA DEL DIRITTO 214 (1969) (It.).

122. *See* Stefania P. Perrino, *Sulla Configurabilità della Rapina di Ovociti*, GIURISPRUDENZA PENALE WEB 1 (2021) (It.).

123. *See* Adriano de Cupis, *Sull'Equiparazione delle Parti Staccate del Corpo Umano ai Frutti Naturali*, RIVISTA TRIMESTRALE DI DIRITTO E PROCEDURA CIVILE 138 (1986).

separated from them.[124] He gives the example of an unconscious person who has had biomaterial removed from their body against their will. Hardcastle asks the question: Who has a right of ownership in the biomaterial in question? Answering that ownership arises with the person from whom the organ has been removed, he analogizes ownership rights with the capturing of wild animals on another's land apart from the will of the landowner. The peculiarity of the status of wild animals is that as long as they have not been seized, they are not anyone's property, including the property of the owner of the land plot. In order to protect the interests of the land owner, the common law developed a construction according to which the land owner has a qualified property right to wild animals in the sense that they have the exclusive right to seize them.[125]

In the event that the trespasser takes possession of the animal, violating the described exclusive right, the landowner has absolute ownership over the wild animal, even though they did not make the seizure themselves.[126] Although a person does not have ownership in their body until the part of the body is separated from them (i.e., pre-existing ownership), Hardcastle observes that there is a relationship between the part of the body, not of a real but a personal nature.[127] This relationship is based on the inviolability of the body, which allows, just as in the case of wild animals, ownership in the part of the body to be granted to the person from whom it has been illegally separated.[128] In essence, however, this theory means nothing more than the transformation of the personality right to the whole body into a right of ownership to the separated part of the body, only disguised and derived by analogy with landowner rights to wild animals.

The preceding paragraph examined the problem of the emergence of ownership in the context of the hypothetical situation of the illegal removal of biomaterials from the human body. Of much greater curiosity is the case of Antinori Severino examined by the Italian Court of Cassation.[129] This case investigated the issue of oocyte theft, and a peculiarity of the case was that the eggs were stolen directly from a woman's body. The defendants' attorneys reasoned that there could be no liability for the theft since there was no chattel at the time of the theft and thus no property damage was caused by the removal of this

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124. *See* HARDCASTLE, *supra* note 45, at 154. This analogy was also invoked by DAVID PRICE, HUMAN TISSUE IN TRANSPLANTATION AND RESEARCH: A MODEL LEGAL AND ETHICAL DONATION FRAMEWORK 253 (2009); NUFFIELD COUNCIL ON BIOETHICS, HUMAN TISSUE: ETHICAL AND LEGAL ISSUES, ¶ 9.11 (1995).

125. *See* Blades v. Higgs (1865) 141 Eng. Rep. 621 (HL) (Eng.); *Yanner v Eaton* [1999] HCA 53 (Austl.).

126. *See* Blades v. Higgs (1865) 141 Eng. Rep. 621 (HL) (Eng.); *Yanner v Eaton* [1999] HCA 53 (Austl.).

127. *See* HARDCASTLE, *supra* note 45, at 154.

128. *See id.* at 155.

129. Cass. pen., sez. II, 25 novembre 2020, n. 37818 (It.).

"thing."[130] Under the prior practice of the Court of Cassation, the oocytes in a woman's body cannot be considered as mere things temporarily in the body.[131] Therefore, only from the moment of separation, as generally recognized, could body parts be the subject of theft.[132]

The court approached this undoubtedly complex issue from the perspective of the theory of mobilization (*teoria della mobilizzazione*), according to which movable things are also those things which, although not movable things at the time of the theft, became so as a result of actions taken by a person.[133] On the basis of the mobilization theory, by removing an egg from a woman's body, the doctor makes it a movable thing (mobilizes it), which it was not previously. This opens the way to qualify their actions not only as an unlawful invasion in the body, but also as theft. The decision achieved its goal of holding the doctor liable for theft and not for the more lenient, according to Italian law, interference with the human body.

But the decision is not entirely logical. The mobilization theory is characterized by the dual status of the object of encroachment; it is, at the very moment of the theft, both not movable property, which is achieved by applying the general rules, and, at the same time, it is movable (for purposes of proving the crime), by virtue of the mobilization theory. In and of itself, the theory of mobilization does not publicize how such duality does not cause a logical contradiction. The application of the Italian theory of mobilization achieves the same results as the theory of body rights analogous to those of wild animals. Notwithstanding the dogmatic flaws of these two theories, in fact, the result of their application in Henrietta Lacks's case would be the same as if abstract ownership be employed, since in each of these cases the separated cancer cells were to be considered her property. Thus, any

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130. *See id.*

131. *See* Cass. pen., sez. F., 17 agosto 2016, n. 39541 (It.).

132. *See* Trib. Milano, 25 maggio 2016, Dir. pen. cont., 2017 (It.) (holding that, until the moment of separation, body parts were not property and could not be the subject of property crimes); *cf.* FERRANDO MANTOVANI, DIRITTO PENALE, PARTE SPECIALE 82 (6th ed. 2016) (stating that from the moment of separation, body parts could be subject to theft without restriction); *see also* R. v. Herbert (1961) 25 JCL 163 (Eng.) (theft of detached hair); Trib. correctionnel de Fontainebleau, Apr. 25, 1947, D. 1947, at 312 (Fr.) (theft of an aborted embryo).

133. *See, e.g.*, Cass. pen., Sez. I, 12 febbraio 1974, n. 8514 (It.) (parts of a building which were not considered movable things were mobilized). The dogma of mobilization may also be found in many other cases; *see also* Cass. Pen., Sez. IV, 24 novembre 2016, n. 6617 (It.) (a tree that was stolen by ripping it out of the ground); Cass. pen., Sez. V, 19 febbraio 2019, n. 7559 (It.) (a column with a telephone set). The theory of mobilization applies not only to the removal of a thing from real estate, but also from what is not a thing in principle. *See, e.g.*, Cass. pen., Sez. II, 7 giugno 1984, n. 9802 (It.) (applying the theory to the removal of dentures from a corpse). Regarding the transformation of body parts into a movable thing, see ADRIANO DE CUPIS, VOCE CORPO (ATTI DI DISPOSIZIONE DEL PROPRIO), *in* NOVISSIMO DIGESTO ITALIANO 854–56 (1959); STEFANO ROSSI, CORPO UMANO (ATTI DI DISPOSIZIONE SUL), *in* DIGESTO (DISCIPLINE PRIVATISTICHE) 250 (2012).

unauthorized conduct with respect to her cancer cells would amount to an infringement upon her right of ownership, which, in turn, would give rise to a claim against the tortfeasor.[134]

It seems to us that the theories described earlier not only suffer from an elementary lack of logical justification, but also from a practical rigorism that makes it difficult for individuals to choose how to protect their rights to a physically-separated body part. In view of this, we can propose the application to separated body parts of the theory of abstract ownership described above. The advantage of a theory which puts forward abstract ownership in the human body is that it substantially expands the boundaries of the autonomy of the human will by giving to a person the broadest possible rights regarding the determination of the regime of biological substances separated from their body.

In cases where the separated part of the body continues to be considered a body, the individual has the right to choose whether to retain the bodily regime of the separated part of the body, or to concretize their abstract ownership in it and abandon the bodily regime. The ability to choose can seriously help a person, for example, when they deposit their sperm for reproductive purposes, but it is subsequently destroyed. The destruction of this sperm harms both the human body and the abstract right of ownership in this sperm. Compensation cannot be claimed on both grounds at the same time, because as long as the abstract ownership is not concretized (this condition continues as long as the separated part is considered a human body), the abstract owner cannot enforce their claim against the tortfeasor. The person who gave the sperm—due to the fact that many countries have different procedures for compensation and proof of harm depending on what was harmed (a body or property)—can make a choice as to whether to recover the harm to the separated part of the body as a body, or to concretize their abstract ownership right in the body part, and to recover the harm to the separated part of the body as property. This approach will make life much easier for many people, allowing them to protect their interests most effectively. The option to choose between the procedure for compensation of either bodily injury or proprietary harm seems, from the perspective of possibly recoverable damages, fairly similar for Henrietta Lacks's estate. The basis for a claim of unjust enrichment (including in the form of disgorgement of profits) in Maryland is tortious conduct.[135] This may

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134. *See* Shevelev & Shevelev, *supra* note 115, at 633.

135. *See* Wash. Cnty. Bd. of Educ. v. Mallinckrodt ARD, Inc., 431 F. Supp.3d 698, 717–18 (D. Md. 2020) (recognizing the standard practice of Maryland courts to dismiss unjust enrichment claims unaccompanied by tortious conduct); Temescal Wellness of Md., LLC v. Faces Hum. Cap., LLC, Civil Action No. GLR-20-3648, 2021 WL 4521343, at *8 (D. Md. Oct. 4, 2021) ("[I]t is not clear whether it is permissible under Maryland law for a suit to consist of a single claim of unjust enrichment without an accompanying underlying tort.") (internal quotation marks omitted); *see also* Mem. of Law in Supp. of

take the form of personal,[136] as well as proprietary,[137] harm. Not surprisingly, Henrietta Lacks's estate claims both battery and, to exactly quote, "theft of Mrs. Lacks's tissue."[138]

Thus, we consider it preferable to recognize the right of abstract ownership in the person from whom a body part has been separated. Accordingly, in connection with the initial emergence of ownership in the donor of the body parts, ownership by others can only arise with the cessation of ownership by the donor in their body parts. The most common means of disposing of separated body parts is the donation of body parts,[139] as well as the abandonment of ownership in body parts. In this context, it is important to note that ownership of the severed

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Thermo Fisher Sci's Mot. to Dismiss 19 (Dec. 16, 2021), https://storage.courtlistener.com/recap/gov.uscourts.mdd.500650/gov.uscourts.mdd.500650.20.1.pdf [https://perma.cc/VYP4-UKSW] (archived July 1, 2022) (citing these and other cases on the part of defendant in Henrietta Lacks's case). *But cf.* DOUG RENDLEMAN & CAPRICE ROBERTS, REMEDIES: CASES AND MATERIALS 517 (9th ed. 2018) (being used by Estate of Henrietta Lacks's attorney in the proposition that unjust enrichment does not presuppose any underlying tort).

136. *Cf.* Schultz v. Bank of Am., N.A., 990 A.2d 1078 (Md. 2010) (on personal injury torts in Maryland).

137. *Cf.* Lawson v. Commonwealth Land Title Ins. Co., 518 A.2d 174 (Md. Ct. Spec. App. 1986) (on torts in respect of personal property in Maryland).

138. Pl.'s Opp'n to Def.'s Mot. to Dismiss the Compl. 6, 17, 20 (Feb. 14, 2022), https://storage.courtlistener.com/recap/gov.uscourts.mdd.500650/gov.uscourts.mdd.500650.41.0.pdf [https://perma.cc/KA8Q-5KSX] (archived July 1, 2022).]. However, the argument of theft of tissue is rather unsubstantiated and is not developed by an attorney.

139. *But see* GIOVANNI DI ROSA, BIODIRITTO, ITINERARI DI RICERCA 158 (2009) (It.) (believing that, although in many countries the transfer of organs for transplantation is called a gift or donation, the act of transferring organs is different from the actual contract of donation). Consequently, the transfer of organs for transplantation, according to some, is a *sui generis* institution. *See* Massimiliano Cicoria, *Profili del Dono nel Diritto Privato*, 2010 GIUSTIZIA CIVILE 279 (It.). This institution as a form of turnover is not characterized by pecuniary status. GIORGIO RESTA, DONI NON PATRIMONIALI, *in* 4 ENCICLOPEDIA DEL DIRITTO 518–20 (2011) (It.). We are, on the contrary, inclined to answer in the affirmative manner to the question whether the transfer of organs is a gift or a special institution. A thing transferred as a gift is not capable of changing the nature of a contract. Regarding the subjects of donation, it should be remembered that, although the organ is always ultimately transferred to the recipient, the donee under the contract is usually a medical organization. *See* Grégoire Loiseau, *Le Contrat de Don d'Éléments et Produits du Corps Humain. Un Autre Regard sur les Contrats Réels*, 39 RECUEIL DALLOZ 2252, 2252 (2014) (Fr.).

body parts is the reason why the acts of donation[140] and abandonment[141] have their effect.

In practice, however, it is possible to encounter a misunderstanding of this obvious tenet.[142] To demonstrate how the relationship between donors of body parts and third parties should not be qualified, we would focus on the curious American case, *Washington University v. Catalona*.[143] In that case, Washington University claimed ownership in biomaterials donated by donors for research purposes. The defendant in that case, Catalona, a surgeon who had once worked at the university and who also wanted to use the transferred materials, argued, with the support of the donors of the materials, that they had only transferred the materials for bailment, not wanting to give up their property rights.[144]

The court, in resolving the case, seems to have fallen into a logical contradiction: it claimed that the donors of the biomaterials donated them, but at the same time held that they had no ownership rights to the biomaterials.[145] The court's logic is hardly worthy of serious criticism, and while some try to find rationality in such astounding judgments,[146] we believe that this approach is unsubstantiated, and if

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140. *See, e.g.*, 20 HALSBURY'S LAWS OF ENGLAND ¶ 1 (4th ed. 1989); STAIR MEMORIAL ENCYCLOPEDIA, *supra* note 76, § 601 (defining gift as an act of gratuitous transfer of right of ownership, and therefore requires ownership in the gift). In particular, regarding the disposition of donor organs, see Walter Land, *The Dilemma of Organ Allocation: The Combination of a Therapeutic Modality for an Ill Individual with the Distribution of a Scarce Valuable Public (Healing) Good*, *in* PROCUREMENT, PRESERVATION AND ALLOCATION OF VASCULARIZED ORGANS 361 (Geralyn Collins et al. eds., 1997); Henri Kreis, *Whose Organs are They Anyway?*, *in* ORGAN TRANSPLANTATION: ETHICAL, LEGAL, AND PSYCHOSOCIAL ASPECTS 140 (Willem Welmar et al. eds., 2008) (each noting that the ability to distribute donor organs depends on whether the donor is given ownership in those organs).

141. *See* Jean McHale, *Waste, Ownership and Bodily Products*, 8 HEALTH CARE ANALYSIS 123, 131 (2000); Paul Matthews, *Property and the Body: History and Context*, *in* PROPERTY RIGHTS IN THE HUMAN BODY 30 (Kristina Stern & Pat Walsh eds., 1997) (both supporting the view that abandonment of rights in organs implies the existence of rights in organs); *c.f.*, *e.g.*, James Childress, *The Body as Property: Some Philosophical Reflections*, 24 TRANSPLANTATION PROCS. 2143, 2144 (1992) (believing that disposing of organs in any way presupposes ownership in them).

142. A critique of the approach that recognizes both the gift of body parts and the donor's lack of rights to them has also been outlined in GRAEME LAURIE, GENETIC PRIVACY: A CHALLENGE TO MEDICO-LEGAL NORMS 313 (2002) (Scot.).

143. Wash. Univ. v. Catalona, 437 F. Supp. 2d 985 (E.D. Mo. 2006).

144. *See id.* at 998.

145. *See id.* at 996–99.

146. See, for instance, the duplex theory advanced by Remigius Nwabueze. This author applies the anthropological approach used in the work of Strathern, MARILYN STRATHERN, KINSHIP, LAW AND THE UNEXPECTED: RELATIVES ARE ALWAYS A SURPRISE (2005), as a basis for his theory and points out that separated body parts are both property and non-property, since they themselves, not being property, become property in the hands of researchers. Ownership in detached parts, the author continues, is an exception permitted only to researchers, but not to the individuals who transferred the materials in question. *See* Remigius Nwabueze, *Regulation of Bodily Parts: Understanding Bodily Parts As a Duplex*, 15 INT'L J.L. CONTEXT 515, 522 (2019); *cf.*

the court had continued to rely on the donation rules, it would clearly have succeeded in making its decision consistent.

Another common way of disposing of rights to severed body parts—an important source for physicians and researchers to obtain biomaterial—is through an abandonment of ownership in severed body parts. It is believed that if a person undergoing medical procedures in which organs, tissues, or other body parts are separated does not express their will regarding the status of these separated parts, they are considered to have abandoned rights to them, and then those rights can be acquired by a physician.[147] Such a position is based on the presumption that a person who is indifferent to what happens to their severed body parts abandons rights to them.[148]

Radhika Rao, *Genes and Spleens: Property, Contract, or Privacy Rights in the Human Body?*, 35 J.L. MED. ETHICS 371, 371 (2007) (averring that researchers may have property rights where donors do not, or have a fuller right to separated body parts due to the fact that the utilitarian purposes of organ use are better achieved in the hands of researchers). Looking at the authors' reasoning, one can only wonder how strong the odious ideological and economic assumptions can be, that they can be forced to deny the basic rules of law that require that property rights arise initially in the source of the biomaterial.

147. *See* Volker Lipp in: LAUFS/KATZENMEIER/LIPP ARZTRECHT, 8th ed. 2021, at VI recital 77 (Ger.); Jochen Taupitz, *Verkauf von Restblut an die Medizinprodukteindustrie: nur mit Einwilligung des Patienten?*, 2017 MED. 353, 354–55 (Ger.); STEPHAN SCHREIBER, TRANSFUSIONSGESETZ 62 (2001) (Ger.); Tade M. Spranger, *Die Rechte des Patienten bei der Entnahme und Nutzung von Körpersubstanzen*, 2005 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1084, 1085 (Ger.); STELLA EHRLICH, GEWINNABSCHÖPFUNG DES PATIENTEN BEI KOMMERZIELLER NUTZUNG VON KÖRPERSUBSTANZEN DURCH DEN ARZT? 54 (2000) (Ger.); Gerhard Nitz & Christian Dierks, *Nochmals: Forschung an und mit Körpersubstanzen - wann ist die Einwilligung des Ehemaligen Trägers Erforderlich?*, 2002 MEDR 400, 401 (Ger.); EVA ZECH, GEWEBEBANKEN FÜR THERAPIE UND FORSCHUNG: RECHTLICHE GRUNDLAGEN UND GRENZEN 105–107 (2007) (Ger.); MARCO WICKLEIN, BIOBANKEN ZWISCHEN WISSENSCHAFTSFREIHEIT, EIGENTUMSRECHT UND PERSÖNLICHKEITSSCHUTZ 46–47 (2007) (Ger.); NUFFIELD COUNCIL ON BIOETHICS, *supra* note 124, ¶¶ 9.14, 13.26. In France, similarly, anything that was separated from, discarded, or not used by a person during surgery is considered *res derelictae*. *See* Hermitte, *supra* note 95, at 33; Nicolas Masquefa, La Patrimonialisation du Corps Humain 219 (2019) (PhD Dissertation, Université d'Avignon); Galloux, *supra* note 64, at 1020–21; *see also* Venner v. State, 354 A.2d 483, 499 (Md. Ct. Spec. App. 1976) (Powers, J.) (holding that because of social custom, if a person does nothing to exercise either ownership or possession, or control over body material, it means they have abandoned it). For the same opinion, see Dickens, *supra* note 15, at 186; Imogen Goold, *Abandonment and Human Tissue*, *in* PERSONS, PARTS AND PROPERTY: HOW SHOULD WE REGULATE HUMAN TISSUE IN THE 21ST CENTURY? 125, 143 (Imogen Goold et al. eds., 2014); Loane Skene, *Ownership of Human Tissue and the Law*, 3 NATURE REVS.: GENETICS 145, 147 (2002).

148. *See* Galloux, *supra* note 64, at 1021; Robert Kouri & Suzanne Philips-Nootens, *L'Utilisation des Parties du Corps Humain pour Fins de Recherche: l'Article 22 du Code Civil du Québec*, 25 CHRONIQUE: DROIT DE LA SANTÉ. REVUE DE DROIT 359, 375 (1994) (each arguing that indifferent treatment equates to abandonment of ownership in separated body parts).
When considering the abandonment of organs in a hospital, a specific ground such as consent to the hospital's procedures may also be applicable. Thus, in Browning v. Norton Childs.' s Hosp., 504 S.W.2d. 713 (Ky. 1974), the court stated that if a person is a patient in a hospital, they thereby consent to any action it takes unless they express an objection.

The loss of interest is discussed in the following case. In *R v. Stillman*,[149] a person blew their nose and threw their nasal secretions into a garbage can.[150] A police officer picked up the discarded secretions and used the DNA contained in them to compare with a perpetrator's DNA.[151] The person claimed that the police officer violated their property right by using the nasal secretions without their consent.[152] The court responded that the police officer acquired ownership in the secretions because, by discarding the secretions, the person had no interest in retaining ownership in them.[153]

The moral of the case seems to be that one should use handkerchiefs, on which a person solemnly testifies onto brightly colored threads their wish to retain ownership over their discarded nasal secretions, and that the trash can is merely a place where the person wishes to store the used handkerchief, which preserves the biomaterial. This is, of course, a joke, but it begs the important question of whether a person should really be considered to have abandoned ownership in biomaterials if they have not expressed any willfulness with respect to the biomaterials.

Few would be willing to accept such an assertion,[154] because it is likely that a refusal of the presumption of abandonment of a person's organs would necessitate costly procedures for obtaining information

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Id. at 714. Based on the rule deduced, the court concluded that a person who was not concerned about the fate of their amputated leg for four weeks could not point out that the hospital had violated their rights by cremating their leg. *Id.* A similar strategy is chosen by Mark Pawlowski, *Property in Body Parts and Products of the Human Body*, 30 LIVERPOOL L. REV. 35, 48 (2009). Another example where a person who comes to a clinic and agrees to its procedures is, perhaps, the case of submitting urine for tests. *See* Doe v. HealthPartners, Inc., No. A06-1169, 2007 WL 1412936, at *3–4 (Minn. Ct. App. May 15, 2007) (considering a case of an individual filing a claim of conversion of his urine, who previously said that he could not expect to get the urine submitted for testing back).

149. *See* R v. Stillman, [1997] S.C.R. 607 (Can.); *see also* R. v. LeBlanc (1981), 64 C.C.C. 2d 31 para. 6 (Can. N.B.C.A.) (holding that a person relinquished ownership of blood samples that ended up in the front seat of a car); R. v. Love (1994) A.J. 847, paras. 87–90, 110 (Can. Alta. Q.B.) (holding a removal of a paper napkin from a trashcan by an undercover officer not to be an illegal taking of property because the person, initially owning the napkin, was found to had abandoned ownership).

150. *Stillman*, [1997] S.C.R. para. 52.

151. *See id.*

152. *See id.*

153. *See id.* para. 55.

154. Among these few are Jürgen Simon & Jürgen Robienski, *Eigentum an Humanem Material in Biobanken und dessen Nutzung*, *in* WEM GEHÖRT DER MENSCHLICHE KÖRPER? ETHISCHE, RECHTLICHE UND SOZIALE ASPEKTE DER KOMMERZIALISIERUNG DES MENSCHLICHEN KÖRPERS UND SEINER TEILE 297, 306–08 (Thomas Potthast et al. eds., 2010) (Ger.); CHRISTOPH REVERMANN & ARNOLD SAUTER, BIOBANKEN ALS RESSOURCE DER HUMANMEDIZIN 136–37 (2007) (Ger.); Patrick Breyer, *Der Zivil- und Strafrechtliche Schutz von Körpersubstanzen, die Patienten zu Analysezwecken entnommen Wurden, und Möglichkeiten der Forschung mit Solchen Substanzen*, ZEITSCHRIFT FÜR GESUNDHEITSRECHT [GESR] 316, 317 (2004) (Ger.); Hans-Dieter Lippert, *Zur Zulässigkeit Medizinischer Forschung an Menschlichen Körpermaterialien*, 1997 MEDR 457, 458 (Ger.); Marion Albers, *Rechtsrahmen und Rechtsprobleme bei Biobanken*, 2013 MEDR 483, 486 (Ger.).

from the person as to whether or not they wish to retain rights in their separated body parts.[155] This Article asserts that if body parts are severed from a person, for example, during a medical operation, the person cannot be considered to have abandoned them unless the person has been advised in advance how those severed body parts will be used.[156] In other words, the *animus dereliquendi* (the intention to abandon the severed organs) must be informed. Otherwise, the presumption as to the manner in which the person from whom the body parts have been severed wishes to dispose of them will become a fiction authorizing the unwilling removal of organs from the person and the violation of their ownership rights.

In any event, even attempting to compromise and accepting that the patient is presumed to have abandoned any part of their body until proven otherwise, this presumption should clearly not apply when a body part is extracted for which the person has not consented to the separation, or where it was not medically necessary. In such cases, maintaining the presumption of abandonment would be tantamount to legalizing the abuse by doctors of their fiduciary rights and duties, who would be free to remove any part of the human body for their own selfish ends by performing a medical operation. Hardly anyone would want to go to the hospital in the awareness that on the operating table they would be surreptitiously dismantled for their organs. And given the ultra-profitable American system of medical insurance, the adoption of such a presumption is fraught with substantial losses for medical organizations, since when the above presumption is extended to cases of unauthorized removal, ordinary people will try hard to avoid contact with doctor-expropriators in the absence of necessity. To be fair, in the Henrietta Lacks case, the removal of her cells, which later became the basis for the HeLa cells, was also medically unnecessary.

However, in the context of medical interventions, it is not even the marginal perception of the institution of abandonment, but the attempt to legitimize the acquisition of ownership by physicians (since it is they who separate the organs of a person), that is most debatable. For example, in the *Doodeward* case that we have previously examined,[157] the doctor who performed the necessary work was recognized as the owner of the separated body part on the basis of the notorious work and skill exception, but in present time it is hard to imagine how the work and skill exception—the root of which is initially vicious and unjust—may still be viable. At first glance, the labor theory of ownership does tip the scales in favor of the physician, who, legally having access to a part of a person's body, has performed certain labor

155. *See* Kathleen Liddell & Alison Hall, *Beyond Bristol and Alder Hey: The Future Regulation of Human Tissue*, 13 MED. L. REV. 170, 214–15 (2005).

156. A similar conclusion was reached, for example, by the Trib. Napoli, 14 marzo 1972, Giur. it., 1972, 394 (It.), as well as MARIA C. VENUTI, GLI ATTI DI DISPOSIZIONE DEL PROPRIO CORPO 176 (2002) (It.).

157. *See supra* notes 19–29 and accompanying text (discussing *Doodeward*).

on it.[158] On the other hand, this part of the body did not arise by itself and is the result of physiological processes in the human body; in a sense, the body is the result of its inner work,[159] and therefore the patient, by virtue of the same theory, is no less entitled to property.

Furthermore, it is not difficult to say that the doctor owns the body insofar as they acquire ownership in the patient's interest. It is therefore not surprising to find solutions where the doctor is recognized both as the only person who has performed labor in relation to a body part and as the agent of the patient,[160] thereby performing labor and acquiring rights (including property rights) precisely in the patient's interest and on behalf of the patient.

From this we can conclude that in order for the doctor to legally acquire ownership in a body part, there must be a corresponding will on the part of the patient (i.e., expressed in the form of consent to conduct medical examinations, etc.),[161] which would indicate a desire to transfer all rights to the severed body part to the doctor. Thus, even decisions that might seem to undermine the patient's ownership in the separated parts of their body, when interpreted sensibly, take on a meaning that is fully consistent with the thesis that the person from whom the body parts are separated is initially the most empowered with regard to them.

III. OTHER CONCEPTS OF RIGHTS IN SEPARATED BODY PARTS

Having fully characterized the theory of ownership in separated body parts, we will now also present a critical analysis of alternative conceptions that recognize certain rights in separated body parts on grounds other than ownership. These concepts begin with the more traditional personality rights theory described in subpart A, continue

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158. *See* Carlo Piria, *Gli Interessi Scientifici e Patrimoniali su Parti Staccate dal Corpo Oggetto di Ricerche Biotecnologiche*, 1990 RASSEGNA DI DIRITTO FARMACEUTICO [RASS. DIR. FARM] 808 (It.); Andrew Tettenborn, *Wrongful Interference with Goods*, *in* CLERK AND LINDSELL ON TORTS 1024 (19th ed., 2006); Breed and Legal Profession Complaints Committee [2013] WASAT 27 at 21 (Austl.).

159. *See* UK DEP'T OF HEALTH, THE USE OF HUMAN ORGANS AND TISSUE: AN INTERIM STATEMENT 7 (2003) (claiming that the person from whom tissue is taken and from whom cell lines are made deserves partial financial compensation for the price of their tissue because they too have invested their work and skill). *But cf.* Trib. Milano, 17 Aprile 1961, Temi 1961, 141 (It.) (arguing that this part of the body should belong solely to the patient).

160. *See Re H, AE [No. 2]* [2012] SASC 177, ¶ 60 (Austl.); *Re Estate of Edwards* (2011) 81 NSWLR 198, ¶ 88 (Austl.); *Re Cresswell* [2018] QSC 142, ¶ 166 (Austl.); *Chapman v S.E. Sydney Loc. Health Dist.* [2018] NSWSC 1231, ¶ 77 (Austl.).

161. Thus, it is noted that in order to legally remove biomaterial from a person, one must have consent from them, in which three elements can be distinguished: consent to extraction, consent to the processing of personal data, and consent to further use for scientific or commercial purposes. *See* Ansgar Ohly, *Die Einwilligung des Spenders von Körpersubstanzen und ihre Bedeutung für die Patentierung Biotechnologischer Erfindungen*, *in* MATERIELLES PATENTRECHT: FESTSCHRIFT FÜR REIMAR KÖNIG ZUM 70 GEBURTSTAG 417, 421 (Christoph Ann et al. eds., 2003) (Ger.).

with the exotic and non-trivial copyright approach described in subpart B, and end with sovereign possession in biomaterials described in subpart C.

A. *Personality Rights in Separated Body Parts*

In the preceding part of this article, we considered the concept of ownership in separated body parts. This concept, despite its widespread prevalence, is not the only concept that exists. Many scholars, justifiably drawing attention to problems unresolved or unsolvable under past concepts of ownership in severed body parts, have inevitably concluded that a different concept of rights to severed body parts is needed: one that is more consistent with the real state of affairs and that serves the special, personal interests of the individual in the severed parts of their body.[162] To be precise, the claim against the concept of ownership is that it was allegedly incapable of protecting the most personal interests that might be contained in a person's organs even after they had been separated.[163]

In particular, Jesse Wall suggested that ownership in biomaterials is only effective when it is contingent in relation to the bearer of the right, that is, when there is no difference as to which person owns the rights to the biomaterial.[164] There is no difference, for example, which scientific institution would conduct research on biological material, since each of them lacks personal ties to this biomaterial, and therefore there may be ownership in it.[165] However, Wall continues, in many disputes such as *Yearworth*,[166] ownership in the biomaterial by a particular person is essential, since not everyone will be able to use it at all in the way that was raised in the dispute,[167] such as fertilization. His argument is abundantly clear: the fertilization of the stored sperm would inevitably cause the source of sperm to become a father of the child conceived, and if the fertilization

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162. *See* Charles Foster, *Dignity and the Ownership and Use of Body Parts*, 23 CAMBRIDGE Q. HEALTHCARE ETHICS 417, 417 (2014) (calling the concept of ownership inadequate); *see also* Hans Forkel, *Verfügungen über Teile des Menschlichen Körpers*, JURISTENZEITUNG [JZ] 593, 595 (1974) (Ger.); Hans Forkel, *Das Persönlichkeitsrecht am Körper, gesehen Besonders im Lichte des Transplantationsgesetzes*, JURA 73, 74 (2001) (Ger.) (reporting complete failure of a lawyer who refuses to allow personality rights for separated body parts).

163. *See* HANS FORKEL, IMMISSIONSSCHUTZ UND PERSÖNLICHKEITSRECHT 19–20 (1968) (Ger.).

164. *See* Jesse Wall, *The Trespasses of Property Law*, 40 J. MED. ETHICS 19, 20–21 (2014); *cf.* Forkel, *Verfügungen*, *supra* note 162, at 596 (believing, as an ardent proponent of personality rights theory, that if a person donates their organs to an organ bank without specific instructions as to how the donated organs are to be used, the person has given up personality rights and has only ownership rights over them).

165. *See* Wall, *supra* note 164, at 20.

166. *See Bazley v Wesley Monash IVF Pty. Ltd.* [2010] QSC [2011] 26 (Austl.); *Re the estate of the late Mark Edwards* [2011] NSWSC 478, ¶¶ 63–68 (Austl.).

167. Wall, *supra* note 164, at 20.

is done without, or contrary to, his free will, this act would be fraught with coerced parenthood.[168] From this, the author deduces that property rights are not adapted to the protection of interests in cases where the interests and choices that are associated with a particular bearer of rights are protected.[169] It is very likely that these kinds of reflections have guided many in deciding to support a theory of personality rights over detached body parts.

The theory of personality rights over severed body parts has a legion of proponents.[170] The peculiarity of this theory is that the personality right usually coexists with the right of ownership in the severed body parts, either prevailing over it or coexisting with it in parallel.[171] The latter circumstance allows one to argue that the personality right is often intended to complement the right of

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168. *See, e.g.*, Samantha Smith, Stolen Sperm: Should the Law Absolve an Involuntary Father From the Duty to Furnish Child Maintenance? (2015) (Ph.D. in Law Dissertation) (on file with the University of Cape Town) (discussing an interesting and curious case of using someone else's sperm without one's consent, and the consequences thereof from the civil, criminal, and family law perspective).

169. Wall, *supra* note 164, at 21.

170. *See* ERWIN BERNAT, RECHTSFRAGEN MEDIZINISCH ASSISTIERTER ZEUGUNG 115 (1989) (Ger.); Dagmar Coester-Waltjen, *Die Künstliche Befruchtung beim Menschen – Zulässigkeit und Zivilrechtliche Folgen*, DEUTSCHER JURISTENTAG 56, 32 (1986) (Ger.); Erwin Deutsch, *An der Grenze von Recht und Künstlicher Fortpflanzung*, 1985 VERSR 1002, 1004 (Ger.); Erwin Deutsch, *Des Menschen Vater und Mutter. Die Künstliche Befruchtung beim Menschen – Zulässigkeit und Zivilrechtliche Folgen*, 1986 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1971, 1974 (Ger.); Dieter Giesen, *Geburt eines Ungewollten Kindes? Wertverwirklichung oder Schadensereignis?* 1970 FAMRZ 565, 569 (Ger.); Andreas Heldrich, *Schadensersatz bei Fehlgeschlagener Familienplanung*, 1969 JUS 455, 461 (Ger.); Adolf Laufs, *Die Künstliche Befruchtung beim Menschen – Zulässigkeit und Zivilrechtliche Fragen*, 1986 JURISTENZEITUNG [JZ] 769, 772 (Ger.); Günter Püttner & Klaus Brühl, *Fortpflanzungsmedizin, Gentechnologie und Verfassung – Zum Gesichtspunkt der Einwilligung Betroffener*, 1987 JURISTENZEITUNG [JZ] 529, 532 (Ger.); Jochen Taupitz, *Privatrechtliche Rechtspositionen um die Genomanalyse – Eigentum, Persönlichkeit, Leistung*, 1992 JURISTENZEITUNG [JZ] 1089, 1093 (Ger.); GEORG WERNER, ENTNAHME UND PATENTIERUNG MENSCHLICHER KÖRPERSUBSTANZEN 53–55 (2008) (Ger.); Cornelia Pagel, *Die Nabelschnur als Rechtsproblem – drei Fragen, drei Antworten*, *in* KÖRPERTEILE – KÖRPER TEILEN 189, 191–93, 195 (Dirk Preuß et al. eds, 2009) (Ger.); HERBERT ZECH, INFORMATION ALS SCHUTZGEGENSTAND 299 (2012) (Ger.); MAX KLUSEMANN, DAS RECHT DES MENSCHEN AN SEINEM KÖRPER 34 (1907) (Ger.); *cf.* Paolo Zatti, *Di là dal Velo della Persona Fisica – Realtà del Corpo e Diritti "dell'Uomo"*, *in* MASCHERE DEL DIRITTO, VOLTI DELLA VITA 64-7, 81–83 (2009) (It.) (holding that only personality rights but not property rights exist over separated body parts).

171. *See* Forkel, *Verfügungen*, *supra* note 162, at 593–95; JANSEN, *supra* note 67, at 57–79; Jochen Taupitz, *Wem Gebührt der Schatz im Menschlichen Körper? – Zur Beteiligung des Patienten an der Kommerziellen Nutzung seiner Körpersubstanzen*, 191 ACP 201, 209–11 (1991) (Ger.) (arguing for prevalence of ownership rights over personality rights). *But see* MONIKA LANZ-ZUMSTEIN, DIE RECHTSSTELLUNG DES UNBEFRUCHTETEN UND BEFRUCHTETEN MENSCHLICHEN KEIMGUTS. EIN BEITRAG ZU ZIVILRECHTLICHEN FRAGEN IM BEREICH DER REPRODUKTIONS- UND GENTECHNOLOGIE 222 (1990) (Ger.) (averring that personality rights coexist with ownership rights without subordinating one another).

ownership,[172] taking into account the personal nature of the disposition of the severed body parts and the personal connection that may persist between the severed organs and the person from whom they were severed,[173] even after the transfer of ownership to another person.[174]

The personal connection of the individual with the separated parts of the body, which gives rise to the extension of the right of personality to the separated parts of the body, has, according to many, a very concrete material expression: the unique genetic material of the individual, without which the right of personality would cease to exist.[175] In this interpretation, it is possible to include, as special cases of personality rights, rights in severed body parts based on an individual's privacy interest,[176] as well as rights based on an interest in protecting the dignity of the individual.[177] These rights are also

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172. *Cf.* Johannes Hager in: STAUDINGER BGB, 13th ed. 1999, § 823 recital C 243 (Ger.); ROLF MÜLLER, DIE KOMMERZIELLE NUTZUNG MENSCHLICHER KÖRPERSUBSTANZEN – RECHTLICHE GRUNDLAGEN UND GRENZEN 49–51 (1997) (Ger.); WICKLEIN, *supra* note 147, at 104–05; Georg Freund & Natalie Weiss, *Zur Zulässigkeit der Verwendung Menschlichen Körpermaterials für Forschungs- und Andere Zwecke*, 2004 MEDR 315, 316 (Ger.) (each describing the role of personality rights in supplementing right of ownership).

173. *See* Forkel, *Verfügungen*, *supra* note 162, at 595 (arguing that any disposition of body parts is personal).

174. On the retention of the personal connection to the organs upon their separation and transfer to a third party, see NATIONALER ETHIKRAT, BIOBANKEN FÜR DIE FORSCHUNG 32 (2004) (Ger.).

175. Jochen Taupitz & Marie Schreiber, *Biobanken – Zwischen Forschungs- und Spenderinteressen*, 2016 BUNDESGESUNDHEITSBLATT [BGESBL] 304, 305 (Ger.); WICKLEIN, *supra* note 147, at 82–83, 93–95; Breyer, *supra* note 154, at 319; CHRISTIAN HALASZ, DAS RECHT AUF BIO-MATERIELLE SELBSTBESTBESTIMMUNG 20–21 (2004) (Ger.); VERENA WERNSCHEID, TISSUE ENGINEERING – RECHTLICHE GRENZEN UND VORAUSSETZUNGEN 164–66 (2012) (Ger.). Here it should be noted that the above-referenced authors, in forming their position on the scope of the personality right, usually reasoned exclusively about human DNA as genetic material. However, this limitation is not correct. *See* Herbert Zech, *Anwendbarkeit des Übereinkommens über Biologische Vielfalt und des Nagoya-Protokolls auf das Humane Mikrobiom?*, GEWERBLICHER RECHTSSCHUTZ UND URHEBERRECHT [GRUR] 881, 885–86 (2018) (Ger.) (substantiating that even the human microbiota—the aggregate of bacteria in a person—can be genetic material, since collectively these bacteria are unique to each individual and therefore are capable of carrying information about their host).

176. The concept of private interests in the human body and parts and materials depart from what is common in America. *See, e.g.*, Doe v. High-Tech Inst., Inc., 972 P.2d 1060, 1068–69 (Colo. App. 1999) (holding it impermissible to test a person's blood for HIV without their consent because it is widely recognized that there are "privacy interests in a person's body," including detached parts of the body, such as the blood in this case, which was separated from the whole body); *see also* Henry v. Hulett, 969 F.3d 769, 778 (7th Cir. 2020); State v. Athan 158 P.3d 27, 51 (Wash. 2007); State v. Surge, 156 P.3d 208, 220 (Wash. 2007); Schultz v. GEICO Cas. Co., 429 P.3d 844, 847 (Colo. 2018); U.S. v. Comprehensive Drug Testing, 513 F.3d 1085, 1104 (9th Cir. 2008) (each adhering to the concept of privacy interests in the person's body); *cf.* Patricia Roche, *The Property/Privacy Conundrum over Human Tissue*, 22 HEC FORUM 197, 198, 207–08 (2010); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 445 (2000) (each discussing the privacy interests in the detached human body parts).

177. Much attention to human dignity in determining rights to separated body parts is drawn by Jonathan Brown, *Dignity, Body Parts and the Actio Iniuriarum: A*

personal and involve a unique connection to a particular individual in the subject matter to which they apply.

Personality rights to separated body parts tend to limit the free use of separated parts, which could be carried out by the owners of the biomaterials if the biomaterials were not subject to personality rights.[178] The primary instrument of control over the manner of use of the separated body parts entrusted to the person from whom the parts have been separated is their consent to a particular use of the biomaterials.[179] Although many scholars believe that an individual is perfectly free to determine the scope of consent to the use of body parts, and may even give general consent to any type of use of the segregated parts,[180] there are those who disagree with this approach to a person's personality right with respect to the separated parts of their body.[181] They correctly note that the unconditional requirement of consent from the person from whom the biomaterial is taken is contrary to the blanket nature of the personality right, in which it is necessary to weigh on a case-by-case basis the opposing interests and values to determine whether the general personality right has been violated.[182]

Novel Solution to a Common (Law) Problem?, 28 CAMBRIDGE Q. HEALTHCARE ETHICS 522, 522 (2019); *see also* Cour d'appel [CA] [court of appeal] Douai, Aug. 2, 2017, No. 16/03268 (Fr.) (holding that body parts separated from a corpse have the same dignity in themselves as a corpse). In our understanding, there is no reason to believe that the French court would have decided differently regarding a living body and its separated parts.

178. *See* SCHÜNEMANN, *supra* note 103, at 86; BERND APPEL, DER MENSCHLICHE KÖRPER IM PATENTRECHT 130 (1995) (Ger.); RICHARD KREFFT, PATENTE AUF HUMAN-GENOMISCHE ERFINDUNGEN 112–13 (2003) (Ger.).

179. *See* WOLFRAM HÖFLING, VERFASSUNGSRECHTLICHE ASPEKTE DER VERFÜGUNG ÜBER MENSCHLICHE EMBRYONEN UND "HUMANBIOLOGISCHES MATERIAL", GUTACHTEN FÜR DIE ENQUETE-KOMMISSION DES DEUTSCHEN BUNDESTAGES "RECHT UND ETHIK DER MODERNEN MEDIZIN" 145–57 (2001) (Ger.); BIANCA BÜCHNER, KÖRPERSUBSTANZEN ALS FORSCHUNGSMATERIALIEN 121, 242 (2010) (Ger.).

180. *See* BÜCHNER *supra* note 179, at 242; DÖRTE BUSCH, EIGENTUM UND VERFÜGUNGSBEFUGNISSE AM MENSCHLICHEN KÖRPER UND SEINEN TEILEN 85–87, 138–40, 255–56 (2012) (Ger.); Adolf Laufs in: LAUFS/KERN HANDBUCH DES ARZTRECHTS, 4th ed. 2010, §130 recital 45 (Ger.); UDO SÖNS, BIOBANKEN IM SPANNUNGSFELD VON PERSÖNLICHKEITSRECHT UND FORSCHUNGSFREIHEIT 245–47 (2008) (Ger.); Friedrich von Freier, *Getrennte Körperteile in der Forschung zwischen leiblicher Selbstverfügung und Gemeinbesitz*, 23 MedR 321 (2005) (Ger.).

181. *See, e.g.*, NATIONALER ETHIKRAT, *supra* note 174, at 52; Jochen Taupitz, *Wem gehört das menschliche Genom?*, ZEITSCHRIFT FÜR BIOPOLITIK 131, 134 (2003) (Ger.); Taupitz, *supra* note 147, at 355; MARIE SCHREIBER, DIE MEDIZINISCHE FORSCHUNG MIT ABGETRENNTEN KÖRPERSUBSTANZEN MINDERJÄHRIGER 306–08 (2019) (Ger.) (each pointing out the inadmissibility of general consent to any type of use).

182. On such an interpretation of the personality rights, see Bundesgerichtshof [BGH] [Federal Court of Justice], 2012 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2197, recital 35 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 13 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 334, 338 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 31 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 308, 312–13 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice], 36 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 77, 82–83 (Ger.); Bundesgerichtshof [BGH] [Federal Court of

Since personality rights to separated body parts depend on the ability to associate the separated parts with a particular person,[183] the power to control the use of separated body parts through consent will only remain so long as the identifying link between the person and the biomaterials is not lost. On this basis, some scholars argue that when anonymization is employed in the use of bio-materials (i.e., when it is not known and cannot be reliably established whose biomaterial is being used), it is impossible to violate the personality right of a person by using biomaterials, even if their consent to use the biomaterial has not been obtained.[184]

In this case, it is clear that for the abovementioned commentators, the personality right is expressed in rights related to the protection of personal data, where anonymization excludes the application of personal data protection laws.[185] A similar effect to anonymization is achieved through pseudonymization, in which, in the absence of the encryption keys necessary to decrypt the data, it becomes relatively anonymous, which means that it is impossible to link the data to a specific person.[186] True anonymization is not possible for many biomaterials since they may contain human genetic material,[187] which means that the person's consent will have to be sought for the use of the biomaterial. The reason is that the presence of genetic material will link the detached body parts to a specific person who is the bearer of the personality right.[188]

The theory of personality rights in separated body parts creates a positive impression if we focus solely on the well-intentioned goals it

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Justice], 50 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 133, 143 (Ger.); Erwin Deutsch, *Das Persönlichkeitsrecht des Patienten*, 192 AcP 161, 163 (1992) (Ger.); Axel Beater in: SOERGEL BGB, 13th ed. 2005, § 823 recitals 48–50 (Ger.); Gerhard Wagner in: MÜKoBGB, 6th ed. 2013, § 823 recital 242 (Ger.); Hartwig Sprau in: PALANDT BGB, 79th ed. 2020, § 823 recital 95 (Ger.); Hanns Prütting in: PWW BGB, 13th ed. 2018, § 12, recital 31 (Ger.).

183. *See* Wall, *supra* note 164, at 21 and accompanying text.

184. *See* STEFFEN FINK, EINWILLIGUNG UND VERTRAGLICHE REGELUNGEN ZUR ENTNAHME VON KÖRPERSUBSTANZEN, DEREN AUFBEWAHRUNG UND VERWENDUNG IN BIOBANKEN 56–58 (2005) (Ger.); KATRIN ANTONOW, DER RECHTLICHE RAHMEN DER ZULÄSSIGKEIT FÜR BIOBANKEN ZU FORSCHUNGSZWECKEN 107 (2006) (Ger.).

185. *See* RITA METSCHKE & RAINER WELLBROCK, DATENSCHUTZ IN WISSENSCHAFT UND FORSCHUNG 15–16 (2002) (Ger.).

186. *See* Peter Gola & Rudolf Schomerus in: GOLA/SCHOMERUS BUNDESDATENSCHUTZGESETZ, 12th ed. 2015, § 3a recital 10 (Ger.); Alexander Roßnagel & Philip Scholz, *Datenschutz durch Anonymität und Pseudonymität*, 2000 MULTIMEDIA UND RECHT [MMR] 721, 724–25 (Ger.); Gerald Spindler & Judith Nink in: SPINDLER/SCHUSTER RECHT DER ELEKTRONISCHEN MEDIEN, 3d ed. 2015, § 13 (Ger.); REVERMANN & SAUTER, *supra* note 154, at 165.

187. *See, e.g.*, DEUTSCHER ETHIKRAT, HUMANBIOBANKEN FÜR DIE FORSCHUNG 9–11 (2010) (Ger.); ALINE HIRSCHL, RECHTLICHE ASPEKTE DES NEUGEBORENENSCREENINGS 303 (2013) (Ger.); Klaus Pommerening, *Personalisierte Medizin: Herausforderungen für den Datenschutz und die IT-Sicherheit*, *in* SCHUTZ GENETISCHER, MEDIZINISCHER UND SOZIALER DATEN ALS MULTIDISZIPLINÄRE AUFGABE 21, 30 (Heribert M. Anzinger et al. eds., 2013) (Ger.).

188. *See* HIRSCHL, *supra* note 187, at 303–34.

sets: namely, the protection of the rights of the person from whom the biomaterials are separated. However, this theory is not without many weaknesses, which, when put together, prove the complete failure of this theory and its inability to achieve the goal set by its proponents.[189]

First, personality rights cannot operate independently in separate body parts. The dignity and privacy rights on which the personality rights to private parts of the body rely are of a negative nature, and allow an entitled person only to prohibit third parties from using or disposing of separate organs, but does not positively empower the person to use and dispose of separate body parts themselves.[190] This inadequacy of the personality rights is the very reason why it has to be accompanied by the right of ownership, which does not suffer from such defects.[191]

Another problem with personality rights is their reliance on human dignity. Human dignity is too vague a category to base a right to such a thing as separated body parts on it.[192] In addition, proponents of the theory of personality rights have never clarified why they invoke human dignity in defense of their theory if, at the moment of separation from the body, the body part loses all connections with human dignity.[193] This aspect of the critique reveals the genetic

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189. *See generally* GIUSEPPE CRICENTI, I DIRITTI SUL CORPO 165–68 (2008) (It.) (describing these weaknesses).

190. *See* Gilbert Meilaender, *Human Dignity: Exploring and Explicating the Council's Vision*, *in* HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT'S COUNCIL ON BIOETHICS 253, 274 (Adam Schulman et al. eds., 2008); *see also* Moore v. Regents of the Univ. of Cal., 51 Cal.3d 120, 181 (1990) (Mosk J., dissenting) (indicating, in reasoning about the negative nature of personality rights, that "[t]he patient can say no, but he cannot say yes").

191. The peculiarity of ownership is also that it can be opposed to any person who possesses separate body parts. On the contrary, a feature of the personality rights, which are based on privacy and bodily integrity, would be that it would not be possible to require the surrender of separated body parts from a third person who had no direct connection with the person and had not invaded their body. Jonathan Herring & Phong Chau, *Interconnected, Inhabited and Insecure: Why Bodies Should Not Be Property*, 40 J. MED. ETHICS 39, 42 (2014); Radhika Rao, *supra* note 146, at 372.

192. *See* Luís R. Barroso, *Here, There and Everywhere: Human Dignity in Bioethics*, 35 B.C. INT'L & COMP. L. REV. 331, 333 (2012); Ruth Macklin, *Dignity is a Useless Concept*, 327 BRITISH MED. J. 1419, 1419 (2003); Mirko Bagaric & James Allan, *The Vacuous Concept of Dignity*, 5 J. HUM. RTS. 257, 269 (2006) (each considering dignity as a vacuous and extremely vague concept); *see also* Jean-Michel Poughon, *L'Individu Propriétaire de Son Corps? Une Réponse Entre Scolastique Juridique et Réalisme Économique?*, 11 L'EUROPE DES LIBERTÉS 1 (2003) (Fr.) (claiming human dignity to be an open-ended category detached from the material world). It is interesting to note that the amorphousness of dignity is recognized even by proponents of the use of the concept of dignity in relation to detached body parts. *See* Charles Foster, *Dignity and the Use of Body Parts*, 40 J. MED. ETHICS 44, 45 (2014). *Contra* Lemennicier, *supra* note 18, at 111; BERTRAND LEMENNICIER, LA MORALE FACE À L'ÉCONOMIE ch. 2 (2005) (Fr.) (each firmly believing in the relative clarity of the concept of human dignity and criticizing the human dignity's conceptual vagueness as previously described).

193. *See* Xavier Bioy, *Le Corps Humain et la Dignité*, *in* 15 CAHIERS DE LA RECHERCHE SUR LES DROITS FONDAMENTAUX: LE CORPS HUMAIN SAISI PAR LE DROIT: ENTRE LIBERTÉ ET PROPRIÉTÉ 17 (Aurore Catherine et al. eds., 2017) (Fr.); Muireann

proclivity of the personality rights to protect exclusively the human body and not the parts separated therefrom, which, from the moment of separation, become the most ordinary things. The theory of personality rights, as ineffective with regard to separated body parts, must give way entirely to the right of ownership, which is genetically and functionally adapted to the exercise and protection of rights to any thing, including separated parts of the body.

To employ the theory of personality rights in Henrietta Lacks's case, it would be no difficulty to say that the detached cancer cells from Mrs. Lacks's body, from which the HeLa cells were later produced, clearly have the closest personal link neither to the doctor George Otto Gey, who excised them, nor certainly to John Hopkins Hospital, where Henrietta was treated. Here, the holder of personal rights would be, without a shadow of a doubt, Mrs. Lacks. However, if she only has personal rights in respect of the detached cells, can she claim disgorgement of profits as a result of the infringement of her personal rights? On the one hand, to leave John Hopkins and its ultimate successor Thermo Fisher benefiting from unlawful acts is clearly inconsistent with the alphabetic principle of *ex iniuria ius non oritur*;[194] on the other hand, to grant Henrietta Lacks's estate's claim is to equate personal and proprietary remedies. Ancient Romans proclaimed: ubi jus, ibi remedium.[195] To put it vice versa, if the remedies of two rights are identical, then the rights themselves must also be, if not identical, at least homogeneous in structure. But to recall the famous Roman jurist Gaius: there is nothing in common between *persona* and *res*, in other words, between personal rights and rights in rem. Consequently, granting Mrs. Lacks's heirs the right to Thermo Fisher's profits would amount to the successful implementation of a tricky manipulation tending to erase the distinction between rights in rem and personal rights. But this is not the only stumbling block to defending the rights of the deceased Henrietta Lacks through the

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Quigley, *Property: The Future of Human Tissue?*, 17 MED. L. REV. 457, 457–66 (2009); Matteo Macilotti, *Reshaping Informed Consent in the Biobanking Context*, 19 EUR. J. HEALTH L. 271, 271–88 (2012); Lyria B. Moses, *The Problem with Alternatives: The Importance of Property Law in Regulating Excised Human Tissue and in Vitro Human Embryos*, *in* PERSONS, PARTS AND PROPERTY 201 (Imogen Goold et al. eds., 2014).

194. *See* State Mut. Life Assur. Co. of Am. v. Hampton, 696 P.2d 1027, 1035 n.6 (Okla. 1985) (citing many cases in support of the assertion that "The rule is believed to have its antecedents in ancient maxims of general jurisprudence: No man shall take advantage of his own wrong and its Law-French and Latin counterparts—(1) Nul prendra advantage de son tort demesne; (2) Nullus commodum capere potest de injuria sua propria; (3) Jus ex injuria non oritur; (4) Nemo allegans suam turpitudinem best audiendus; and (5) Nemo ex proprio dolo consequitur actionem").

195. *See* State v. Kan. City Firefighters Loc., 672 S.W.2d 99, 109 (Mo. Ct. App. 1984) (translating this as "[t]here there is a right, there is a remedy"); *see also* United States v. Loughrey, 172 U.S. 206, 232 (1898) (stating that "[t]he maxim ubi jus, ibi remedium lies at the very foundation of all systems of law"); Middlesex Cnty. Sewerage Auth. V. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 42 n.2 (1981); T.I.M.E. Inc. v. United States, 359 U.S. 464, 484 n.7 (1959).

theory of personal rights. To say that personal rights differ from property rights in that they are inextricably linked to the person of the rights holder and cannot be transferred to others, including by virtue of inheritance, is like discovering America anew. In that case, can we truly speak of adequate protection of Mrs. Lacks and others who passed away before they can sue the offenders, while their heirs are no longer able to protect their rights? Obviously, the internal limits of personal rights, preventing them from being inherited, once again demonstrate the failure of personal rights as a guiding paradigm of human rights in one's own body.

B. *Copyright in Separated Body Parts*

In addition to the theory of personality rights, which has traditionally opposed the theory of ownership in severed body parts, there is another theory that also purports to explain the nature of rights to severed body parts and to protect to the greatest extent the person entitled to them. We speak of the theory of copyright in separated body parts. Since copyrights are considered intellectual property, they are at least terminologically similar to the ordinary property rights in separated body parts. The essence of this theory is that the separation of body parts from a person is analogous to copyright. The person creates the body parts, like a copyright holder creates their copyrighted work, and is therefore considered their author.[196] Proponents of the copyright theory explain the emergence of copyrights by the close connection that exists between the severed body parts and the person from whom these parts are severed.[197] This connection with the body part is so strong that it predetermines the inalienability of copyrights.[198]

We believe that such a theory does not hold water, since it lacks both a solid foundation and a practically meaningful purpose. It is difficult to detect a creative character in the act of separating a part of a body from a whole body, and it would be all the more impossible to detect it if the separation were caused by external circumstances unrelated to the human will, such as natural phenomena. Moreover, even if there were a creative character in the act of separating a body part, this character should still be ignored, since the value of separated body parts is usually not at all in the creativity of the separator, who gave a particular form to the separated part, but in the biological and genetic origins that the body parts separated from the person have.

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196. *See* FRANCESCO S. PASSARELLI, DOTTRINE GENERALI DEL DIRITTO CIVILE 52 (1977) (It.) (arguing that a person acquires rights in separated body parts in the original way by analogy to copyright).

197. *See* Justine Pila, *Intellectual Property Rights and Detached Human Body Parts*, 40 J. MED. ETHICS 27, 31 (2014).

198. *See id.*

In any case, even if we accept that the severed body part has a special value because of the creative powers invested by the severer of the part,[199] it would be contrary to common sense to apply the general rules of copyright. To do so would mean that any artist or craftsman who revealed their work to the world could claim a copyright in a body part that was severed from another person, including parts obtained without the other person's consent or even contrary to their objections.

Also, we note that most of the institutions of copyright are not applicable and adequate to the legal and material nature of the separated body parts. For example, it would be interesting to know whether the proponents of such a theory are prepared to hold a body part thief liable for plagiarism, since the actions of illegally moving a detached body part are analogous to an appropriation of authorship. If, in addition to the above, we consider that copyrights are not an alternative to property rights and can only exist in addition to property, then there is no reason to allow the establishment of copyrights with respect to separated body parts in a different manner from the manner employed with respect to other property.

C. *Sovereign Possession of Separated Body Parts*

The last approach was found the New Zealand case of *Re Lee*,[200] which, although it concerned the separation of parts from a dead body, is, by its methodology, applicable to the separation of body parts from a living body.[201] This case was based on fairly typical circumstances: namely, the removal of sperm from a deceased partner by a woman in order to use the sperm to conceive a child. In determining who owns the sperm rights, Judge Heath begins by refusing to acknowledge the existence of property rights on the woman's side.[202] In furtherance of this thesis, the court finds that the clinic, where the court ordered the sperm to be stored, holds the sperm "as an agent of the Court," and that a court order to hold the sperm should not indicate ownership

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199. It is difficult for us, however, to say to what extent a detached body part, at least on a physical and chemical level, can be recognized as original. *Cf., e.g.*, Renate Gertz, *Is It 'Me' or 'We'? Genetic Relations and the Meaning of 'Personal Data' Under the Data Protection Directive*, 11 EUR. J. HEALTH L. 231, 231 (2004) (pointing out that almost all genetic information present in one's body parts is identical to the genetic information of another person). A consistent application of the principle of originality of the creative result would lead one to the conclusion that any body part is, in a sense, a derivative work based on ancestral genetic material, for any work developed from another work is derivative.

200. *Re Lee* [2017] NZHC 3263 (N.Z.).

201. However, Judge Heath, who decided the case, points out that no conclusions should be drawn from his decision as to the admissibility of taking sperm from a living person in a coma, *see id.* at [104], nor as to rights in sperm if it was taken while alive from a person by their own decision, as in *Yearworth*. *Id.* at [91]. Contrary to the judge's wishes, we would like to show how the approach he proposed would have worked as applied to living bodies, as this approach is clearly unique.

202. *See id.* at [90], [111].

rights to anyone (i.e., according to the logic of the court, the clinic is not storing sperm at all on the basis of property rights, which belong to the woman, but on the basis of someone else's—seemingly, the court's—rights).[203]

From this reasoning, one can already see the conclusion that the court, acting consistently, will logically and inevitably reach. Indeed, given that all persons who lawfully seized, transported, and stored semen did so as agents of the court—acting under its authority, rights, and orders—there is nothing left to the court but to present its logical conclusion that the court has "control" over the seized semen.[204] This conclusion about the court as the subject of rights in sperm is particularly strong and unambiguous when one knows the unusual context in which the court understands the word "control": the court equates it with the possession the woman has just been deprived of.[205] In other words, the kind of possession that the courts awarded to a woman seeking an order in neighboring Australia, the New Zealand court awarded to itself.

It should be noted that Judge Heath, in support of his construction, referred to the decision of *Re H, AE (No. 2)*,[206] indicating that it supposedly supported the judge's chosen approach.[207] The reality, however, speaks strongly against any similarity: if there is one, it is only in isolated places, and it is deceptive. Judge Gray does speak of the court's control over the use of semen,[208] but it is precisely the control over the exercise of the right of possession owned by the woman regarding the semen, which is her property.[209] Thus, Judge Gray is talking about the well-known concept that rights to some property may be limited to a specific use, which must be established and controlled in a certain manner. This conclusion can scarcely be equated with that of Judge Heath, who, instead of restricting the rights of an entitled person, deprives them of such rights, transferring the rights in full to the court.

This concept, called the concept of sovereign possession of biomaterials, is as original as dubious; since the rights of the court, as a judicial authority, derive from the rights of the state, and hence it is the state that holds the ultimate rights to the seized biomaterial. It is our firm belief that the state's sovereign rights over separated body parts directly contradict the sovereign rights of the individual over their own body, and therefore must be rejected in a democratic society. This concept of rights in severed body parts is a prime example of exactly how they should not be regulated.

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203. *Id.* at [112].
204. *Id.* at [120].
205. *See id.* at [116], [118].
206. *Re H, AE [No. 2*] [2012] SASC 177 (Austl.).
207. *See id.* ¶ 121.
208. *See id.* ¶ 62.
209. *See id.* ¶¶ 58, 60, 63.

IV. CONCLUSION

Refusal to consider the separated parts of the human body as property is the beginning of a slippery slope toward a blatant disregard for the rights of the individual to their body and its parts. Failure to accord to the separated body parts the characteristics of property, and thus the ability to be owned, leaves the individual confined to a hastily constructed theory of personal rights that is incapable of fully guarding the individual's property expectations and interests and shielding them from outside encroachment by affording them real, rather than illusory, protection. Furthermore, it is precisely the negation of ownership that is the culprit behind the fact that, from an economic perspective, it is far more profitable to oppress human rights concerning separated body parts. As the textbook *Moore* case has shown, people may not even dream of redress for the violation of their rights—the best that is available to them is compensation for the failure of others to fulfill their fiduciary or similarly contingent duties. The *Moore* case, while pivotal, has become a beacon for transnational corporations gratifying their own mercantile economic interest under the guise of "socially-oriented activities" and invading others' bodies with impunity, masking with the high values of a welfare society.

The case of Henrietta Lacks is an excellent opportunity to right the previous vicious wrongs of history and to take a giant step forward in the perception of the nature of the human body, allowing the right in the body, originally thought of as strictly personal, to be filled with proprietary content, thereby making it truly valuable to the individual themselves. The acknowledgement of a person's abstract ownership of their own body, as argued in this Article, can contribute to this goal by explaining in a consistent way why a person owns their body before separating certain parts from it, and why, after the act of separation, parts of the body belong to them by right of ownership, thus granting them full and real pecuniary protection against any encroachment upon the body.

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