

A BODY OF ONE'S OWN:  
AN INSTITUTIONAL APPROACH TO PROPERTY AND SELF-OWNERSHIP

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I, Hannah Maeve Carnegy-Arbuthnott, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

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## ABSTRACT

What type of ownership do we have over ourselves? And what are the different ways in which we ought to be permitted to subject our bodies to the market? Giving blood or selling one's hair are uses of the body which assume rights of disposal over parts of the person which are similar to, or perhaps indistinguishable from, those we have over property. Such cases pose a puzzle: intuitively we both want to treat some aspect of the body as property, and strongly resist doing so. For example, the thought of a person having the right to cut off her hair and sell it does not strike us as particularly problematic. But if a stranger were to sneak up on her and cut off a length of her hair, it would be wrong for us to treat that assault as a case of theft. In response to this sort of puzzle, I propose a negative argument: that theories of property or self-ownership which are based in some fundamental natural right are unable to provide an adequate explanation of how we should treat these cases. The positive contribution of the thesis is to argue that an institutional theory of property can give us answers as to when to treat the body as property. By an institutional theory of property, I mean one that rejects the idea that property is fundamental, but does not rely on an underlying natural right to justify the institution of property. This institutional approach provides a robust theoretical basis for distinguishing ourselves as inalienable, some aspects of our bodies as potentially alienable, and external objects as straightforwardly so.



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## INTRODUCTION

Is my body among the things that I own? There are some uses of the body which assume rights of disposal over the person that are similar to or indistinguishable from rights of disposal over property. We take a mature adult to have an exclusive say over how to use her body, and in particular to determine which other persons may be permitted to come into contact with her body and when. Ostensibly, at least, these principles mirror the key elements of what it means to own something.<sup>1</sup> What's more, we often use the language of ownership, at least rhetorically, to emphasize the importance of it being me who gets to decide what happens to my body. J.W. Harris points to familiar examples of a teenager complaining to her parents, "you don't own me!", or a campaigner for euthanasia rights insisting, "my life belongs to me!"<sup>2</sup> The point of drawing analogies between property ownership and body ownership in this way is usually to emphasize the sovereignty of an individual's choice over her own body, and the importance of her being able to enact her choice without interference from others. Some take the comparison more literally, insisting that the right to determine what shall be done with one's own body just is a property right. For proponents of self-ownership, the notion of having full property rights over oneself gives expression to the concept of individual autonomy. Others, however, deny that any part of the human body can be property, and argue that bodily rights must be considered to be a different category than property rights. This latter view starts from the assumption of persons as subjects who take possession of external objects. Regardless of where one stands on the spectrum between these two positions, it is clear that at the level of ordinary usage, there is at least some rhetorical power to invoking an analogy between property ownership and the powers a person has over her own body. The analogy is generally understood to emphasize the importance and exclusivity of a person's powers of control over herself, or to assert the agency of the person over her own body. When we think about ownership of property, we make a similar link in the other direction. The more property a person owns, the more options she has available to her in terms of the actions she is entitled to engage in without interference from others. The more limited a person's sphere of property is, the more limited her options are. In that sense, we tend to think of property ownership as in some way linked with agency. This suggests that there is more than just a superficial mirroring of the form of rights we attribute to a person over her own body, and the form of rights we attribute to a person over her property. If there is substance to the analogy between bodily ownership and property ownership, it is not clear exactly why the analogy is meant to be illuminating, which

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<sup>1</sup> Nozick, for example, claims that the essence of the notion of a property right in x "is the right to determine what shall be done with x". (1974) p.171

<sup>2</sup> Harris (1996) p.69

way around it is supposed to work, or what the important points of disanalogy are supposed to be between the two.

The central puzzle that motivates this thesis arises from cases where we intuitively want to treat some aspect of the body as property in some contexts, and yet strongly resist doing so with respect to the very same part in a different context. There are several ways in which people do treat their bodies or parts thereof as property, by trading with them as goods or services. Perhaps the clearest example of this is the lucrative global market in human hair.<sup>3</sup> This practice of buying and selling hair rouses neither moral consternation nor political concern, and it is able to be conducted without interference from the law. Just because this practice involves treating some part of the body as property, it is far from obvious that it ought therefore to be banned or tightly regulated. This is a case in which we seem to assume that the person has rights of disposal over her hair which are similar to or indistinguishable from rights of disposal over property. It suggests that one's hair is the kind of thing we can exercise property rights over.

However, if a stranger were to sneak up on me in the street and cut a length of hair from my head without otherwise harming me, does it follow that we ought to treat that attack as a case of theft? That strikes us as the wrong way to understand the nature of the crime. Many share the intuition that this is not a theft of some property, but rather an assault against the person. To treat it as a taking of property would be to undermine the seriousness of the assault. This can be brought out particularly sharply if the market value of the victim's hair were very low, meaning that if treated as theft, it would be a relatively trivial case of petty theft.

There are other parts of the body for which commercial trades would be considered illegal, politically controversial, morally problematic, or perhaps all three. Debates around trades in human tissue and organs such as blood, ova, or kidneys provide prominent examples of this.<sup>4</sup> Technological advances present us with an increasingly wide range of contexts in which parts of the body may be seen as a valuable commodity as the subject of research into lucrative new medical treatments. A complication in these debates is that for many of the body parts concerned, the idea of removing it from the body and transferring it to another person for free is not considered problematic. Many cases of altruistic donation are considered entirely admirable. There is something about adding money to the interaction which causes concern. One might think that it is by trading in body parts for money that one treats the body as property. However, it is equally possible to draw an analogy between donating human tissue

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<sup>3</sup> C.f. BBC World Service, Sunday 24 June, 2001, [http://www.bbc.co.uk/worldservice/people/highlights/010622\\_hair.shtml](http://www.bbc.co.uk/worldservice/people/highlights/010622_hair.shtml) (retrieved 08/04/2017). In the UK, several online services allow people to offer their hair for sale by posting adverts online and sending in their ponytails for valuation. E.g. Bloomsbury Wigs Hair Harvest website: <http://www.hairharvest.co.uk/> (retrieved 08/04/2017), or <http://buyandsellhair.com/> (retrieved 08/04/2017), which advertises itself as "The #1 Global Human Hair Marketplace".

<sup>4</sup> See Radin (1996), Phillips (2013), Satz (2010)

and giving away some item of property for free, as a similar power to alienate what is one's own would be invoked in both cases.

The cases outlined above present us with the following puzzle. With respect to the very same body part, we both want to treat it as property in some contexts, and strongly resist doing so in others. There is nothing particularly problematic about the idea of people be able to exercise property rights over their hair by selling it, and yet we strongly resist viewing violations against a person's hair as mere property violations. Likewise, most think it appropriate that people be able to remove their kidneys to give them to someone else, thereby exercising a power to alienate that part of themselves and give it away to another person, who then gains the same powers of control over the kidney held by its original owner. The exercise of these powers mirrors transfers of ordinary property through gift. And yet the suggestion that the mirroring of kidney transfers and property transfers might extend as far as treating kidneys as fully fledged commodities is strongly resisted by many.

Part of the difficulty at the heart of this puzzle arises from the importance we typically place on the distinction between persons and mere objects. We often emphasise the fundamental value of the person by juxtaposition to the relatively trivial value of mere objects. Consider, for example, the rhetorical power of statements such as "she was treating him like a doormat", "I'm a *person* too, you know!", "you can't just drop her like yesterday's trash", or "Stop objectifying me!". The implication is that in order to recognise the importance of the person, one must recognise that the person is not an object. A glaring complication with this is that human persons are physically embodied. We tend to think of our physical bodies as constituting the boundary of the person, but as soon as we do that, it threatens the neat distinction between persons and objects. Our physical bodies are decidedly among the physical objects in the world, and as the examples above illustrate, it is well within the power of persons to treat parts of their bodies as mere objects. As a result, we are compelled to want to treat persons' bodies as special relative to other objects, while recognising that we often have an interest in treating some parts of the body as objects like any other. This brings us back to the question of the analogy between the body and property. To what extent are the powers that a person has over her own body similar to those she has over property? This is not merely an intellectual puzzle, but rather gives rise to important practical questions as to where to set the limits on various uses of the body. Ought we to allow people to sell their hair, their blood, or their kidneys? What kind of reasons can we use to support different answers to these questions? The purpose of this thesis is to shed light on the nature of this analogy by providing a robust theoretical basis for distinguishing ourselves as inalienable, some aspects of our bodies as potentially alienable, and external objects as straightforwardly so.

One aspect of this thesis is a negative argument that theories which either consider property to be foundational or which seek to justify institutions of property based on some other fundamental natural right provide inadequate tools to be able to explain the puzzle set out above. As a theory which takes property to be foundational, a theory of self-ownership in some ways gives the most straightforward answer to the question of whether we own our bodies. This approach explains property rights in external objects as grounded in the fundamental moral right of self-ownership, and it is by virtue of the right to property in herself that a person is able to acquire property rights over things in the world. Where the body is concerned, the principle of self-ownership would straightforwardly tell us that any part of a person's body is her property to do with as she pleases. Any interference with that choice would constitute a limitation on the person's powers of ownership over herself, and therefore restrict her autonomy. Though this view provides the simple answer that the body just is one's property, several problems arise from this simplicity. The first is that it would bind us to defining the case of the hair assault described above in terms of a violation of a property right, which strikes many as a mistaken way of understanding the wrong committed against the victim. Second, it leads to conservative conclusions about the strength of the link between external property and the person, leading to a strict insistence on non-interference in property rights.<sup>5</sup> The real question that a proponent of self-ownership needs to answer is why we should think of property as fundamental in that way. In order to plausibly assert a fundamental moral right to self-ownership of this form, some explanation is required as to why this particular moral right expresses the fundamental value of the person.

An alternative to self-ownership is a stance that insists that the categories 'person' and 'object' are mutually exclusive. This kind of view starts from the concept of the person as a subject who can take possession of external objects. Instead of viewing property as foundational, property is viewed as an institutional creation which is grounded in some other fundamental right. Kant's theory of property is an example of such a view.<sup>6</sup> It views property rights as based in the fundamental right to agency, and posits that an institutional system of property is necessary to enable agents to enact their purposiveness in the world. A feature of Kant's account is that it draws a sharp distinction between bodily rights as natural rights and property rights as institutional. As a result, neither persons nor any part of them are considered as the possible objects of property rights. A consequence of this is that it would be very difficult for a Kantian to explain why it is me who should be able to sell my hair, rather than anybody else. In particular, it creates a point of schism between my rights of disposal over my hair while it is still on my head (under natural bodily rights), and any right of disposal I could claim over the hair once I have cut it off from my head (an acquired property right). There is no reason within the

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<sup>5</sup> As illustrated by Nozick's claim that taxation amounts to a form of slavery (1974)

<sup>6</sup> Kant (1991 [1797]), for exegesis see Ripstein (2010), Herman (1993), Pallikkatahyil (2017)

Kantian account to suggest that there is any special relation between me and my hair once it has been cut from my head, when it comes to the question of who might get to claim ownership of and sell it. A second problem of a different sort arises from the way in which a person's relation to external property is understood on this view. If property is seen as grounded in a fundamental right to agency, and justified by the fact that it is necessary for establishing the material bounds of that fundamental right, the relation between external property and the person becomes very important indeed. This is shown most clearly in Arthur Ripstein's interpretation of the importance of external property as grounded in purposiveness.<sup>7</sup> Ripstein argues that any interference with a person's property which has not been consented to constitutes coercion, by forcibly causing the owner's means to be put to use in pursuit of ends she does not share. From the insistence that proper regard for persons necessitates a sharp distinction between the concepts of person and object, this view ends up both downplaying the importance of a person having a privileged relation to her own detached body parts, while simultaneously assimilating trivial external objects to the person by viewing property interferences as coercion. From the simplistic distinction between persons and objects, the line between the two ends up becoming blurred in a way that obscures, rather than illuminates, the importance of the person and her relation to her own body.

The bulk of the negative argument is provided in chapters 1 to 3. Chapter 1 provides an analysis of the foundations of self-ownership. The rationale behind this is that although there has been extensive debate about the distributive implications of the principle of self-ownership, the question about its foundations has been largely neglected. Within the libertarian literature on self-ownership, however, most take its roots to lie in the Lockean concept of property in the person. In order to understand what basis there might be for positing property as a foundational principle of rights, this chapter starts with an analysis of what motivates the concept of property in the person in Locke's political philosophy. The chapter argues that Locke's concept of property in the person is grounded in theological assumptions which are unsuitable for motivating a contemporary liberal principle of self-ownership. This chapter also considers the Kantian approach as a possible alternative to Locke, and raises preliminary concerns about the way in which its insistence on the separation between property and the person leads to counter-intuitive results.

Chapter 2 provides an analysis of the appeal of the concept of self-ownership to contemporary liberals in light of the fact that the Lockean grounding of property in the person was found to be unsuitable to motivate the concept as it has been invoked in contemporary liberal theories. The chapter draws out key points of tension in the view of self-ownership proposed by Nozick and Cohen, in light of its lack of stable foundations. It suggests that there

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<sup>7</sup> Ripstein (2010)

is nevertheless a common theme found in both the Lockean and Kantian accounts of property which may give reason to think it appealing to theorise rights over the person as similar in form to property. This is the suggestion that property provides the tangible subject which gives content to an abstract notion of autonomy. It concludes that if this is the source of the appeal behind giving expression to a principle of autonomy through property, it is not clear that this gives rise to a 'full' principle of self-ownership of the Nozickian sort. It ends by suggesting that in order to understand why or in what way we ought to think of people as self-owners, we need to understand the reasons we have to apply ownership rights over different objects in different ways, and what implications this would have for thinking of people as owners of themselves and their bodies.

In response to this, Chapter 3 investigates whether a person's body is the kind of thing we ought to treat as property at all, if treating as property involves treating as an object. It thus returns to the Kantian reasons for insisting on a sharp distinction between persons and objects. Through an analysis of the feminist debate on objectification, it argues contra Kant that there is nothing inherently wrong with treating the body as an object in some contexts. Rather than condemning objectification as a distinctive category of moral wrong, we ought to recognise that as embodied beings we often have reason to make use of one another's bodies in their capacity as an object. Drawing an insight from Kant's approach to institutions, however, it suggests that institutions have a role to play in shaping the context within which this objectification happens, in order to ensure that where people's bodies are treated as objects, this is compatible with proper regard for them as persons.

This is the point at which I start to develop the positive thesis. The positive contribution of this thesis is that we need to think of property neither as foundational nor based on a fundamental natural right to agency. Instead, we can start from understanding property as an artificial institution constructed to serve some of our interests. This institution plays a role in setting the context within which we interact, and can be justified by the extent to which it serves our interests. The way in which we understand it to serve our interests, however, cannot be based on a purely theoretical account of the rational interests of pre-social beings in the state of nature. I argue that the main purpose of regulatory institutions such as property is to provide a context within which we are able to interact without wronging one another. However, it is a mistake to think that these institutional structures perfectly track the underlying moral structure of our interactions. I suggest that at the moral level, the test of reasonable rejection gives us a test to determine when a person is wronged. One wrongs a person by interacting with them in a way which they would reasonably reject. However, although the institutions and conventions we use to regulate our behavior towards one another are geared towards ensuring that we avoid wronging one another, it is possible to violate such an institution without wronging. Likewise,



there may be ways of wronging someone which do not violate any institutional or conventional rules.

When constructing the institutional structures which we use to regulate our behaviours towards one another, we ought to construct them in such a way as to provide adequate protection to people from being wronged in serious ways. A complicating factor in this assessment is the fact that certain conventional practices and cultural attitudes affect the way in which we value certain interactions. Accordingly, certain sociological variables will have bearing on which kinds of interactions and situations are ones we would reasonably reject. In order to answer questions on where to place the limits on the application of the institution of property, our approach to these questions must take into account each of these three levels, and the way in which both institutional and conventional structures set the context for understanding where people ought to be protected from serious wrongs. This approach helps us to explain why it is appropriate that some types of object be understood as falling exclusively under the institution of property, while others, including the body, are open to being potentially or partially regulated as property, but not exhaustively so.

Chapter 4 provides the starting point for distinguishing between the underlying moral structure of our interactions and the transactional operation of claims at the conventional or institutional level. Drawing on work by Munoz-Dardé, section 4.1 argues that the way in which we track the transaction of claims through consent does not map perfectly onto the moral features of our interactions which mark them as consensual. Rather, consent functions as a social tool through which we ensure that our interactions are consensual in a way that is publically trackable. Section 4.2 draws a parallel between the form of transactional claims of consent over the body and over property, with a view to clarifying the analogy between having ownership of objects and having ownership of one's body. Through a critical analysis of Thomson's distinction between First Property and Second Property, this chapter clarifies the points of analogy and disanalogy between ownership of the body and ownership of objects with respect to the importance of having the power to exclude others from what is owned. In doing so, it establishes an initial basis for considering ownership powers over the body to be similar in form to property rights, while providing reason for thinking of the body as a special kind of property.

Chapter 5 provides the substance for constructing the institutional approach to property. While chapter 4 elucidates the similarity between the form of claims over the body and property in terms of a power to exclude others from committing trespass, chapter 5 is where we begin to address the specific questions at the centre of the thesis, which is to what extent various aspects of the body ought to be alienable as property. It frames concerns about treating some aspects of the body as property as a concern about giving consent to certain uses of one's body in a way

that is problematically irrevocable. In light of this, section 5.1 argues that Hume's conventional account of property provides an insight for tackling such questions through its suggestion of the way in which conventions of property are dependent on a practice of promising to enable the alienation of artificial relations of property. Though Hume's account provides us with a promising basis from which to build, its purely conventional explanation of property does not provide us with the tools to answer the normative questions as to how we ought to construct and apply our institution of property. This prompts us to turn to a contractualist account of promising, and an analysis of the way in which conventional aspects of the practice of promising combine with the generation of foundational moral obligations. This helps to shed light on the circumstances under which certain forms of irrevocable alienation of claims become problematic, which forms the basis of the discussion in section 5.3. Having clarified where points of moral concern arise pertaining to certain kinds of promise, and the way in which these function to release someone from a promissory obligation, we are then in a position to be able to flesh out an approach to explaining what kinds of binding agreements ought to be enforceable institutionally, and how this will inform our treatment of different objects depending on how we value or relate to them.

An important question remains after fleshing out the institutional approach to property. Returning to the suggestion from chapter 2 that property gives concrete expression to the abstract notion of autonomy, this leads us to question whether the way in which the institutional approach places constraints on various aspects of self-ownership based partly on reasons arising from contingent social facts amounts to imposing problematic constraints on an individual's autonomy, relative to the maximum powers of ownership we could conceive of her having. Chapter 6 provides a response to a univocal understanding of property rights which takes a property right to be 'fuller' the more Hohfeldian incidents are included in that right. It argues that the standard Hohfeldian structure of property rights is compatible with a heterogeneous concept of property which can explain the extent of property rights over different objects as limited differentially depending on the nature of those objects and the way in which persons relate to them.

The institutional approach thus provides a robust theoretical basis for distinguishing ourselves as inalienable, some aspects of our bodies as potentially alienable, and external objects as straightforwardly so. It helps to solve the original puzzle in the following way. It straightforwardly serves our interests to be able to alienate certain parts of ourselves as property, such as by cutting off some hair to sell it. There is no reason to reject an institution that attributes to people exclusive ownership rights over their hair such that they can cut it off and alienate it as they wish to, because it does not place people at risk of being wronged in serious ways. Once it has been cut off, interferences with the hair can be treated as under the category of an institutional violation of interfering with object-property. However, while the hair is still

attached to the person and thus a constitutive part of her, the non-consensual cutting and taking of it constitutes an intrusion against the person which she would reasonably reject. In that case, there is a direct wronging of the person which is absent in a case where it is stolen after it had already been cut off. This is partly explained by the fact that even if I treat my hair as fungible to the extent that I might make the decision quite lightly to cut some of it off, it is nevertheless important to my sense of control over myself and my physical boundaries, as well as to my powers of self-expression that I be in control of decisions pertaining to my hair. For a stranger to non-consensually and unexpectedly cut some of my hair would reasonably lead me to feel that my powers to control access to my body were under threat. This explains both why it would be reasonable for me to reject this intrusion, and why we take this kind of bodily intrusion as a more serious wrong than some theft of object-property that does not involve an interaction with a person, even if the property in question is the same quantity of my hair which I had already cut off. In a sense, this approach can let us have our cake and eat it too. It provides us with the theoretical framework to explain why I ought to have the ability to treat my hair as my property, but also to reject the claim that an assault on my hair is just an infringement of a property right.



## CHAPTER 1

### THE FOUNDATIONS OF SELF-OWNERSHIP: LOCKE ON PROPERTY IN THE PERSON

“Though the earth, and all inferior creatures, be common to all men, yet every man has a property in his own person: this no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.”<sup>1</sup>

The concept of self-ownership holds a firm grip on liberals to both the left and right of the political spectrum. It is a concept which is strongly associated with principles of individual autonomy, and those who endorse it take some principle of self-ownership to lie at the heart of the liberal project. On the right, Nozick famously invokes self-ownership to defend minimal government and argue that taxation amounts to partial slavery.<sup>2</sup> On the left, critics such as Michael Otsuka have gone to great lengths to explain why the concept of self-ownership is compatible with certain egalitarian patterns of redistribution.<sup>3</sup> G.A. Cohen notably abandons the principle after a long struggle trying to reconcile it to an egalitarian position, eventually conceding that Nozick was right on the implications of self-ownership for taxation.<sup>4</sup>

There is much to be said about the appeal of the concept of self-ownership, not least because it offers a considerable amount of flexibility in the interpretation of its precise meaning and the rights that it entails.<sup>5</sup> Indeed, while liberals of various stripes have argued over the implications of a robust principle of self-ownership for issues like taxation and wealth redistribution, other critics such as Barbara Fried have questioned whether the concept has any determinate implications at all that would allow it to ground a distinct or coherent philosophical approach.<sup>6</sup> Fried comments that many liberal writers assume that self-ownership is a principle that can be logically derived from the principles of autonomy. However, she points out that the concept of property is a cluster concept consisting of various functional parts, which are subject to change depending on the kind of thing that is designated as being property. This being the case, one may wonder along with Fried what it is that anchors the supposedly fixed concept of self-ownership. Though there has been extensive debate about the implications and applications of the principle of self-ownership, this question about the foundations of the concept of self-ownership has been largely neglected.

What is clear is that most take the roots of self-ownership to be found in Locke’s *Two Treatises of Government*, where it is introduced as the notion of ‘property in the person’. So if

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<sup>1</sup> Locke, (1988 [1690]) §27, 1-5

<sup>2</sup> Nozick (1974)

<sup>3</sup> Otsuka (1998)

<sup>4</sup> Cohen (1995)

<sup>5</sup> See, e.g. McElwee (2010)

<sup>6</sup> Fried (2004)

we are looking for a philosophical argument to ground the widely invoked principle of self-ownership, this would be an obvious first avenue of investigation. In order to begin to clarify the foundations of self-ownership, the task of this chapter is to elucidate the foundations of the principle of property in the person in Locke's political theory. I argue that it is only possible to arrive at a full understanding of the significance of self-ownership for Locke in the light of his wider theological framework. The implication is that if we try to abstract the concept of self-ownership away from Locke's theological context, there will be significant gaps left to plug in order to salvage a principle that is sufficiently clear and robust to play a central role in contemporary liberal theory.

In Part I, I begin by introducing Locke's principle of property in the person, and the role it plays in his wider theory of property acquisition. Locke structures what I call the 'problem of property' as a pragmatic question of survival, and argues on the basis of this that the necessary solution must exist within natural law – that there must be a natural right to property acquisition grounded in some feature of persons. I suggest that this framing of the problem in terms of a minimal need for survival is partly what makes it so appealing to contemporary liberals. However, I go on to argue that this problem of survival is not sufficient to motivate the further claim that the solution must be a natural form of property rights grounded in the concept of property in the person. This raises a suspicion that there must be something more going on in Locke that substantiates this second step in the theory.

Part II takes up this suspicion and fills in the details. There, I explain that in order to fully understand the place of property in the person in Locke's political theory, it is necessary to understand his particular theory of natural law and the wider theological framework in which it is embedded. Though there is in Locke the familiar liberal narrative of the self-interested rational individual, on closer inspection this is underpinned by the substantial assumption that we are creatures of God, and in particular, that our reason serves as revelation of God's will. I will show how various elements of the theological content of Locke's theory of natural law must be drawn upon to fully explain the foundations of the concept of property in the person, and thereby underpin Locke's wider natural rights theory of property.

Finally, I suggest that if the concept of property in the person in Locke relies substantially on these theological assumptions, then this concept is an inappropriate candidate for a principle of self-ownership as invoked by contemporary liberals. Moreover, if we attempt to abstract a principle of self-ownership away from these theological roots without replacing them with some other substantive content, this opens the question of why it should be appropriate to apply the framework of property to a person's talents and powers to explain the importance of individual autonomy. Unless this gap is plugged, I suggest along with Fried that the principle of self-ownership remains so wide in its application as to be of dubious theoretical worth.

## 1.1 PROPERTY IN THE PERSON

We should begin with an analysis of what Locke says specifically about property in the person. Considering the influence that the concept has had on the liberal tradition of political philosophy, Locke actually says very little about it. The key passage is from the *Second Treatise*:

“Though the Earth, and all inferior Creatures, be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*. It being by him removed from the common state Nature placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other Men. For this *Labour* being the unquestionable Property of the Labourer, no Man but he can have a right to what that is once joyned to, at least where there is enough, and as good left in common for others.”<sup>7</sup>

This dense passage introduces several key points about the pattern of rights Locke considers to be constitutive of property. In the section immediately preceding the passage quoted above, Locke outlines what he takes to be the main puzzle to be solved by a theory of property acquisition as follows: First, we know through reason and scripture that men have a right to preservation, and consequently to food and drink. We also know that God has given the earth to all men in common. But if all men have a joint claim of ownership over the land and all its fruits, then it would be impossible for any one man to claim an exclusive property right over any piece of the earth without infringing that common ownership of the rest of mankind. However, if claiming exclusive use of something were impossible, then it would seem that survival would be impossible, too. What Locke purports to offer is a solution to this problem in the form of an explanation as to how individuals can legitimately claim private property, thereby excluding all others from use of that property, without requiring the consent of all to relinquish their common claim to it.<sup>8</sup>

The premise that “every man has a property in his own person” plays a crucial part in this solution. And the way that Locke has set out the problem of property already tells us something about what it means to have such a property. One obvious point is the contrast between the common claim that all men have over earthly materials, and the exclusivity of the claim that each individual has in his own person. The fact that Locke elucidates the concept of property in the person specifically in terms of labour is also noteworthy. Locke is clearly not thinking in terms of the physical body as a material possession, but rather of some domain of human activity

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<sup>7</sup> Locke, 1988 [1690] §27

<sup>8</sup> Locke, *Second Treatise* §25-26

over which each individual has an exclusive claim against all others. This is followed by the famous labour-mixing claim, whereby Locke posits that individuals can acquire exclusive property rights over material things by mixing their labour-property with those things.

The general form of the problem of property yields a second insight into Locke's conception of property in the person. As outlined briefly above, Locke begins by thinking in terms of need and desire for material goods, and the thought that God gave the earth to mankind in common (for our benefit), but that there must be a way for each individual to actually access his own portion of it in order to reap that benefit and satisfy his needs. All have a claim over the common pot of things each one of us needs to survive and thrive, and each person has a need to be able to exclude all others from some portion of it in order to enjoy it. The significance of having an exclusive claim over some thing is the implied threat that others may lay claim to it and take it away from you. What is at stake is something of value both to a particular individual, and to all others. As we have seen, the fruits of the earth are of value because they provide subsistence to humans. Indeed on Locke's understanding they were put here by God for that very reason: "The Earth, and all that is therein, is given to Men for the Support and Comfort of their being."<sup>9</sup> Labour is of value because without it, people would not be able to access those fruits. It should be noted that labour is not construed as merely adding value to what nature would otherwise provide (through, for example, pruning fruit trees to yield a bigger crop), but rather as a necessary means to accessing any object in the world. This is evident in Locke's example of gathering acorns from under an oak:

"No Body can deny but the nourishment is his. I ask then, When did they begin to be his? When he digested? Or when he eat (sic)? Or when he boiled? Or when he brought them home? Or when he pickt them up? And 'tis plain, if the first gathering made them not his, nothing else could."<sup>10</sup>

Here we see that labour is a broad term for Locke which encompasses even the simplest act of picking up a stray object from the ground. Defining labour in such broad terms may seem to some to be stretching the meaning of the term beyond what we normally take labour to be. While there is some intuitive appeal to the notion that working hard on something to add value to it gives the worker a stronger claim over that thing than others have, even this intuition is not strong enough to garner universal agreement. And it is even less clear that the mere act of picking up an acorn could have the same intuitive force. Much criticism of Locke's theory of property has focussed on this aspect, to question why full property rights should be attributed to the first person to simply pick something up (as opposed to, for example, value-adding generating proportional rights to use or income).<sup>11</sup> However, it is not my purpose here to assess

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<sup>9</sup> *Ibid.* §26, 1-5

<sup>10</sup> *Ibid.* &

<sup>11</sup> C.f. Waldron (1988)



the overall adequacy of Locke's position on labour, nor to provide a detailed exegesis of the labour-mixing argument. Rather, what I'd like to highlight about this quirk of the theory is that the labour Locke has in mind as being the property of an individual is a type of activity that has inherent value. Furthermore, we can understand the value of labour on Locke's account before we posit anything about its moral status.<sup>12</sup> The value of labour is derived from its necessity for survival. And it is the fact that labour is of value for the survival of humans which makes one person's particular labour the kind of thing that others might want to lay claim to for themselves, and therefore the kind of thing over which it makes sense to posit that each individual would need exclusive claims to against others.

The reasoning here is not that persons, such as they are, must have ongoing control over their actions and labour. Locke's is not the popular narrative so influential to modern liberal thought of the rational individual needing the freedom of self-determination to enact his rational, independent nature in order to flourish for himself. At least not in relation to property. Though reason does play a key role in Locke's derivation of the concept of property within his framework of natural law, it is not this notion of our inherently rational nature as valuable in itself that does the work. Rather, the principle of natural law which gives rise to property is first arrived at through an ostensibly thinner reason-based principle – that of the necessity of our material survival.

## 1.2 AN ALTERNATIVE: PERSONS AND PROPERTY AS MUTUALLY EXCLUSIVE

As explained above, the general form of the problem outlined by Locke is as follows. The world is owned in common, and there is a problem of how any individual could claim any part of the world for himself, including the simple act of drinking from a stream, without offending the common right of all others to that same bit of water. Without being able to do so, the individual would not be able to survive. So there must be a mechanism by which individuals can legitimately claim at least that quantity of material resources which is necessary for survival. As it stands, however, this does not settle the question as to why each individual must have property over his own labour as a matter of natural right. To posit property in the person is not the only possible answer to the problem of private acquisition. There are alternative ways of solving the initial problem of survival without attributing to the individual a property right in himself. A possible alternative approach can be found in Kant. Kant understands the problem of property acquisition in a similar way to Locke. His understanding of the problem can be outlined as follows: In order to exercise our full autonomous nature as rational beings, we need

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<sup>12</sup> This is not to say that there is no further moral dimension to the value of labour. As we shall see later, there is such a distinctive moral aspect to it, and one that is fundamentally rooted in theological principles.

to be able to claim things in the world as our own property. This requires using force to exclude others from using the things we want to (e.g. chasing others off a field we have cultivated to grow crops). However, this use of force is illegitimate, as it is incompatible with the full and equal freedom of others, and so it lacks authority. In order to establish property rights that depend on authority rather than force, an institution of property is required.<sup>13</sup> We might reconstruct this argument as follows:

- (1) Excluding others from use of some object by force is impermissible
- (2) Without the possibility of rightful exclusion, gaining secure use of objects is impossible (morally impermissible)
- (3) Since effective agency requires secure use of objects, a system of rights and coercive enforcement that defines conditions of legitimate possession and use is necessary and justified.

A puzzle in this argument is the step from (2) to (3), where we can ask why the implementation of an institution of property is the necessary condition of legitimate possession. Indeed Arthur Ripstein points out that we can ask why a different Kantian option for defending rightful exclusion of others from something in the state of nature couldn't apply for property, namely the concept of 'hindering a hindrance to freedom'.<sup>14</sup> In the state of nature, if somebody tries to interfere with you by, for example, trying to cut off your hand, you have a right to prevent them from doing so by force on the basis that the other person is attempting to hinder your freedom, which is contrary to the principle of the full liberty of each compatible with the equal liberty of all. Hindering this attempt at a hindrance of freedom by force thus presents no problem in terms of hindering the attacker's freedom. We might ask why this doesn't apply to property as well – if I need to claim property in order to exert my full freedom, why could I not defend my exclusion of others from it by force along the same lines?

An illuminating response to this question is provided by Japa Pallikkathayil, who argues that property rights suffer from three problems outside the context of civil society: (i) an indeterminacy regarding what one must do to acquire a property right and regarding what counts as interference with a property right; (ii) a problem of adjudicating for each case where reasonable disagreement arises as to whether principles of fair acquisition or protection from damage have been breached; (iii) each person would lack the assurance that others will abide by these rules.<sup>15</sup> These problems make the universalization of claims to property and invoking

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<sup>13</sup> Barbara Herman (1993) suggests this interpretation of the argument proposed by Kant in *The Metaphysic of Morals* (1991 [1797]).

<sup>14</sup> Ripstein (2009)

<sup>15</sup> Pallikkathayil (2017)

a principle of ‘hindering a hindrance to freedom’ problematic, if not impossible, without an institution laying down determinate rules for the acquisition and protection of property. It is not determinate, in the state of nature, which kinds of interference with objects counts as a hindrance of someone else’s freedom.

Bodily rights, by contrast, are not subject to this problem, because on Kant’s view the innate right to freedom necessitates rights of control over one’s own body, as it is our body that anchors us in the world and allows us to act on our will. There is no need to create an institutional system for the acquisition of bodily rights, as there are already naturally determinate rules for this. Granting it is already naturally determinate what counts as our own body, one might still ask whether the rights we hold over our naturally determined bodily boundaries could be the same or similar to property rights, including, for example, the right to alienate through transfer. Pallikkathayil argues that on Kant’s view, however, because property rights are acquired rights, in order to have some property right over one’s body, one would have to actively lay claim to it as one’s property at some point. If it were possible to do this, in order to be consistent with the equal freedom of others, it would have to be possible in principle for others to gain the same property rights in your body. But this possibility would be inconsistent with the innate bodily rights one has via the innate right to freedom.<sup>16</sup> The Kantian view of bodily rights grounded in the innate right to freedom thus excludes the possibility of having property rights in any part of your body, at least until you’ve already alienated it.

For Kantians, bodily rights remain fundamentally grounded in our status as free beings and the innate right to freedom, and as such the main core of how bodily rights are conceived and protected is not ‘up for grabs’ as in the property case. On the basis of her claim that having a property right in your body is inconsistent with having an innate bodily right to it, Pallikkathayil concludes that this means we have no direct right to transfer parts of our bodies to others. It might be possible to claim a property right in a body part that had been alienated from one’s body, if rules were in place to determine what counts as alienation, but this would involve a two-step process of first removing the part from one’s body, and then claiming it as one’s property within the relevant framework of property rights.

This account grounds the separation of bodies and property firmly in the concept of the innate right to freedom, and by positing a model of having property rights in oneself as in tension with this grounding. Only by alienating an organ or appendage as no longer part of your body could you then claim a property right in it, at which point there is a public framework of property rights within which you could legitimately transfer it to somebody else. While it is part of your body, however, it is deemed to be inextricably linked with your person, and nobody can claim control rights over your person because this is incompatible with the full and equal

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<sup>16</sup> *Ibid* pp.14-15

freedom of all. Even if you were to willingly grant this type of control over your being to another person, this for Kant would be impermissible because the bodies of persons are not the kinds of things it is permissible to sell, even if the body in question is your own. To do so would be to degrade your own moral status as a free and equal being. To recap, if I had property rights in my body, then it would have to be possible, in principle, for anyone else to claim property rights in my body. As such, any innate right to my body, and thus to the instrument that makes it uniquely possible for me to exercise my freedom, would be undermined. Referring back to the central example sketched out in the introduction, this feature of the Kantian account leaves it unable to account for our intuitions regarding use of some of our body parts. It creates a point of schism between my rights of disposal over my hair while it is still on my head (under natural bodily rights), and any right of disposal I could claim over the hair once I have cut it off from my head (an acquired property right). It is thus unable to explain why it should be me who is able to sell my hair once it has been cut from my head, rather than anybody else.

There are, of course, differences in the starting assumptions between Kant and Locke. Perhaps most notably, Kant does not start from the assumption of ownership in common, as Locke does. But Kant's understanding of rational beings as free and equal, and the implications of this for the general structure of negative rights that individuals hold against one another, are not significantly at odds with Locke's view of natural rights in the state of nature.

The crucial step to be noted in Kant's view of the property problem was the jump between premises (2) and (3). The thought behind these steps is that there is no legitimate way for one individual to unilaterally restrict the freedom of all others with respect to any part of the world. This is because there are no determinate rules for property acquisition which follow from the principle that each individual should enjoy the maximum freedom compatible with like freedom for all. Yet Kant recognises the same dilemma as Locke – that it is necessary for us to be able to claim some things for our own secure use. What is most salient for our purposes here is that Kant's solution arises from the recognition that there is no natural solution to the problem of property acquisition. Rather, Kant proposes that the solution must take the form of an institutional framework put in place by rational beings. As such, the content of the institution of property, including rules determining what counts as legitimate property acquisition, is to a large extent up for grabs. For Kant, there could be any number of legitimate candidates to be chosen as a principle of property acquisition, as long as they are compatible with the principle of freedom.

Recall that Locke thought that the only alternative to there being a natural right of property acquisition would be for each individual to require the consent of all others to appropriate any part of the commons. In a sense, what Kant provides is an argument to the effect that this is exactly what is required, though the 'consent of all' takes the form of the implementation of a framework of institutional rules and regulations for property acquisition

within civil society. The reason that Locke thought the consent of all would not be a workable solution brings out another important contrast between Kant and Locke. For Locke, the problem of property acquisition arises out of a scenario as simple as taking a draught of water from a stream. Locke assumes that if one required the consent of all in order to legitimately take a handful of water out of a stream to drink, then one would perish before one had the chance to do so. It would therefore not be reasonable to think that universal consent could be the only way to acquire property, because it is simply not humanly feasible. Clearly, any thirsty individual in the state of nature would not have time to wait for a Kantian-style institution of property to be put in place either. So how does the Kantian account provide for this? The answer is that the right of each individual to drink water from a stream does not come under the category of property acquisition for Kant, but rather can be explained by each individual's right against interference in his person from others, according to the principle of freedom. So for Kant, taking physical possession of something comes under a different set of rights than those which govern property acquisition. The necessity of property rights, for Kant, arises because of the problem of how to keep objects within one's legitimate sphere of agency once one is no longer holding (or sipping) them.<sup>17</sup> For Kant, property provides a solution beyond mere survival. As rational beings with our own ends, we each need to be able to legitimately set ends and be able to enact the necessary means to those ends. This will often involve needing to exclude others from objects in the world that are not in one's immediate possession for a certain period of time, for example excluding others from a field so that one can plough it, sow some seeds, and cultivate the pear trees one wants to grow.

An interesting point of tension arises from the way in which Kant's account draws the link between property and purposiveness. As I outlined above, it starts from a sharp distinction between rights over the person and rights over object. Rights over one's person and body are determinate natural rights. Property rights are only acquired under an institutional structure, and it is a matter of contingency which objects one gains property rights over under that structure. This hierarchy of rights might seem to fit well with our intuitions that although property rights are important, we take interferences with a person's body much more seriously than interferences with the objects one owns. However, the way in which Kant justifies property rights in objects as a necessary condition of being able to enact one's purposiveness in the world links the sphere of property directly to a person's sphere of agency. It would seem to lead to the conclusion that any interference in a person's property constitutes an infringement to their purposiveness. Rational agency being the distinctive moral attribute of persons, for Kant, a interference with a person's property once those institutional rights have been secured would constitute an impermissible intrusion to the defining moral feature of the person – her

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<sup>17</sup> See Ripstein (2010)

purposiveness. In this way, we might think that despite insisting on a sharp distinction between the realms of person and object, Kant's account nevertheless ends up linking property and the person more closely than one would intuitively think to be plausible. For the purposes of this chapter, however, we can note that Kant's account provides a solution to a similar kind of problem that Locke considers without committing to the claim that the right to property must be a natural right.

One may be tempted to think that if Locke's interpretation of both the problem of and solution to property acquisition is grounded on a notion of pure physical survival, rather than making any claims about the inherent moral features of persons, this would suggest that his theory smuggles fewer normative claims into its basic assumptions, thereby lending it broader appeal to contemporary liberals. But as we've just seen, in order to base his theory of property acquisition on the necessity of survival, Locke has to classify an action as simple as scooping up a handful of water to drink as an act of property acquisition. The notion that one has to come to own something before being able to make use of it – even exclusive use of it – strikes me as being at odds with a common-sense understanding of property. It is not obvious that in order to make exclusive use of any part of something that is owned in common, one would require the consent of all other owners. Especially if the object in question is necessary to each individual for survival. If I live in a commune with a pear tree in the garden, which is communally owned, it is clear that we could have a conception of common ownership on which I am entitled, as part of the commune, to pick a pear for myself to eat, so long as I leave enough for others.<sup>18</sup> I may even pick a number of pears, intending to eat one later, and place them in a fruit bowl on the table in the kitchen. On one possible understanding of common ownership, I will be entitled to eat some or all of the pears in the bowl if I wish to, but equally, if all the pears have been eaten by my fellow commune members before I return later that evening, then no ownership right of mine will have been infringed. By contrast, if we look to Kant, we can see that there is a way of construing a set of natural rights which would protect this action without talking in terms of property. Moreover, these Kantian natural rights are derived from the concept of individuals as free and equal, an assumption which Locke shares. However, given the two problems raised briefly here about the Kantian approach, one might think it worth persevering with a self-ownership based account in the hopes of making sense of the puzzle with which we started at the outset.

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<sup>18</sup> Locke's two provisos here, first, that enough and as good should be left for others, and second that what is appropriated should not be left to spoil, could be applied as a feature of common ownership, rather than as restrictions on private ownership.

## 1.3 THE THEOLOGICAL UNDERPINNINGS OF PROPERTY IN THE PERSON

At this point, it seems that Locke's concept of property in the person is under-motivated, and the question arises, in light of possible alternatives, why apply the concept of property in order to explain the legitimacy of actions as simple as taking a drink of water from a stream? There is a good case to dig a little deeper in order to identify what's really providing the foundations for his concept of property in the person. The answer lies in the theological assumptions which ground Locke's theory of natural law.

I have explained above that Locke's theory of property is driven by reasoning as to the necessity of self-preservation. But self-preservation alone is not sufficient to ground the system of natural law which Locke endorses. Rather, for Locke, no liberal order can be viable without a religiously grounded morality.<sup>19</sup> Locke's reliance on a theological moral framework is not made explicit throughout the *Second Treatise*, as he often writes in terms of a 'law of reason' tout court, or writes as though reason provides an alternative to the teachings of scripture.<sup>20</sup> This makes it all the more tempting to treat certain parts of Locke's political theory as though they can be picked out and applied directly within secular liberal theory. It is important to note, however, that in passages such as the one below, Locke is not merely paying lip-service to Biblical teaching in order to appease his contemporaries:

“Whether we consider natural *Reason*, which tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things as nature affords for their Subsistence: or *Revelation*, which gives us an account of those Grants God made of the world to *Adam*, and to *Noah*, and his Sons, 'tis very clear, that God (...) *has given the Earth to the Children of Men*; given it to Mankind in common.”<sup>21</sup>

As the latter part of the above passage shows, there is a close connection between reason and divine revelation for Locke. Indeed, reason is the guide to revelation, as stated explicitly in the *First Treatise*:

“For the desire, strong desire of Preserving his Life and Being having been Planted in him as Principle of Action by God himself, Reason, which was the Voice of God in him, could not but teach him and assure him, that pursuing that natural Inclination he had to preserve his Being, he followed the Will of his Maker, and therefore had a right to make use of those Creatures, which by his Reason or Senses he could discover would be serviceable thereunto. And thus Man's Property in the Creatures, was founded upon

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<sup>19</sup> Forde (2001)

<sup>20</sup> c.f. *Second Treatise*, §30

<sup>21</sup> *Ibid.* §25, 1-10

the right he had, to make use of those things, that were necessary or useful to his Being.”<sup>22</sup>

Locke sees reason as the primary tool by which to make sense of divine commands. Rather than starting with the rational self-interest of each individual and generalising towards principles which are compatible with the recognition of this principle in others, Locke uses our drive for self-preservation as evidence to reason towards God’s intentions for us. Forde explains: “To begin with, God must understand that moral behaviour cannot be reasonably expected of human beings (or any rational beings) unless he makes it worth their while in terms of pleasure or happiness.” Moreover, God would not be so cruel as to give us impulses towards self-preservation and happiness only to punish us for following them. “Rather, such impulses, together with our natural desire for happiness and the characteristics of the world in which we have been placed, are our surest indications of the divine plan.”<sup>23</sup>

Having reached an understanding of God’s divine plan through rational contemplation of our own natures, this in turn satisfies the need that inquisitive rational beings have for a *reason* to act morally towards others. Morality is grounded in God’s will for all mankind. If the self-interest of each individual indicates that God wishes his creatures to survive and thrive, the divine plan must be for all mankind to thrive. This being the case, any individual who pursued his own self-interest to the detriment of others would be violating God’s will:

“For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one another’s Pleasure (...) Every one as he is *bound to preserve himself*, and not to quit his Station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to *preserve the rest of Mankind*”<sup>24</sup>

The law of nature is thus presented not only as a prohibition against harming others, but also as a command to each individual to preserve himself. The importance of property in the person for Locke is that we, as creatures of God, are custodians of God’s property. We belong not properly to ourselves but to God, and owe it to him to preserve ourselves accordingly. Natural law is, Locke writes, a ‘plan, rule, or ... pattern’ of life.<sup>25</sup>

This provides us with better foundations from which to understand the deeper layers of the significance for Locke of each individual having property in his person. As we have already seen, Locke’s solution to the problem of property hinges on the need of each individual to survive. But we can see from the exposition above that taking the necessary means to survival

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<sup>22</sup> *First Treatise*, §85

<sup>23</sup> Forde (2001) pp. 399-400

<sup>24</sup> *Second Treatise*, §6

<sup>25</sup> Locke *Essays on the Laws of Nature*, 81



is not only *permissible*, but rather *obligatory* for God's rational creatures. Each individual thus has not only a self-motivated interest in acquiring the necessary means to thrive, but a divine imperative – a “Principle of Action”<sup>26</sup> to do so. Humans are thus required to make use of reason in order to fulfil our function by discovering God's will for us. To say that we have a principle of action to ensure our own self-preservation is to say that it is part of our function as prescribed by moral law to do so.

With this in mind, we can understand a little better why the simplest act of picking up an acorn is imbued with the significance of property. Locke makes it clear that the capability of having dominion over things is a unique feature of rational beings made in the image of God.<sup>27</sup> He frequently writes of dominion as interchangeable with the term property, a comparison which he makes explicit in §39 of the *First Treatise*. In this section, he is arguing against his opponent Sir Robert Filmer that God did not give Adam private dominion over the earth in such a way as could justify the power of a monarch over other men. Filmer, attempting to defend the monarchical view, argued that while Adam was given *Dominion* over the earth and all things in it, Noah in contrast was given a *Liberty to use them*, which Adam had not had. Locke says of Filmer: “He endeavours to insinuate, as if this Grant to Noah, conveyed no Property, no Dominion”.<sup>28</sup> Locke goes on to challenge this view in the following way:

“Men may be allowed to have propriety in their distinct Portions of the Creatures; yet in respect of God (...) Mans Propriety in the Creatures is nothing but that *Liberty to use them*, which God has permitted, and so Man's property may be altered and enlarged, as we see it was here, after the Flood, when other uses of them are allowed, which before were not. From all which I suppose, it is clear, that neither Adam nor Noah, had any Private Dominion, any Property in the Creatures, exclusive of his Posterity, as they should successively grow up into need of them, and come to be able to make use of them.”<sup>29</sup>

Locke here is insisting that having dominion, property, and the liberty to use something all come to the same thing. Moreover, Locke interprets the biblical evidence as suggesting that God enlarges the scope of man's common property in (or dominion over) the earth and its creatures according to two things: need and the ability to use them. We again see evidence of Locke's particular approach to theology here: if reason indicates that there is a human need for a certain thing, and a capability to make use of that thing in our own interests, then God must have granted us permission to use it.

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<sup>26</sup> *First Treatise*, §86

<sup>27</sup> *First Treatise*, §30

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

From this we can see that having dominion is equated with property, and that dominion, being a capacity that is explicitly carved out of God's likeness, has an undeniably moral aspect to it. Moreover, God gave this power with the specific command to labour.<sup>30</sup> The significance of labour, and the duty to respect the fruits of another person's labour as his own, are inextricably tied to this theological understanding of the moral status of dominion. Each individual must have both the capacity and the right to pursue his own self-interest by appropriating the fruits of his own labour without interference from others. As we have seen above, this can be explained, according to Locke, by reasoning from the premise that God made us self-interested in this way, and that this must therefore be part of his plan of natural law. In light of Locke's theology, we can also see a deeper layer to this right. As suggested above, property acquisition through labour is not only deduced to be *permissible* as a necessity for survival, but is also given as a command by God. It is not simply the case that a person has a right against physical interference in whatever he happens to do. Over and above this, every instance of an individual performing this kind of self-preserving action is an instance of the individual fulfilling his positive duty to preserve himself, according to God's will. Any interference in this would interrupt the fulfilment of such duties. I suggest that it is the notion of the fulfilment of such duties which lends most significance to the concept of property in the person, over and above the mere necessity of survival. This can be made clear if we imagine a case of petty theft. If I steal an acorn that you have picked up from the ground and just set down next to you, I have not threatened your survival, as long as you could just as well pick up another acorn to satisfy your hunger. But I have interfered with your fulfilment of a (small) act of self-preservation. This act being an instance of a fulfilment of God's command to you, my intervention counts as a contravention of natural law. Within this framework, we could also interpret my act, if done as a deliberate way to avoid having to go and find my own acorns, as a refusal to follow God's command to carry out my own labour. It might clarify things to put it in the following terms: The attempt of an individual A to claim the fruits of labour of another person B would not only infringe against the natural right of B to survival, it would also constitute an affront to God's will on two levels: (1) as an interference in B's ability to fulfil his duty to God, and (2) as a refusal on A's part to carry out her own duty to God. In order for God's command to be properly fulfilled, each must reap her own rewards. A mere right against physical interference would not be sufficient to prevent this, as the case of taking an acorn that somebody had accidentally dropped, before they have the chance to pick it up again, would not constitute physical interference, but would violate God's will in the above way.

On this understanding, labour covers any act, however small, of self-preservation carried out by rational beings. This means that the picking up of the acorn counts as labour insofar as

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<sup>30</sup> *Second Treatise*, §35

I pick up the acorn in order to eat it. It is perhaps a consequence of this interpretation of Locke that an instance of picking up an acorn would not count as labour, and would therefore not generate a property right in the acorn, if I were picking up the acorn in order to smash it, or waste it in some way. This is no cause for concern, as such an interpretation would seem to chime well with Locke's two provisos that each leave enough and as good left for others, and that any individual may only appropriate so much as he can make use of to his advantage without it spoiling.<sup>31</sup>

The way in which Locke justifies the concept of property in the person as a fundamental principle of natural right therefore has a specific scope of application. The principle is presented as one that applies specifically to rational beings. But the way in which Locke conceives of rational beings is quite specifically as creatures of God whose very rationality provides evidence for God's intentions. Woven into this substantial assumption of the existence of God are further Judeo-Christian influences as to the significance of man's dominion over the earth and the moral importance of labour. Without these, the claim that property in one's labour exists as a natural principle which guarantees each a right to own the fruits of his labour starts to look as though it is built on shaky foundations.

This chapter has shown how Locke's concept of property in the person and the significance of labour to property acquisition is deeply embedded in a wider theological framework. This framework serves to explain why Locke conceives of property in the person as a fundamental principle of natural law, rather than viewing property as an institutional construct which only arises through a compact among men. The question then arises, what is left of the concept of property in the person once abstracted from this theological framework? What appeal does it retain in liberal philosophies, and what assumptions support this appeal? Cohen defines the principle of self-ownership as follows: "each person enjoys, over himself and his powers, full and exclusive rights of control and use, and therefore owes no service or product to anyone else that he has not contracted to supply."<sup>32</sup> This is the form of self-ownership endorsed by Nozick, who holds that full rights of self-ownership include the right to sell oneself into slavery.<sup>33</sup> The principle seems to be invoked as a principle of full ownership over actions, where this is construed as *any* action an individual may wish to take. But as we can see, this is far wider than the scope of Locke's principle of property in the person. We have seen that in Locke, there is some explanation as to why it is morally important that each individual has uninterrupted ownership over his own acts of labour – because each individual must be ultimately responsible for fulfilling God's commands of his own accord. If we jettison this theological framework, how are we to explain the application of property rights to explain ownership of one's actions as a

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<sup>31</sup> Locke, Second Treatise §31

<sup>32</sup> Cohen (1995)

<sup>33</sup> Nozick, (1974)

way of talking about autonomy? Recall that ownership of actions in this sense goes beyond mere protection from interference in the sense of somebody stopping me from doing something I want to do. The notion of ownership is supposed to further prohibit anybody else from benefitting from my actions (reaping any income from them) without my consent. Waldron criticises this notion of ownership of actions: “since actions are dated events, it is quite incoherent to talk of ownership rights in them after they have been performed; and it is even more incoherent to think that the ownership of one’s past actions (whatever that means) is somehow imperilled by certain ways of dealing with external objects.”<sup>34</sup> On the picture of Locke that I have proposed, we can understand the importance of past actions and their relations to external objects as tracking the ownership of each individual’s fulfilment of God’s will by engaging in acts of self-preservation. Moreover, it is a crucial element of the structure of the concept of property in the person that each individual has not only a negative duty to interfere with the actions of others, but also a positive duty to engage in their own acts of labour. Without this structure, there is a concern that the notion of self-ownership as extended over all actions is left too broad in its practical extension to provide an effective principle of autonomy. Whether or not its theoretical efficacy could be salvaged, and more pressingly, however, it leaves us with the following question: why think of this fundamental aspect of an individual – her autonomy – in terms of property? What is it about property that makes it a prime candidate to embed right at the heart of what liberal theory has to say about the fundamental political importance of persons? The next chapter will take up this question by examining what is so appealing about using the concept of property to elaborate a central principle of autonomy.

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<sup>34</sup> Waldron (1990)

## CHAPTER 2

### WHAT IS THE APPEAL OF SELF-OWNERSHIP?

The contemporary understanding of the principle of self-ownership is based in the idea that each person should have full rights of control over her own body and person, as a master would have over a slave. On G.A. Cohen's account, a person has full self-ownership when he, "enjoys, over himself and his powers, full and exclusive rights of control and use, and therefore owes no service or product to anyone else that he has not contracted to supply."<sup>1</sup> The Stanford Encyclopedia entry on libertarianism sums up the appeal of self-ownership as follows:

"The principle of full self-ownership is attractive for many reasons. It is a strong endorsement of the moral importance and the sovereignty of the individual, it expresses the refusal to treat people as interchangeable objects (things that may be traded off for each other), and it seems to provide a clear and simple starting point for our thinking about justice."<sup>2</sup>

Three things are striking about this statement. First, that the principle of self-ownership should express a refusal to treat people as interchangeable objects is surprising, given that the framework and language of property is usually applied to objects precisely *as* fungible commodities, amenable to be traded with other pieces of property in market exchanges. Second, that the framework of property should provide a strong endorsement of the *moral* importance of the individual requires further explanation. On the face of it, the mercenary nature of property – usually conceived as a system of entitlements to and exclusions from fungible material resources – does not obviously provide the conceptual tools to tell us anything about the moral significance of human beings and our interactions with each other. Third, given that the concept of property has been held to be a cluster concept with several indeterminate parts, the application of which ranges greatly depending on the kind of object being labelled as 'property', we might well question the purported benefit that the principle seems to provide a "clear and simple" starting point for thinking about justice.<sup>3</sup>

This all points to a tension in the concept of self-ownership – that it seems on the one hand to be intuitively powerful in its simplicity, and yet on closer inspection tends to lead to a host of counter-intuitive results in the way comparisons are made between persons and property. This intuitive appeal and superficial simplicity of the concept of self-ownership can lead to a lack of definitional precision in many discussions on the topic. That said, the aim of this chapter is not to tighten up or pin down working definitions for the concept of self-ownership across the

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<sup>1</sup> Cohen (1995)

<sup>2</sup> Vallentyne and van der Vossen (2014)

<sup>3</sup> E.g. see Fried (2004)

various literature. Rather, the aim is to arrive at a better understanding of how the concept is invoked and how it is taken to function in various liberal philosophies, and to explain what are the reasons that make it so appealing to use the concept of property to express the form of a person's rights over herself. I suggest that if there is something appealing about invoking property in this way, it can be explained through the idea, encountered in various social contract accounts, that property provides the tangible substance for the abstract notion of autonomy. This idea is not only present in theories which take property to be fundamental, but also finds expression in Kantian theories that insist on self-sovereignty as a fundamental natural right as distinct from property rights. Property is embedded in these liberal political theories as a fundamental piece of the puzzle of how free individuals can be conceived as contracting to live in regulated society together with one another. Property therefore emerges as the framework which both enables (or legitimizes) the establishment of authority, and draws spheres of entitlement and exclusion which provide the shape and structure of external autonomy. This way of telling the hypothetical story of the beginnings of the state starts from the assumption that being able to establish secure use of objects in the world as property is necessary for individuals to pursue their fundamental interests or enact their inherent moral nature. There is something plausible about this claim, if we understand property as being the physical manifestation of an individual's powers and actions, and providing the concrete subject of consent and negotiation with others. In simple terms, we usually need to make use of some number of material resources to do the things we want to do.

I will suggest that the plausibility of this picture could help to explain the appeal of self-ownership within the context of liberal political philosophy. If external property is embedded at the heart of the liberal reconciliation between state authority and individual liberty, this gives rise to a temptation to theorize that the same framework of property can be applied directly to our less tangible outputs (our actions, talents, or powers), to explain the importance of each individual's entitlement to hold exclusive power over these. A picture thereby emerges whereby we have property 'all the way down', no longer only invoked to provide the shape of external autonomy, but also to explain the fundamental moral importance of the autonomy of the individual. One problem with this approach is that it's not clear to what extent the concept of self-ownership arises from and is informed by our understanding of the framework of object-property, or whether, conversely, the principle of self-ownership is invoked as a prior principle which justifies certain frameworks of object-property rights over others.<sup>4</sup>

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<sup>4</sup> For example, on Nozick's account, how are we to understand his argument that self-ownership implies that taxation amounts to a form of partial slavery? One of the assumptions behind this argument is that full ownership includes the right to all income and wealth generated from one's property. This assumption is relatively uncontroversial when applied in the context of a common-sense understanding of object-property, so this seems to be a case where the content of the concept of self-ownership is being informed by Nozick's understanding of the shape of rights over object-property. But

The first section of this chapter examines Nozick's view of self-ownership, and identifies some points of tension which arise from it, partly as a result of problems with jettisoning the theological underpinnings found in Locke. The second section suggests that despite the problems with a view of self-ownership which proposes property as foundational, there is some appeal to the concept. This appeal is derived from the idea, common to both concepts of self-ownership and self-sovereignty, that property provides the tangible substance that gives shape to an abstract notion of autonomy. Having explained the appeal behind the concept in those terms, I suggest that this leaves an open question as to what shape the concept of self-ownership ought to take, particularly on the important question of whether it includes full rights of alienation.

### 2.1 NOZICK ON PROPERTY AND SELF-OWNERSHIP

The most influential contemporary account of self-ownership is that espoused by Robert Nozick.<sup>5</sup> It will therefore be most illuminating to start with an analysis of how Nozick uses the idea of self-ownership and his reasons for applying the framework of property to explain the importance of individual autonomy. One thing to note about the concept of self-ownership in Nozick is that, somewhat puzzlingly given the influence that he has had on this specific topic, Nozick only uses the term 'self-ownership' once in his *Anarchy, State and Utopia*. But he uses it at a crucial point in his case for the minimal state, when he is arguing that taxation amounts to forced labour: "End-state and most patterned principles of distributive justice institute (partial) ownership by others of people and their actions and labor. These principles involve a shift from the classical liberals' notion of self-ownership to a notion of (partial) property rights in *other* people."<sup>6</sup> The standard interpretation of Nozick has thus been that self-ownership construed as an absolute property right in oneself is the fundamental right that underlies his case for the minimal state.

Nozick elucidates the concept of self-ownership as follows: "The central core of the notion of a property right in *X*, relative to which other parts of the notion are to be explained, is the right to determine what shall be done with *X*; the right to choose which of the constrained set of options concerning *X* shall be realized or attempted." Nozick says that the constraints that determine which set of options is available for any given type of property are set by 'other

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as we see in the argument against taxation, this conception of self-ownership is then used to draw conclusions about what shape the framework of object-property must take (i.e. there can be no legitimate taxation on monetary transactions between self-owning individuals). It's not clear how the principle of self-ownership can *explain* this, if the content of the principle is informed by the assumption that this is already how the realm of object-property works. This issue will be discussed in more depth below.

<sup>5</sup> Nozick (1974)

<sup>6</sup> *Ibid.* p.172

principles or laws operating in the society'. Which, on Nozick's theory, are "the Lockean rights people possess (under the minimal state)." It is this set of rights against physical interference that explain why I can choose to leave a knife that I own in many places, but not in somebody else's chest (nor, presumably, on any other piece of their property, unless I had gained their consent to do so).<sup>7</sup> Broadly understood, then, limits are set to the framework of property rights over ordinary material objects by other moral side constraints, such as the right held by each individual against being harmed. Nozick goes on to explain that this notion of a property right as being that which denotes the power to determine what shall be done with the thing that is owned explains why early theorists invoked the concept of property in the person: "They viewed each person as having a right to decide what would become of himself and what he would do, and as having a right to reap the benefits of what he did."<sup>8</sup>

It is on the basis of this understanding of self-ownership as including not only the right to decide what actions one partakes in, but also the right to reap the benefits of one's actions, that Nozick argues that patterned principles of distributive justice involve "appropriating the actions of other persons." He argues as follows:

"Seizing the results of someone's labor is equivalent to seizing hours from him and directing him to carry on various activities. If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you. Just as having such a partial control and power of decision, by right, over an animal or inanimate object would be to have a property right in it.

End-state and most patterned principles of distributive justice institute (partial) ownership by others of people and their actions and labor. These principles involve a shift from the classical liberals' notion of self-ownership to a notion of (partial) property rights in *other* people."<sup>9</sup>

This picture helps us to understand what Nozick thought was so appealing about the concept of self-ownership. He seems to find the concept appealing for the same reason that he says earlier theorists invoked it, namely because it captures the idea that each person has a right to decide what to do with himself, and a right to reap the benefits of his chosen actions. To use Nozick's own terminology, it captures the moral side-constraints that pertain to individuals and explain the limits of interference in their lives by any other agent, including the state. Furthermore, as Nozick draws out the implications of the right to reap the benefits of one's actions, self-ownership on his understanding provides a neat way of explaining why these side

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<sup>7</sup> *Ibid.*, p.171

<sup>8</sup> *Ibid.* p.172

<sup>9</sup> *Ibid.*, p.172



constraints extend beyond mere physical harm to cover a strong prohibition against non-consensual interference with an individual's material property, where that property has been justly acquired. One of the most forceful criticisms that Nozick aims at patterned theories of redistribution (in direct response to Rawls' difference principle) carries this logic through in the opposite direction. Nozick argues that if such principles of justice are to apply to the fundamental institutional structure of society as directed at end-states, there can be no principled way to stop these principles of redistribution extending all the way down to include the bodies of individuals, as well as their material property. Nozick asks:

“May all entitlements be relegated to relatively superficial levels? For example, people's entitlements to the parts of their own bodies? An application of the principle of maximizing the position of those worst off might well involve forceable redistribution of bodily parts (“You've been sighted for all these years; now one – or even both- of your eyes is to be transplanted to others”).”<sup>10</sup>

This argument can perhaps give us a better understanding of how the principle of self-ownership functions in Nozick's theory, and the shape it takes. Another clue can be found in a previous section of the same work, where he describes a Lockean view of individual rights as establishing a line or hyperplane that ‘circumscribes an area in moral space around an individual’, which limits the actions of others.<sup>11</sup> Combining these points together, they point towards a neat picture of self-ownership as establishing a moral sphere within which the individual is protected from interference by others. The basic rights of full self-ownership would include in this sphere the individual's physical body as well as her talents, powers and actions. But in order to understand what counts as an interference in an action beyond physically preventing somebody from doing something (which would involve either some physical interference with her body, or the threat of physical interference), we need to have some account of the things in the world with which the individual is entitled to act. Nozick's Lockean picture gives us at least a suggestion in this direction – that by acting on certain things in certain ways, and with certain people (i.e. entering into transactions with other property owners), the individual is able to link ownership of her actions to ownership of things in the world. This enlarges the hyperplane around her such that interferences in her acquired property now constitute infringements on self-ownership.

On this picture of Nozick's account, one might think that one of the great benefits of a principle of self-ownership is that it is possible to derive from it the limits which we ought to set to the framework of property rights that range over ordinary material objects. If self-ownership entails the right to reap all the benefits of one's actions, then any time I act alone to acquire an

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<sup>10</sup> Nozick (1974), p. 206

<sup>11</sup> *Ibid.*, p. 206

as yet un-owned object, I must gain full and exclusive ownership rights in that object. On Nozick's logic, if another individual were to claim a property right in that object, it being a benefit of my action, she would thereby be claiming a property right over my action, infringing on my full rights as a self-owner. But this can't be what Nozick has in mind, because he himself admits that:

“We lack an adequate, fruitful, analytical apparatus for classifying the types of constraints on the set of options among which choices are to be made, and the types of ways decision powers can be held, divided, and amalgamated. A theory of property would, among other things, contain such a classification of constraints and decision modes, and from a small number of principles would follow a host of interesting statements about the consequences and effects of certain combinations of constraints and modes of decision.”<sup>12</sup>

This indicates that Nozick is thinking of taxation as involving seizing of property, rather than as imposing a constraint on the set of options concerning the property in question that are available to the owner to realize or attempt. More on this point later. But this section points to a certain difficulty for Nozick's thesis of self-ownership. Nozick here admits that property rights over objects are rarely, if ever, absolute, in the sense of there being no constraints on the set of options one can choose to do with a thing. If that's the case, and there are no absolute rights where ordinary object property is concerned, then property would not seem to be the obvious framework within which to express an absolute right to determine one's own actions and reap the benefits of them. Unless, that is, one holds that the principle of self-ownership is what grounds or explains property rights over objects in the first place. On that kind of picture, it would be possible to start from an absolute property right in the self to principles of property ownership over objects which are constrained by virtue of the fact that they must not extend so far as to infringe on the self-ownership of any other individual. Indeed, something similar to that kind of account is what we find in Locke, who starts with property in the person as the moral basis that explains both the legitimacy and the necessity of individuals being able to acquire private property. The theological grounds of the concept of property in the person that explain the moral aspect of property also help to explain the provisos that Locke places on property acquisition.<sup>13</sup> With those provisos in place, it is unclear what other principles would be needed to provide an adequate analytical apparatus for classifying the types of constraints that shape a theory of property, or why they would be needed.

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<sup>12</sup> *Ibid.*, p.171

<sup>13</sup> The proviso that acquirers must leave 'enough and as good' left for others is consistent with the notion that it must be possible for each individual to fulfil God's command to labour on the earth, thereby creating a property right in it, on the principle that ought implies can. The spoilage proviso in turn chimes with Locke's framing of the concept of property in the person as the answer to a moral puzzle about self-preservation, as argued in chapter 1.

Given that Nozick explicitly draws on Locke's idea of property in the person and uses what he deems to be a Lockean proviso to his entitlement theory, his statement in the passage above is slightly puzzling. After all, it would be a big point in favour of the concept of self-ownership if it were the case that the full analytic apparatus of a theory of property rights could be derived from it, but we have strong evidence to think that Nozick does not believe this to be the case. And yet, for his conclusions about taxation and patterned principles of distribution to be supported, there must be some important link between self-ownership, property ownership, and autonomy such that a principle of self-ownership can explain which kinds of impositions on private property constitute illegitimate infringements on autonomy, and why.

It would be helpful here to get clear on what kinds of legitimate constraints there could be on the ways in which ownership powers can be held over property. I mentioned above that Nozick must be thinking of taxation as involving seizure of property rather than systems of taxation imposing constraints on the set of options among which choices can be made with regards to certain types of property. So taxation on transfers of wages from an employer to an employee count as a taking of property by the state. This is illegitimate on Nozick's view, because no particular relationship or contract exists between the employer/employee and the state, or between the employer/employee and the citizens who will benefit from the redistribution of the taxes seized. If I agree to work for 10 hours for a price of £100, and the state takes £20 of my income, the state has thereby claimed ownership of 2 hours of my labour by reaping the benefits of that labour. On this account, it's not merely the case that there is a constraint on the set of options within which an owner can decide to use her money. As a point of contrast, it would help to have an example of a kind of constraint on powers of ownership over a thing that would be legitimate and therefore pose no threat to self-ownership, on Nozick's view. A possible example might be the kinds of rules and regulations governing the renovation of certain buildings considered to be of special architectural or historical interest. These would not constitute a seizure of property in the same way as taxation, but could be viewed as a legitimate constraint insofar as the set of options available to the owner with respect to how to decorate or renovate her property is limited under law, without the state reaping any benefits or income generated by the property from that constraint.

On the face of it, this kind of constraint would neither violate self-ownership in the same way that taxation does, nor derive directly from the principle of self-ownership and the Lockean provisos on property acquisition. This, of course, would cause us to question how these constraints could legitimately arise in the first place. Especially if we start with a Nozickian account that includes with the absolute right of self-ownership the right to reap all the benefits of one's actions. There would have to be some account detailing how owners come to own things like buildings, and how these ownership rights come to be less absolute than the original

right to self-ownership which grounds property acquisition in the first place. The obvious kinds of reasons we might reach for to explain these constraints might appeal to the importance of preserving the cultural heritage or aesthetic standards of a certain community, or perhaps protecting areas of natural beauty. But then the question arises, are these the kinds of principles which it would be legitimate for a state to use in order to place constraints on property rights? If self-ownership does indeed capture the fundamental principles of autonomy which must not be violated by the state, and if self-ownership as a principle of autonomy provides the moral link between persons and use of objects that justifies private property, then it seems we will have to refer back to self-ownership in some respect in order to understand what areas of property can be subject to such constraints, and for what reasons.

This highlights that one of the most appealing things about the concept of self-ownership is also the source of one of the greatest puzzles about it. Namely, if it is the principle of self-ownership from which the framework of property rights is derived, and that principle serves to justify systems of private property based on fundamental notions of autonomy, the principle will turn out to be both very important and very useful. If self-ownership could provide all of that, it would provide a clear standard by which to test theories of distributive justice, insofar as such theories inherently rely on claims about the strength of individual claims to private property and the extent of the state's role in regulating these. Indeed, it is telling that many of the debates about self-ownership revolve around what implications the principle has for patterns of distribution. We've already seen the conclusions drawn by Nozick in this regard, which provide the key point of reference for a range of critics, whether they agree with Nozick or not. G.A. Cohen notably argues that the Marxist claim that capitalists exploit labour from their workers by stealing labour time from them relies on the implicit assumption that individuals own their labour.<sup>14</sup> Cohen thinks this is a fundamental flaw in the Marxist argument, because he concedes that Nozick was right about the implications of self-ownership for taxation. He argues on the basis of this that any political philosophy concerned with equality should abandon the principle of self-ownership in favour of distinctly egalitarian principles. Liberal egalitarians such as Michael Otsuka, however, attempt to reconcile self-ownership with principles of egalitarian redistribution by challenging the purported link between ownership of labour and entitlement to free, untaxed transactions in labour markets.<sup>15</sup> These diverse approaches all seem to recognise the appeal of framing individual autonomy in terms of a property right because the link that this creates between what is taken to be of fundamental importance about the individual and distributions of material goods enables theorists to build a strong moral case for their preferred theory of distributive justice.

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<sup>14</sup> Cohen (1995), pp. 146-147

<sup>15</sup> Otsuka (1998)

But the puzzle lies first in explaining the nature of the link between self-ownership and property ownership, in order to show why they must be linked. And second, in filling in the gaps as to how a framework of property could be derived from the principle of self-ownership. As we've seen from Nozick's account, he tries to combine claims about the importance of self-ownership with conclusions about the permissibility of certain types of interference with object-property on the basis of this importance, while professing ignorance about the analytic apparatus that provides a full theory of property. Furthermore, Nozick assumes that what it means to have full self-ownership is the same thing as what it means to have full ownership of an object. His understanding of ownership is Hohfeldian, so that to own a piece of property means having a certain bundle of rights with respect to that property, which can include but are not limited to: the right to exclude others from use of the property; the right to earn income from the property; the right to transfer certain rights over the property to others; or the right to alienate the property. The more of these rights an owner holds over his property, the 'fuller' the ownership rights. It is this understanding that leads Nozick to think that a full right of self-ownership must include all possible incidents of property, including full rights to income and the right to alienate the property rights one holds in oneself.<sup>16</sup> But without saying anything to fill in the gaps to explain how self-ownership grounds and shapes the framework of object-property, the assumption that self-ownership takes exactly the same shape as object-ownership is premature. As Alan Ryan has pointed out, there is a certain circularity in Nozick's argument:

"It is just because we take a relaxed view about people's rights over their cars, bicycles, books and the rest that Nozick can suggest that if these are my lungs, I can do what I like with them. Conversely, it is just because we don't take a relaxed view about people's rights over their bodies that Nozick can suggest that we have no right to tax people against their will, just as we have no right to force them to marry against their will."<sup>17</sup>

There is perhaps something plausible in the idea that autonomy gains its expression through property, and that property thereby provides us with a framework through which to express the importance of an individual's powers of control over herself. But more work is needed to explain the nature of this link before it is possible to draw conclusions about whether these powers of control ought to be attributed to individuals as property rights over themselves. We cannot simply assume that it takes the same form as the property rights that are currently instituted in law without understanding how such a system of property rights could stem from a principle of self-ownership.

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<sup>16</sup> *Ibid.*, p. 331

<sup>17</sup> Ryan (1992)

### 2.2. PROPERTY AS THE TANGIBLE SUBSTANCE OF AUTONOMY

If the idea that there is a fundamental link between autonomy and property is plausible at least to some liberal political philosophers, it is perhaps because this same idea also finds expression in a concept of self-sovereignty which does not take property to be fundamental, but rather bases it on a more fundamental natural right to autonomy. The Kantian concept of sovereignty, for example, requires a framework of institutional property rights in order to give content to the ways in which an individual may use his sovereign powers. Examining the link between conceptions of autonomy and property from the point of view of self-ownership and self-sovereignty will help to shed light on why the concept of self-ownership has seemed so appealing to theorists in the liberal tradition, as well as to assess whether there is genuine philosophical merit to using the framework of property to express the form of a person's rights over herself.

It is safe to assume that the 'earlier theorist' to which Nozick refers in the passage quoted above is Locke. Locke asserts several times that the chief end of civil society, and of government, is the protection of property.<sup>18</sup> As such, property provides both the explanation for how and why governments come about, and a standard of legitimacy to hold them by. On Locke's picture, civil society doesn't create property rights ex nihilo, but rather provides individuals the security against violation of their property which they lack in the state of nature. Locke claims that although natural property rights exist in the state of nature, there is no guarantee of the protection of these rights from attacks by individuals, nor any mechanism for regulating disputes about what the law of nature requires in complicated interactions between individuals and their property. Locke suggests we should recognise that rational beings in the state of nature would convene and agree to a system of government to solve these problems. Moreover, the very purpose of a system of government once it has been convened in this way is to protect property rights. This move from the state of nature governed by natural law to civil society instituted by the consent of all enables a shift in the framework of property. Most significantly, Locke explains that by agreeing to assign value to precious metals and use them as currency, men circumvent the spoilage proviso, allowing accumulation of land by any individual beyond what he could feasibly make use of himself. This is because he can still ensure productive use of the land by renting it out to other people for money, and hoard the money without it spoiling.<sup>19</sup> As we can see, then, the principle behind the spoilage proviso remains intact, that fruits of the earth are still not to be left to rot while others are excluded from their use, but money allows men to stretch the boundaries of the somewhat rigid framework of property that existed in the state of nature. On this picture, private property originates in the individual as labour, or the capacity to engage in acts of self-preservation, and extends from there into the external world. The

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<sup>18</sup> c.f. Locke, *Second Treatise*, §85, 94

<sup>19</sup> *Ibid.*, §50

notion of the individual mixing his labour-property with objects in the world to appropriate them can be used to support the conclusion that interferences in object-property amount to interferences in self-ownership. This is because, in order to appropriate an object, Locke's individual has mixed part of himself with that object, bringing the object into the sphere of the self. But as I argued in chapter 1, the moral link between the individual's actions and his object-property that explains why the two are connected in this way relies on the substantial theological assumptions about the moral nature of individuals as accountable to God which motivate the account.

As we've seen, Nozick's account is grounded in Lockean principles, so there must be something in Locke's overall picture of the link between property rights and the importance of individual autonomy that he finds appealing enough to invoke the principle of self-ownership. However, it is clear that Nozick and other contemporary writers responding to Nozick's claims about self-ownership wish to offer accounts which are neutral as regards religion. Any account they borrow from Locke will therefore have to be abstracted from his substantial theological assumptions. That means doing away with the assumption that the state of nature is characterised by common ownership given by God, as well as the conception of the moral importance of property in the person being bound up in the ability and imperative to fulfil God's commands. Nozick and those responding to him start instead from the assumption that there is no ownership of the world until self-owning individuals begin to claim parts of it in the right way, thereby bringing those parts of it under private ownership. In a sense, then, the principle of self-ownership has to do more heavy lifting in these theories than it does for Locke, because there is no further dimension outside of the individual which explains why self-ownership is invoked or required. Self-ownership thus becomes bedrock within these theories in a way in which it is not for Locke. Insofar as any theory requires some founding principles to get it off the ground, we might think this is fine. But this leaves the concept open to the kinds of difficult questions raised above, namely why think that *property* extends all the way down to explain the importance of the individual in this way? Especially if the way that a property right over oneself is explained is with reference to the structure of property rights over objects that we recognise within modern institutions as they are currently regulated.

That contemporary accounts construe self-ownership in this way is evident in the way that the discussion is often framed. For example, when Cohen explains that self-ownership involves having the same rights over oneself as one would have over a full chattel slave:

“Each person possesses over himself, as a matter of moral right, all those rights that a slaveholder has over a complete chattel slave as a matter of legal right, and he is

entitled, morally speaking, to dispose over himself in the way such a slaveholder is entitled, legally speaking, to dispose over his slave.”<sup>20</sup>

It’s clear here that Cohen is referencing property rights as they are (or could be) enshrined in law as a benchmark by which to understand the moral right of self-ownership. But to do so he must already have a particular framework of property in mind. Again, unless we understand the link between this legal framework and the moral status of the individual, there remains a puzzle as to why this particular framework is the appropriate one through which to express the moral rights of individuals. In this respect, taking the example of slavery is particularly problematic, because historical laws governing slavery were often informed by the recognition that slaves were humans, rather than mere objects. Of course this recognition did not figure as a moral constraint as to the impermissibility of treating slaves in abusive and harmful ways on the basis that they were human and thus deserving of certain moral regard. Rather, the rationale seems to have been that, viewed as a commodity, and in order to properly regulate use of that commodity, proper regard had to be taken of its character and associated risks as a specifically human commodity, rather than an object-commodity. For instance, slave codes in South Carolina warned against cruelty to slaves, and prevented slave-owners from working their slaves for more than 15 hours a day in spring and summer and more than 14 hours a day in autumn and winter.<sup>21</sup> Slave-owners were also not permitted to teach slaves to read or write, presumably because this would risk upsetting the economic system which relied on the continued oppression of slaves. Educating these slaves would not only constitute a challenge to the principle that slaves were not worthy of human education, but also risk empowering the slaves in a way that could make the systems of oppression less effective. These codes were clearly not developed out of any regard for the moral status or wellbeing of the slaves, but were seen as necessary on economic grounds to preserve the plantation-based economy which was heavily reliant on the slave-trade. So while the humanity of slaves was denied in the refusal to regard them as legal persons under the law, and they were treated as chattel goods to be owned and traded by legal persons, still the peculiar economic status and human nature of these chattel slaves gave rise to restrictions on the property rights of slave owners on the basis of their utility to the slave-owning community.

So even from a purely economic perspective there is reason to think that there are certain reasons that can have a bearing on frameworks of property that stem from the nature of the kind of object that is taken to be owned (abstracting for the moment from any moral concerns). And, even with these restrictions in place, it is not clear that it is right to say that the slaves were not complete chattel of the slave owners, or that the slave owners did not have a full property

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<sup>20</sup> Cohen (1995) p.68

<sup>21</sup> McCord (1840)



right in their slaves under law. It may be that there are reasons which stem from the nature of certain kinds of objects which, in conjunction with considerations about the function of property frameworks within a given society or economic system, mean that full ownership of the object in question just is bounded in that way. So that to make a comparison between ‘limited’ ownership and ‘full’ ownership in the Hohfeldian sense of having these rights against others in respect to a thing just doesn’t make sense. But in order to be able to settle that question, again a fuller account of the function and shape of property frameworks and how they arise is needed. Otherwise, it is not clear why it would be appealing to stipulate a correlation between a full legal right construed in this way and a full moral right of the individual over herself.

We might find some clues to explain more clearly the appeal behind connecting individual autonomy and property if we go back to examining what could be taken from Locke without committing to his theological assumptions. A peculiar aspect of Locke’s theory is that he uses the term property sometimes to refer to what we would normally understand as ownership of material objects, and sometimes in a broader sense as “Lives, Liberties and Estates, which I call by the general name, *Property*”<sup>22</sup>. However, even when the term is used in its broadest sense, there is a certain significance to the use of the label ‘property’ to denote the more abstract concepts of life and liberty. In his commentary on Locke’s *Two Treatises*, Peter Laslett suggests:

“property to Locke seems to symbolize rights in their concrete form, or perhaps rather to provide the tangible subject of an individual’s powers and attributes. It is because they can be symbolized as property, something a man can conceive of as distinguishable from himself though a part of himself, that a man’s attributes, such as his freedom, his equality, his power to execute the law of nature, can become the subject of his consent, the subject of any negotiation with his fellows. We cannot alienate any part of our personalities, but we can alienate that with which we have chosen to mix our personalities (...). In some way, then, it is through the theory of property that men can proceed from the abstract world of liberty and equality based on their relationship with God and natural law, to the concrete world of political liberty guaranteed by political arrangements.”<sup>23</sup>

There are two suggestions here that I think can shed light on what makes it appealing to invoke self-ownership as a principle of autonomy. One is that object-property provides clear physical boundaries that allow individuals to determine in real terms when one person’s actions have a negative impact on the interests of another. For example, if one person in the state of nature is trying to lay slabs to create an even surface on which to put a shed, and another is trying to clear stones from the same bit of land in order to plant crops, each will hinder the other from

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<sup>22</sup> Locke, *Second Treatise*, §123

<sup>23</sup> Locke (1988), p.

performing her chosen action. Despite this mutual hindrance, it is not clear which of the two could claim to have suffered a legitimate infringement until we know which has an entitlement to decide how the land will be put to use. Once there is a pattern of ownership of objects and territory, that provides the framework within which individuals can understand and arbitrate over this kind of dispute. In this sense, object-property provides the concrete subject of questions about how free individuals coming into community with one another can regulate their behaviour with respect to each other's plans. In other words, we need the material stuff to be able to make sense of questions about which ways of acting on things in the world constitute an infringement of another person's liberty.

Second is the thought that once we can understand the role of object-property in this way, property becomes the conceptual tool by which we can also understand how the boundaries of rights to the more abstract concepts of individual freedom and equality are constructed when free and equal individuals with competing interests come to live in community with one another. Namely, we can understand these abstract concepts along the same lines as object-property, as giving the individual a certain sphere which is the subject of the individual's consent. Here we can refer back to Nozick's description of a line or hyperplane circumscribing an area of moral 'territory' around the individual. This is also perhaps where the comparison between legal institutions of material property and the type of moral right one has over oneself makes most sense. Though it would be possible to characterize liberty through principles of non-interference or bodily integrity of the person, these need to be qualified to reflect the fact that individuals have the control to waive their rights against interference with respect to certain people and circumstances as a matter of their choosing. The framework of property can arguably provide this in one fell swoop – to have ownership over a thing is to have the power to control the enforcement of claims against others that a property right confers on the owner, to determine when those claims are waived or forfeited. Laslett suggests that it is possible to apply the idea of alienability, which is most straightforwardly expressed in the ability of an owner to give away or trade a piece of object-property, at the abstract level of aspects of a person's powers and attributes. So, for example, an individual can contract out his services to somebody else, thereby giving his employer the power to determine what kinds of work he will do that day. But note that the power to alienate in this way, if delegation of a power is to be held to be proper alienation, rather than the individual in question simply acting in accordance with the employer's requests, requires a framework to recognise and enforce the alienation of the power from one individual to another. What is required is the political arrangements to institute the framework of property. Whether or not these views can be properly attributed to Locke (Laslett himself hints that it may be a stretch to read this kind of abstract symbolism directly into the *Two Treatises*), they perhaps bring us closer to understanding the appeal behind the contemporary concept of self-ownership. On this picture, property emerges as the

structure that determines the external autonomy of individuals in political community with one another.

If this interpretation gives us an insight into why self-ownership is embedded as a foundational principle of autonomy into contemporary liberal theories, it perhaps also indicates that on a secular account that drops Locke's theological assumptions, self-ownership doesn't constitute an absolute *moral* right as such, but rather a distinctly political principle stipulating how political arrangements are to take account of and guarantee the freedom of the individual. One implication of this is that we no longer get a simple picture of a power of self-ownership within the individual that gives rise to ownership of material objects, thereby providing the 'clear and simple starting point for our thinking about justice'. The relationship is more complex than that. Moreover, without the Lockean assumptions that ground property in the person as a distinctly moral power that does play this property-generating role in the state of nature, the claim that self-ownership guarantees a right to reap all the benefits of one's actions is also found to be lacking. In particular, Cohen's definition (as he understands the concept in Nozick) starts to look a little simplistic. This definition was that the self-owning individual "enjoys, over himself and his powers, full and exclusive rights of control and use, and therefore owes no service or product to anyone else that he has not contracted to supply."<sup>24</sup> As we can see from the discussion above, if the plausibility of self-ownership arises from the way in which we can understand the framework of property as providing the concrete subject of the political contract between individuals, the question of what one could be held to owe through contract to others becomes more complex than a simple question of individual market transactions.

I will not attempt to untangle that web of complexity just yet. Instead, I will briefly explore how the same intuitions about property providing the framework within which to make sense of the social contract feature in the Kantian account which does not take property to be fundamental. While this account rejects the idea of property in the person, it nevertheless invokes property as a framework that provides something like the political personality of the individual in line with the interpretation above. If this is the case, it provides further reason to think that the appeal behind linking property and the person within the liberal tradition stems from the role that property plays in explaining the state as based on social contract. But it does so without providing reason to think that the principle of self-ownership this supports is one construed on the Hohfeldian picture whereby 'full' ownership of oneself must include the maximum possible list of claims and powers, including the claim to reap all the benefits of one's talents, and the power to alienate completely one's rights over oneself.

As suggested in chapter 1, Kant conceives of property as the solution to a particular kind of problem that stems from the peculiar nature of individuals as free and equal. Rather than

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<sup>24</sup> Cohen (1995) p.12

starting as Locke does from the assumption of ownership rights as existing within the state of nature, Kant argues that property must arise as an institutional framework to solve a problem arising from the lack of determinate rules for property in the state of nature. However, both accounts share a common strand of thought that the very nature of free and rational individuals is such that we need to make use of material objects in the world to enact our interests, and we need some conception of property in order to legitimise making exclusive use of external objects. For Locke, the moral necessity of this stems from God's command to us as his creatures, an assumption which also provides determinate shape to property rights in the state of nature. For Kant, the necessity is more formal and accordingly gives rise to a more abstract, conceptual solution. As explained in chapter 1, the problem arises from the moral impossibility of unilaterally imposing restrictions on the end-setting of others with respect to objects in the world. So what is required is just some institution arrived at by mutual consent, some framework of property rules that all could agree to. The content of this could presumably be filled in with reference to any plausible contractualist theory compatible with a Kantian principle of freedom. The necessity of this institution provides a stronger imperative for individuals to come into community with one another under a regulative system. Kant's argument is not that it is prudent for rational individuals to convene under such an institution, but that their very nature as rational autonomous beings necessitates it.

One crucial thing to note about Kant's theory of property is that it rules out the possibility of a person having property in himself as a fundamental right, because the principle of freedom provides a determinate standard by which to understand the innate rights of individuals: "Freedom (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity."<sup>25</sup> Property as a set of rights which is acquired, rather than innate, is an inappropriate framework within which to attribute fundamental rights to the individual, precisely because they arise institutionally from problems of indeterminacy of form.

This account would therefore be incompatible with a move such as Cohen's, on which a moral right to self-ownership was modelled directly on legal rights to property.<sup>26</sup> That said, there have been attempts to defend distinctly Kantian notions of self-ownership,<sup>27</sup> and certainly there are notions of self-sovereignty that are uncontroversially Kantian. The point of interest here is that a Kantian principle of self-sovereignty such as the one advocated by Arthur Ripstein shares some core similarities to a principle of self-ownership. For Ripstein, self-sovereignty

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<sup>25</sup> Kant, *The Metaphysics of Morals* (1991 [1797])

<sup>26</sup> Cohen, notably, takes Nozick to task on his claim that rights of self-ownership reflect the Kantian claim that individuals are ends and not merely means, arguing that self-ownership is inconsistent with Kantian principles.

<sup>27</sup> E.g. Taylor (2004)

determines that “each person is entitled to use his or her own powers as he or she sees fit, consistent with the ability of others to do the same”.<sup>28</sup> This is similar to the notion of having the power to determine how something is put to use which was central to the basic idea of property used to motivate the concept of self-ownership. The part that is missing is the right of the individual to reap all the benefits of her talents and powers. But if we refer back to the way in which the fundamental nature of the individual was linked to frameworks of property once we had abstracted the Lockean account from its theological assumptions, it becomes less obvious that this latter part of the principle is a necessary element of autonomy construed as a property right. We can see that on this picture, what emerged as the core reason to think of individual autonomy in terms of ownership can be adequately expressed by Ripstein’s principle of self-sovereignty. The account that comes closest to explaining the appeal of self-ownership would therefore seem to support a more minimal principle. It would not be obviously wrong, however, to conceive of such a principle in terms of having ownership-like powers of exclusion over some metaphorical territory, especially given the reasons explored above to think that property provides the framework within which individuals come together as political beings. But neither does it give reason to think that powers of alienation must be built into that right.

The purpose of briefly exploring how property is embedded into these accounts as part of the puzzle of how free individuals come to live in regulated community with one another was to uncover a common thread which provides some explanation as to the appeal of a concept of self-ownership. This was the idea that property provides the concrete substance to the abstract notion of autonomy when it comes to determining the limits to our actions on things in the world with respect to those of others. Moreover, the idea of ownership granting the individual exclusive use of what is owned and the power to permit others to use it in various ways echoes the way in which we consider autonomous individuals to hold rights over themselves. This might make it appealing to define a principle of autonomy in terms of each individual having ownership of herself. If this is where the source of the appeal comes from, however, it is unclear that it supports a principle of self-ownership on the Nozickian reading, which includes the right to reap the full benefits of one’s actions, or to alienate any aspect of oneself through sale or gift. If there is something about the concept of property ownership which makes it the right framework through which to construct a theory of what kinds of rights autonomous individuals hold over themselves, I suggest this analysis of the reasons that support applying the concept of property in this way only supports a principle that is more limited in scope than the one proposed by Nozick. It also leaves some key questions which would need to be addressed in order to explain what rights are entailed from calling someone an owner of herself. First, we

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<sup>28</sup> Ripstein (2006) p. 233

need a better understanding of the link between the importance of a person's control over herself, and the justification of an institution that enforces and regulates that control, whether it be through property rights or other means. As we saw above, the extent to which one's ownership of certain kinds of object might be limited under an institution of property will depend on the kind of object that is owned. In order to understand why or in what way we ought to think of people as self-owners, and the extent to which we ought to be able to treat persons and their bodies as property, we need to understand both the reasons we have to limit property rights over ordinary things in various ways, and how this could be applied to the person and her body. This involves several complex questions. An initial one to start with is whether a person's body is the kind of thing that we ought to treat as property at all.

Chapter 2 suggested that the appeal of self-ownership stemmed from the idea that the concept of property provides the concrete substance for an otherwise abstract notion of autonomy. Given the failure of the Lockean basis for self-ownership as a fundamental natural right, however, this leaves it an open question as to how to shape a concept of self-ownership, and where to place the limits on the ownership-type rights one might attribute to a person over herself and her body. I noted in section 2.1. that the extent of one’s ownership rights over a given object may be limited depending on the nature of that object. For example, if one owns a listed building in the UK, there are various restrictions on the structural and cosmetic alterations that one can make to it.<sup>1</sup> It would be plausible therefore to think that ownership of oneself could be limited by reasons that arise from the kind of object a person’s body is. A concern that might be raised, however, is that attributing property rights to a person over her body at all would be to treat the body as an object, especially if those rights included the right to alienate parts of oneself. We have seen that Kant’s theory of property insists on a sharp separation between the concepts of person and object. On that view, persons are seen as transcendental subjects who take possession of external objects as property. It is incompatible with Kant’s view of a person’s natural rights over himself that any part of him should be considered property. A second, important feature of Kant’s account was that it proposed property as an institutional framework which is necessary in order to solve a fundamental moral problem. That problem was that we need to be able to claim exclusive use of things in the world in order to enact our purposiveness, but that unilaterally claiming exclusive use of anything impermissibly imposes constraints on the agency of others. The institution of property provides a way of coming to an omnilateral agreement as to how to set rules regarding what is to count as an act of acquisition, alienation, or interference to property. The omnilateral agreement to the institution needn’t rely on any historical claim as to how such rules actually came about. Rather, we are supposed to be able to conceive of the institution of property as something that rational agents would omnilaterally agree upon, and its principles must apply equally to all.

I pointed out that this way of drawing the link between property and the agency of persons contains an interesting point of tension. It starts by assuming a necessary distinction between the sphere of natural rights concerning the person, and the sphere of institutional or acquired rights concerning objects. However, by theorising property as the necessary ground of being able to enact our purposiveness in the world, it seemingly leads to the conclusion that any

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<sup>1</sup> Planning (Listed Buildings and Conservation Areas) Act 1990

interference to those institutional property rights constitutes an infringement against a person's agency. By extension, interference with property thus constitutes an interference with the person. In a sense, from starting from a sharp distinction between persons and objects, Kant's theory ends up drawing objects into the sphere of the person in a similar way that Lockean theories of acquisition suppose that the sphere of the self becomes extended over objects in a way that threatens this sharp distinction.<sup>2</sup> Nevertheless, the suggestion that certain institutional frameworks are required to solve some moral problems concerning the agency of persons is one which merits further investigation. The purpose of this chapter is to put pressure on Kant's insistence on the sharp distinction between the concepts 'person' and 'object', while retaining the idea that there may be certain agency-based moral problems arising from certain classes of human interaction which require regulation through institutional solutions. I will suggest that instead of holding the spheres of person and object distinct, we need to take seriously the fact that we are embodied beings. As such, though the physical human body is in many senses a constitutive part of the person, it is of course also an object. Moreover, there are some ways of interacting with the human body and making use of its parts for which it is appropriate, and perhaps even necessary, to regard the body in its very capacity as a physical object. There may be some such uses for which it is even appropriate to treat the body as an object just like any other ordinary thing. Thinking of the human body as having this dual status as both a constitutive part of the person and as an object for use qua object will lead to a different perspective on the Kantian suggestion that some institutional frameworks are required to solve agency-based moral problems. The key insight will be that some institutions are required to provide the context to ensure that our interactions with one another pay adequate regard to the person, while suggesting that this can be compatible with treating a person's body as an object. If it is possible for institutional frameworks to ensure proper regard for the person through regulating the ways in which we make use of the body as an object, this would indicate that there may be a case to made in favour of treating the body as property in some contexts.

Following Barbara Herman, I suggest that there is an interesting parallel between Kant's argument on sex and marriage and his argument about property. Analysing the parallels between these two arguments will help to shed light on the link between problems that arise from treating the body as and object, and the role that institutions might play in mitigating such problems.<sup>3</sup> Kant argues that sexual desire inherently involves a problematic tendency to objectify the other, because the proper object of sexual desire is the physical body, rather than the person. Given that sexual desire (or at least intercourse) is a necessary part of human life, Kant argues that we require an institutional solution to solve this problem. That solution, he suggests, comes in the form of marriage. Having sex only within the institution of marriage

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<sup>2</sup> A more detailed discussion of this will follow in chapter 6

<sup>3</sup> Herman (1993)



helps to transform the regard that each person has for her sexual partner, to ensure that alongside the problematic objectificatory sexual desire, the act is also done with proper regard for the other as a person. In this way, marriage sanitises sex, which for Kant otherwise inevitably comes packaged up with the moral problem of regarding the other person as a mere object for one's desire.

Drawing a parallel with the institution of property, one might think that an institution which allowed any part of the body to be treated as property would contribute to, rather than help to mitigate, a moral problem of objectification. However, if we reject the strict Kantian separation between 'person' and 'object' and allow that there may be morally acceptable or perhaps even necessary ways of treating the body as an object, then our view of the role of the institution will change. It need not follow from this that treating some aspect of the person as an object would never be wrong. But there will be a compelling case to be made that institutions such as property can play a role in ensuring that the parameters in which the body is treated as an object remain such as to protect the person from being wronged. In that way, rather than seeking to eradicate any instance of the person's body being treated as an object, the institution should be designed to contain it to those instances where it is compatible with proper regard for the person.

### 3.1. WHAT IS WRONG WITH OBJECTIFICATION?

In order to put pressure on the idea that any instance of treating a person or her body as an object constitutes a moral wrong, it will be useful to investigate in more detail the concept of 'objectification' as a distinctive way of wronging a person. What is the force of the reproach "you're objectifying me!"? We typically hear this as a complaint that a person has been treated inappropriately in a way that disregards her as a person with her own mental life, as if she were an inanimate object. But what is it to treat someone like an object? And what is the wrong in treating a person in that way? One broad interpretation of the wrong of objectification is that it involves a particular kind of failure to treat a person with the proper moral regard due to them as a person. This is to assume that the categories 'object' and 'person' are mutually exclusive such that treating a person like an object always involves a moral mistake. However, Martha Nussbaum points out that there are many respects in which we can treat people like objects, but which are not obviously morally objectionable.<sup>4</sup> She suggests the example of a person using her lover's stomach as a pillow on which to rest her head. If we accept that there can be benign ways of treating a person like an object, then treating-as-object and paying adequate moral regard to the person will not turn out to be mutually exclusive. Moreover, the

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<sup>4</sup> Nussbaum (1995)

concept 'objectification' may not pick out a distinctive category of moral wrong. In light of such examples, Nussbaum suggests we should view objectification as a cluster concept involving any possible combination of seven different features of behaviour, which may or may not amount to wrongdoing, depending on the context of the relationship in which they occur.

To many, Nussbaum's account proves unsatisfactory because it moves too far from the intuition that there is genuine force to the complaint of objectification. Indeed, to efface the moral aspect of objectification in a way that made it impossible to understand the complaint of objectification as a reproach would go too far. There is surely some meaning to the ordinary claim that one has been objectified that we understand as a complaint, and which an adequate account of the term ought to be able to explain. Rival accounts to Nussbaum's such as those provided by Catherine MacKinnon and Sally Haslanger start from the assumption that there is content to the complaint, and attempt to define the specific wrong of objectification by explaining what kind of moral failure it involves.<sup>5</sup> This chapter elucidates the central points of disagreement between these two accounts. Gaining a better understanding of the precise points on which they disagree will shed light on a key insight about the points of overlap between the spheres of 'person' and 'object'. It will also help to bring us towards a clearer understanding of the role that frameworks of property might play in helping to overcome certain moral problems of balancing uses of the body as property with a proper concern for a person's agency.

In a recent article, Kathleen Stock argues that there is no serious disagreement between the account of objectification offered by MacKinnon and Haslanger, and the account offered by Nussbaum.<sup>6</sup> Although Nussbaum takes herself to be in disagreement with MacKinnon and Haslanger, Stock argues that the two camps are simply engaged in different projects. Stock takes Nussbaum to be offering an account of the concept 'objectification' as it is employed in ordinary usage, while MacKinnon and Haslanger aim to identify a specific morally problematic phenomenon, and quasi-stipulatively label it 'objectification'. As such, Stock thinks that any apparent disagreements between the two accounts are merely illusory, "For the two theories are engaged in different projects and are not in competition". I argue that Stock's interpretation rests on a misunderstanding of Nussbaum's account, as it sidelines key cases which Nussbaum uses to directly critique MacKinnon and Haslanger, and ignores the central insight of Nussbaum's paper. The purpose of doing this is not to provide a wholesale defence of Nussbaum's account. Rather, it is to put pressure on the assumption that 'person' and 'object' are mutually exclusive moral categories, and to show that any advance in our understanding of the wrong of objectification will have to start from a recognition of persons as essentially embodied beings. That is, that persons in many ways are objects too. This insight will be key to

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<sup>5</sup> C.f. (Haslanger, 2012), (MacKinnon, 1989)

<sup>6</sup> Stock (2015), pp.194-195

shaping an institutional approach to property which is adequately responsive to the reasons we have to treat aspects of the body as property in some contexts, while strongly resisting the conclusion that the body is fundamentally property.

In this paper, I shall follow Stock in referring to the MacKinnon/Haslanger account, though it should be noted that Nussbaum does not refer to MacKinnon's and Haslanger's accounts as one in this way.<sup>7</sup> On the MacKinnon/Haslanger account, to objectify someone is to view and treat her as an object for the satisfaction of one's desire. Objectification is viewed as a relation of domination where the objectifier actually has the power to impose on the objectified person the properties he desires her to have, and to instrumentalise her as a means to his own ends. Sexual objectification therefore involves the subordination of women to men's sexual interests. It is inherently tied to gender, as to be objectified is constitutive of the category 'woman', and to objectify is constitutive of the category 'man'. According to MacKinnon/Haslanger, objectification necessarily constitutes a moral harm, because it is a form of domination under which the person who is objectified is denied subjectivity and full autonomy.<sup>8</sup>

Nussbaum criticises MacKinnon/Haslanger not for using the word 'objectification' in a restrictive way relative to ordinary usage, as Stock would have it, but rather for basing their account on a view of sexual relations which excludes certain central features of sexual life. While Nussbaum's critique of MacKinnon/Haslanger focuses on objectification in the sexual realm, her account of the concept of objectification applies to a broader range of human interactions. Nussbaum denies that objectification constitutes a distinct kind of moral wrong. Instead, she argues that there are at least seven distinct ways of treating a person as an object. Objectification should therefore be understood as a cluster concept which can pick out any number of combinations of these seven features. For Nussbaum, this is not simply a point of linguistic taxonomy. Her aim in identifying the seven features of objectification and the way they present in different contexts is to establish two important points. The first is that depending on context, objectification can be either good or bad. The second is that objectification may be a *necessary* feature of even the best kind of sexual life. It is this latter point on which the core disagreement between Nussbaum and MacKinnon/Haslanger hangs. The key insight behind it, which Stock's reading ignores, is the following: that as embodied beings, there are many spheres of interaction in which we treat ourselves and others as objects in different ways. To assume a

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<sup>7</sup> Stock treats MacKinnon and Haslanger's views on objectification as homogenous enough with respect to their differences to Nussbaum to bundle into one account. It should be noted, however, that Nussbaum mainly targets her critique at MacKinnon and Andrea Dworkin, referencing Haslanger's exposition of MacKinnon only once in her 1995 paper on objectification. However, for the purposes of this paper, I shall follow Stock in referring to the view which Nussbaum opposes as the MacKinnon/Haslanger account.

<sup>8</sup> Stock (2015) p.192, Haslanger (2012) pp.64-65, MacKinnon (1987) p.54

sharp distinction between the moral categories 'person' and 'object' in order to identify 'objectification' as a specific kind of moral wrong is to ignore the nuances of physical interaction between embodied beings, resulting in a moral analysis which is too blunt to capture the complexities of human behaviour. This insight is important because it has implications that reach far beyond the sexual realm. It is therefore well worth bringing attention to Stock's oversight on what may otherwise seem like a narrow point of dispute between Nussbaum and MacKinnon/Haslanger.

Stock thinks the main difference between the two accounts which prompts critics to see them as in opposition is that MacKinnon/Haslanger take sexual objectification to be necessarily morally harmful, while Nussbaum thinks that some instances of sexual objectification can be benign, or even a 'wonderful part of sexual life'.<sup>9</sup> Stock elaborates:

"Equally, one might take there to be substantive disagreements between MacKinnon-Haslanger and Nussbaum-Langton on: whether objectification is essentially epistemically harmful; whether it is essentially tied to gender relations; whether it can involve merely perceiving a person in a particular way, or must involve action or why exactly it counts as sexual. Yet the appearance of all such disagreements is illusory."<sup>10</sup>

Stock thinks such disagreements are illusory because MacKinnon/Haslanger and Nussbaum are engaged in different projects, each with different criteria of success, such that both could be apt. She argues that the MacKinnon/Haslanger account identifies a specific form of domination and labels it 'objectification' with a view to explaining this behavior and engaging in effective moral criticism. The aim of Nussbaum's cluster concept, on the other hand, is to capture all the kinds of behavior that people have historically referred to as 'objectification' in ordinary language. Its criterion of success is just whether it captures all the significant contexts in which the concept is ordinarily applied.<sup>11</sup> This reading allows Stock to suggest that MacKinnon/Haslanger's concept could fit within Nussbaum's cluster concept. It would simply be seen as one of the kinds of behaviours that we might ordinarily call objectification, and one that is necessarily morally problematic. Stock suggests that MacKinnon/Haslanger could well accept that there are other types of behavior that we ordinarily call objectification and which are not necessarily problematic, it's just that what they are interested in identifying and explaining is a specific moral wrong. The two accounts, according to her, can thus happily coexist.

Stock acknowledges that Nussbaum criticises MacKinnon for being 'insufficiently sensitive' to the human complexities of sexual life, but doesn't engage in enough depth with what Nussbaum takes the substance of her critique of MacKinnon/Haslanger to be. Where

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<sup>9</sup> Nussbaum (1995) p.251

<sup>10</sup> Stock (2015) p.194

<sup>11</sup> Stock (2015) p. 195

Stock goes wrong is to think that Nussbaum's argument is only about the different ways in which a person can be *said* to be treated as an object. An important part of Nussbaum's actual disagreement with MacKinnon/Haslanger is that the latter identify two basic Kantian wrongs at the heart of what they call sexual objectification, namely instrumentality and denial of subjectivity. They then assume that other features such as inertness, fungibility and ownership logically follow from these wrongs. Nussbaum's aim is partly to show that these are logically distinct ideas. On this point, Nussbaum is not simply casting a wider net to fit ordinary language use, but is engaging with the very point which Stock takes to be the criterion of success for MacKinnon/Haslanger. That is, whether their account offers explanatory value as a useful way of grouping observed phenomena in the world, and can be used as a tool for effective moral criticism:

“But it is important to insist that these are logically independent ideas (...) So what we want to know is: How are they connected here? What should make us believe that a typical male way of relating to women as non-autonomous brings these other consequences in its train? (...) If we are contemplating institutional and/or moral change, we need to understand these connections clearly, so that we will have a sense of where we might start.”<sup>12</sup>

Nussbaum's criticism here is as follows: The MacKinnon/Haslanger account is not a useful way of grouping observed phenomena in the world, because it does not provide an adequate explanation of how these logically distinct phenomena (instrumentality, denial of subjectivity, inertness, fungibility and ownership) are connected. Its failure to recognise these phenomena as logically distinct obscures the explanatory value of 'sexual objectification' as MacKinnon/Haslanger define it, rendering the term a less effective tool for moral criticism or social change.

MacKinnon/Haslanger assume that these phenomena are connected because they are constitutive of treating something as an object. They assume that the treating-as-object is what explains the connections between the various phenomena. Furthermore, the treating-as-object is supposed to constitute a distinctive moral wrong. Nussbaum responds that we need to understand which feature of the behaviour identified actually explains its moral wrongness, and she is not satisfied that MacKinnon/Haslanger provide an adequate explanation of this. Her strategy is as follows: by working through examples, she shows how each of the above phenomena can be present in a sexual encounter independent of the other features, and without the encounter being morally problematic. By doing this, she shows that these are logically independent phenomena, and that each is not necessarily morally problematic. Moreover, some might even be a necessary part of a good sexual life. If that is the case, then the way that

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<sup>12</sup> Nussbaum (1995) p.270

MacKinnon/Haslanger identify a group of features and label that grouping sexual objectification doesn't yet explain what it is about that phenomenon that makes it a distinct moral wrong.

Nussbaum's point against MacKinnon/Haslanger is that it is a mistake to think that these features are essentially part of the same thing. Furthermore, if there is some explanation of how the features are manifested in a way that makes the behaviour wrong, Nussbaum suspects that the explanation will be some more basic wrong of failing to treat the person with proper moral regard as a person. If this is the case, then what explains the wrongness in what MacKinnon/Haslanger call 'objectification' will be the same thing that explains why lying, murder, or any number of other ways of wronging a person, are wrong. Not only is the treating-as-object not the feature that makes it wrong, Nussbaum wants to say that features such as denial of subjectivity, instrumentality, fungibility, and ownership are all ways of treating a person like an object, but this fact alone does not make them morally problematic. To call this specific grouping of phenomena 'objectification' serves to obscure, rather than illuminate, why the treatment of women that MacKinnon/Haslanger describe is wrong.

To understand the full force of Nussbaum's critique, it is important to recognise that the disagreement over how to explain the wrong of sexual objectification stems from a more fundamental disagreement about sexuality itself. For MacKinnon/Haslanger, sexual relations have to be understood within the wider context of patriarchal gender relations, which themselves are constituted by objectification. On MacKinnon's account, the gender categories 'man' and 'woman' are partly constituted by hierarchical sexual relations in which 'man' is dominant and 'woman' submissive, and this hierarchy itself is eroticised. So when MacKinnon says, "To be sexually objectified means having a social meaning imposed on your being that defines you as to be sexually used, according to your desired uses, and then using you that way",<sup>13</sup> she is not only describing something which she thinks happens when sex goes *wrong*, but a phenomenon which she believes to be constitutive of what it is to be a woman in the existing social model ("Doing this is sex in the male system"<sup>14</sup>). Nussbaum signals that she wishes to challenge this view when she highlights the following two passages from MacKinnon: "Women's experience of sexual objectification ... is definitive of and synonymous with women's lives as gender female." And "All women live in sexual objectification the way fish live in water."<sup>15</sup> On the MacKinnon/Haslanger account, sexual objectification stems from asymmetrical structures of power which are prior to any individual sexual encounter, and which it is impossible for individuals to transcend while they are still tied to their gender roles.<sup>16</sup> This

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<sup>13</sup> MacKinnon (1989) p.329

<sup>14</sup> *Ibid.*

<sup>15</sup> Nussbaum (1995) p.250, quoting MacKinnon (1989), p. 124.

<sup>16</sup> Though Nussbaum (p.268) notes that Dworkin seemed to think that sex between gay men was a possible exception to this.

is the central point on which Nussbaum disagrees with the MacKinnon/Haslanger view of sexuality.

The comparison that Nussbaum draws between Marx and the work of MacKinnon and Andrea Dworkin is instructive here. Nussbaum points out, "MacKinnon has written that sexuality is to feminism what work is to Marxism: In each case something that is most oneself and one's own is what is seen by the theory to have been taken away."<sup>17</sup> Both Marx's worker and MacKinnon's woman are instrumentalised and denied autonomy in a way which negates their humanity. Nussbaum takes the common point between Marxism and MacKinnon to be that each describes the wrong being perpetrated in terms of people being reduced to objects in certain ways. This is most evident in the way that Marxism describes relations of ownership being instantiated between capitalists and their workers. On both accounts, something that is deeply tied to a subject's personhood is treated as an object under someone else's control – the capitalist owns the worker's labour, and woman's sexuality is owned by man, in that the shape of female sexuality is determined by male desire. What is supposed to be particularly bad about this is that it stifles autonomy by denying the person the possibility of controlling a central part of herself. Neither the worker nor the woman is fully the author of herself. In each case, the structural relations place something that is fundamental to the person's identity as an autonomous being under the control of someone else. In abstract terms, this relation of control mirrors the relation of slavery, the only difference being that in a master-slave relationship, it is the whole of the person that is controlled by the master.

Nussbaum thinks that both Marxism and MacKinnon take the analogy with slavery too far, and it is this purported mistake which best illuminates where Nussbaum's view of sexuality diverges from MacKinnon's. In a footnote, Nussbaum comments:

"One might certainly wonder whether Marx has underestimated the distinction between the worker's situation, based on a contract in which there is at least some kind of consent, and the situation of the slave, which lacks any sort of consent. This tendency to equate relations that may be subtly distinct is closely related to MacKinnon and Dworkin's tendency to efface distinctions among different types of sexual relations."<sup>18</sup>

Note that Nussbaum is not arguing that there is nothing in common between slavery and the problematic relations identified by Marxism and MacKinnon, merely that they tend draw the analogy too closely. Just as the Marxist is committed to saying that all wage labour under capitalism shares something in common with slavery, Nussbaum thinks that MacKinnon/Haslanger are committed to the view that all sexual encounters under current social structures of gender involve some threat to autonomy. Nussbaum may agree that while

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<sup>17</sup> Nussbaum (1995), p.263-264

<sup>18</sup> Ibid.

the wider societal context within which people have sex is problematic, she is pointing out that there are features of individual sexual relationships which can make an important difference to whether any given relationship or encounter is tainted by this particular problem, even where those encounters display the features of instrumentality, denial of subjectivity, inertness, fungibility, or ownership.

The point of the many examples Nussbaum draws on is partly to explore and illustrate these possible difference-making features. Many of the examples are drawn from works of literature, and Nussbaum underlines the importance of recognizing the many layers of context involved in literary analysis. Her point that, 'In the matter of objectification, context is everything',<sup>19</sup> applies equally to moral analysis of real-life interactions. The context of the relationship makes a difference to whether the logically distinct features of objectification come coupled with a failure to treat the person with proper moral regard, or whether they appear as benign features of the encounter. The only context that MacKinnon/Haslanger take to be relevant to the analysis of sexual objectification is the wider social and historical context of female subordination. Nussbaum thinks their unwillingness to recognize that there are further layers of context within that wider framework which make a difference to the moral status of individual encounters renders their concept of 'sexual objectification' too blunt to be an effective tool for moral criticism.

So far, one might still think that Stock's interpretation can be defended in the following way: MacKinnon/Haslanger are not interested in doing moral criticism at the level of individual interactions. The purpose of their concept of sexual objectification is not to locate instances where one person wrongs another. It is rather precisely to critique the more general societal framework at that higher level. Even if Nussbaum is doing more than simply elucidating the concept of objectification as it is used in everyday language, there is still no real disagreement between the two, because Nussbaum is interested in something that individuals do to each other, while MacKinnon/Haslanger are only concerned with the wider societal framework.

If we delve a bit further into the way that each account characterizes sex, however, we will see that this interpretation, too, is misguided. As mentioned above, there is a strong Kantian undercurrent to the MacKinnon/Haslanger account, which can be seen in the emphasis on instrumentality and denial of subjectivity as the key features that define the wrong of sexual objectification. If we compare the way that these are taken to enter into the equation in sex by Kant, by MacKinnon/Haslanger, and by Nussbaum, we can start to see more clearly where these accounts diverge.

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<sup>19</sup> *Ibid.* p.271



Kant took sex to be necessarily problematic. For Kant, the sexual appetite was such that engaging in sex necessarily involved treating one's sexual partner as a mere means to the satisfaction of one's desire. Even where sex is consensual, because being treated as a mere means is not the sort of thing Kant thought it was permissible to consent to, sex by its nature is morally impermissible. However, Kant also recognized that sex is a necessary part of human life, and so we are faced with the dilemma of how to deal with this activity which is both necessary and morally impermissible. In chapter 2, I explained that Kant theorized property as arising from a problem of the same form: that it is necessary for us to claim exclusive use of things in the world in order to enact our agency, and yet it constitutes an impermissible restriction on the agency of others to do so unilaterally. For Kant, this problem required a solution in the form of an institution of property, because there is no naturally determinate way to set rules for the allocation of property rights.<sup>20</sup> Barbara Herman suggests that if Kant's justification for the institution of marriage parallels that of property, it must be because there is similarly no naturally determinate way of setting what it would involve to regard one's sexual partner as a person.<sup>21</sup> With that in mind, we can set out the Kantian argument for marriage in the same way we previously set out the Kantian argument for property:

- (1) The objectification that is necessarily involved in sexual appetite is wrong.
- (2) Without the possibility of the permissible exercise of sexual appetite, sex is morally impermissible.
- (3) Our biological nature is such that sex is necessary for us.
- (4) Since sex is necessary for us, an institution which defines conditions for the legitimate exercise of sexual appetite is both necessary and justified.

Herman points out that the step from (2) and (3) to (4) is puzzling, and perhaps more so than the corresponding step in the argument for property. The question it raises is how marriage legitimizes the exercise of sexual appetite and the objectification that it necessarily involves. Herman considers one possible argument to this effect, provided by Kant in his *Lectures on Ethics*.<sup>22</sup> According to that argument, by joining husband and wife together as one will, in marriage each partner gains themselves back even as they surrender their own will to the other. This type of argument would legitimize sex within marriage as follows: Sex necessarily involves objectification, in the sense that each partner desires the other merely as a means to his or her own sexual satisfaction. This is impermissible, and cannot be made right merely by each party consenting to be used as such. Such consent itself would be impermissible or illegitimate, as for

<sup>20</sup> C.f. Herman (1995) p.67, Pallikkathayil (2017)

<sup>21</sup> (1995) p.68

<sup>22</sup> Kant (2001)

Kant, a person cannot consent to being wronged. In marriage, however, the two wills are joined as one, meaning that each partner takes on the ends of the other as their own. This makes the use of each by the other merely as means impossible, because the fact of having shared ends means that whatever they do, each is always simultaneously pursuing the ends of the other in pursuing his or her own ends.

However, Herman is not convinced by this argument, and thinks that a different argument proposed by Kant in the *Rechtslehre*<sup>23</sup> is more convincing, and provides a closer parallel to the property argument. According to Herman's take on this argument, the purpose of the institution of marriage is to block the transformation of regard that comes with sexual appetite. Marriage does this by securing a juridical relationship of rights and responsibilities between the partners. The specific institutional rules for this are to some extent arbitrary, because the question of how to regard one's sexual partner as a person is to some extent open. On that point, we could again invoke the problems of indeterminacy, adjudication and assurance that Pallikkathayil elucidates with respect to the property argument. The purpose of marriage is to secure moral regard for one's partner as a person in her own right with equal juridical standing in the relationship, and to make acceptance of obligations towards that person's welfare a condition of sexual activity. One could argue that unmarried sexual partners who relied purely on the idea of mutual love or respect would lack the publically recognized declaration of the responsibilities of each to the relationship of the kind that marriage provides. This would leave it indeterminate what kind of obligations each had to the other, and whether or not each was treating the other as an equal party to the relationship. For Kant, it is important that husband and wife are publically established as equal juridical persons. For Kant, it seems that the solution to the moral impermissibility of sex is that within marriage, one no longer has sex with one's partner as a mere object, but always in their capacity as 'husband' or 'wife', which are identities that are firmly defined as equal partners under the public institution of marriage. For Kant, this has the effect of blocking the transformation of regard that comes with sexual appetite: "through mediation by law, the natural tendencies to objectification, and so dominance and exploitation, in sexual relations are blocked."<sup>24</sup> It is important to note, however, that for Kant, even within marriage the nature of sexual desire remains unchanged, so the tendency to objectification remains, it is simply contained within a sanitising framework. We thus start from a problem contained in natural desire, and solve it through an institutional structure designed to regulate our conduct.

For MacKinnon/Haslanger, the problem of objectification is introduced the other way around. There is no suggestion that sexual desire itself involves some natural tendency to objectification, rather that the societal and institutional structures that shape gender and

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<sup>23</sup> Kant (1996) [1797]

<sup>24</sup> Kant (1996) [1797] p.67

sexuality cause asymmetrical power structures within which sex and sexual desire become the expression of and vehicle for the objectification of women. The assumption behind MacKinnon/Haslanger is that if we could only fix the societal framework around gender and sexuality, then sex would be free of objectification and all its problematic consequences.

Nussbaum, perhaps surprisingly, is more closely aligned with Kant in this regard. She hints that objectification may be an intrinsic part of sexual life, and perhaps even necessary to the best kind of sexual encounters. Note that it is not only the peripheral aspects of objectification that Nussbaum thinks can be a wonderful part of sex, but also the central Kantian notion of a (mutual) denial of autonomy. Indeed, it is the surrender of autonomy which Nussbaum identifies as the key marker of what she considers to be good sex in the examples drawn from D.H. Lawrence.<sup>25</sup> So for Nussbaum, mirroring Kant, objectification *is* intrinsic to sexual desire, but it needn't be morally problematic, as long as the objectification is consensual and reciprocal.<sup>26</sup> She points out that what one might call Lawrentian objectification involves the very same features which MacKinnon/Haslanger take to be involved in sexual objectification: denial of autonomy, denial of subjectivity, surrender of agency, inertness, fungibility, even violability. In the examples which Nussbaum draws from D.H. Lawrence's *The Rainbow*, these features are present in the sexual encounters between Brangwen and Lydia as a wonderful part of their sexual life. The key aspect that makes this wonderful, rather than abusive, is the willing resignation of autonomy and subjectivity which the characters share with each other. According to Nussbaum, "The power of sexuality is most authentically experienced, in [Lawrence's] view, when the parties do put aside their conscious choice-making, and even their inner life of self-consciousness and articulate thought, and permit themselves to be, in a sense, objectlike."<sup>27</sup>

The crux of Nussbaum's argument is that context matters. She does not disagree with MacKinnon/Haslanger on the point that there are aspects of the wider societal framework which can have a harmful influence on sex and sexuality, but insists that this features as one of many factors which must be taken into consideration in any moral analysis of sexual relationships. Nussbaum may accept that patriarchal structures contribute to a harmful, asymmetrical kind of objectification. But it is a mistake to think that the features that MacKinnon/Haslanger identify in this particular manifestation of sexual objectification hang together as a logically cohesive and distinct category of moral wrong. For Nussbaum, they have simply identified one way in which sexual objectification can be distorted in a harmful way. But just as the choice and consent of a worker under a capitalist regime distinguishes the relationship

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<sup>25</sup> Nussbaum (1995) p. 273-274

<sup>26</sup> There is also an interesting parallel between the way in which Kant writes about marriage as the union of two persons through shared ends, and the dissolution of individual boundaries in Nussbaum's description of Lawrentian sexuality.

<sup>27</sup> Nussbaum p.273

between worker and capitalist in an important way from that of a slave to slave-owner, there is space for individuals to have relationships with features of objectification which avoid the harmful effects of the wider social structure within which they operate.<sup>28</sup> What matters is whether those power imbalances are instantiated in the individuals' relations with each other. The disagreement could be summed up as follows: for MacKinnon/Haslanger, it is sexual objectification which turns sexuality bad, but for Nussbaum, it is sexist structures which turn sexual objectification bad.

The purpose of this paper is not to defend wholesale Nussbaum's alternative account of objectification, nor to suggest that she successfully defeats MacKinnon/Haslanger on every point of disagreement. But it is important to recognise that there are real points of disagreement between the two accounts. Not least because to brush over those disagreements as Stock does effaces a key insight of Nussbaum's paper. As I suggested above, there is a tendency to insist on a strict separation of the concepts person and object. The proper treatment of persons, we think, must involve always treating them as autonomous subjects. But to insist on too strict a separation of these categories as mutually exclusive ignores the fact that we operate in the world with and through our physical bodies. And there are some realms of interaction where the proper object of desire or interest is the physical body. As such, we need a more nuanced approach to the moral analysis of these spheres of interaction than 'treating as object = bad', 'treating as autonomous being = good'. What Nussbaum prompts us to think about is what other factors bear relevance on whether a given instance of treating a person's body as an object is also compatible with proper regard for them as a person.

#### 3.2. INSTITUTIONS AS KILL OR CURE

This latter point can help to bring us towards a better analysis of what we require from an institution of property. I suggested that one of the key insights from Nussbaum's paper is that there are some uses of the body where the appropriate object of our desire or interest is some part of the body as an object. Nussbaum's discussion of objectification shows that sex is one such example where treating another person like an object in the right context can be entirely appropriate and even enhance the experience for both parties involved. Nussbaum does not deny that there are pernicious ways of treating another person like an object. On the contrary, many of the examples she highlights involve just that. Correspondingly, she does not dispute the seriousness of the sexist structural phenomenon identified by MacKinnon and Haslanger. Nussbaum's disagreement with them is mainly on the question of whether the notion of

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<sup>28</sup> Note, however, that it is not the mere presence of consent which renders the objectification unproblematic on Nussbaum's view, but rather the willingness of each party to surrender to the other in the Lawrentian way she describes, and the mutuality of the encounter.

treating-as-object is sufficient to define the problem. Linking back to the Kantian suggestion that some institutional structures might be required to solve certain moral problems, this insight gives us a different perspective on what kind of institutional solution might be required to solve problems associated with objectification. If we agree that there may be some benign or even wonderful cases of treating a person like an object, and that it is possible for objectification to happen in a very pernicious way, it would be plausible to conclude that we ought to shape the institutions that regulate our behaviour towards one another in such a way as to allow for (or perhaps even encourage) benign objectification, while blocking pernicious objectification. This conclusion will be even more compelling if we accept that there may be some ways of putting a person's body to use which necessitate treating it as an object. The key features of the context that Nussbaum highlighted as salient in the benign cases of Lawrentian objectification were that the acts were consensual, that the objectification they involved was mutual, and as a result, no damaging power imbalance was created. We saw that the MacKinnon/Haslanger account assumed that sex would be free of objectification if we could only change the damaging patriarchal structure around gender hierarchies and sex. In light of Nussbaum's argument, one could well agree that those patriarchal structures are problematic, but in light of the fact that they create and perpetuate damagingly skewed relations of objectification. In response, we ought not to seek to eradicate objectification in our interactions with one another, but rather to create conventions and institutional structures which establish the possibility of engaging in consensual and mutual objectification while dismantling damaging power hierarchies.

Linking this to the questions with which we started concerning treating the body as property, there is clearly a link between treating the body as property, and treating the body as an object. Many critiques of various markets in human bodies or body parts build the case against commodification of the body on the basis that such practices create problematic power relations between those who trade with their bodies and the buyers in those trades. On a wider scale, it is suggested that commodification has damaging effects beyond those who actively participate in the markets. For example, Debra Satz argues that markets in sex work create a 'theater of inequality' which perpetuates the damaging stereotype that women's bodies are primarily objects of desire to be consumed by men, and that women are sexually subservient to men.<sup>29</sup> This line of argument has clear parallels to the view of objectification developed by MacKinnon and Haslanger. But now, having rejected the idea that treating-as-object is necessarily incompatible with adequate regard for the person, instead of concluding that all markets that treat the body as an object necessarily pose a threat to agency, we can start to flesh out what kind of institutional approach is required to allow contexts of objectification which adequately protect the person. We can accept that there may be cases where it is appropriate

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<sup>29</sup> Satz (2010)

or even necessary to treat certain aspects of the body as though they are objects which can be traded as property. That being the case, the rules of our institution of property ought to make provision for those circumstances, while including adequate measures to prevent problematic hierarchies of power from being created and perpetuated. Moreover, it may be the case that we require certain institutional structures to regulate our interactions with one another in a way that ensures proper regard for the person. Again, it is important to note that simply treating-as-object does not necessarily constitute a problematic hierarchy of power.

It was noted that the points of context that Nussbaum highlighted as salient in the cases of benign objectification were largely to do with personal features of the interaction between the characters. The mutuality of the objectification largely depended on their attitudes towards one another, towards the act, and their mutual willingness to surrender themselves to becoming objectified. One of the complicating factors in all this is that the institutional structures which we live under often have a powerful hand in shaping those personal features of interactions. What this means is that when we insist that context matters, we must keep an eye on the fact that context matters at the institutional level, at the interpersonal level, and at the level of what conventional social values we tend to attach to certain things, including aspects and uses of the body. In order to construct an institutional approach to property that takes a pragmatic stance on where and when to treat the body as property, it will be necessary to take account of each of these levels, and their potential impact on the agency of individuals.

There are many ways in which institutional structures might solve moral problems for us. Nussbaum emphasises that the interpersonal aspects of interactions can make a crucial difference as to whether certain features of an interaction threaten to wrong any of the persons involved.<sup>1</sup> She suggests that where sex involves each partner treating the other as an object, even to the extent of involving denial of autonomy and subjectivity, this may be a wonderful feature of the interaction, rather than a concerning one, if it happens in a way that is mutual and consensual. Likewise, where a person treats her lover's stomach as a pillow, that creates no cause for concern if the wider context of the relationship is one in which the lover is treated as more than just a pillow.<sup>2</sup> Nussbaum's more general point is that it is possible to objectify a person (in many senses of treating her like an object), without thereby wronging her. And where objectification happens without wronging, there is no reason for us to be concerned about the objectification. I suggested that this view has implications for how we think about the role of the institutions we use to regulate our behaviour towards one another. In particular, it will have implications for the institutions, like property, which might be involved in regulating interactions in which the body is treated like an object. This is because we might require some institutional frameworks in order to ensure that our interactions with other people don't involve wronging them. We saw that the question of treating the body like property is closely linked to the idea of treating the body as an object. Moreover, even if we allow that there are benign or even wonderful cases of objectification, we ought still to take seriously the feminist arguments that certain kinds of objectification can pose a serious threat to the agency of those who are systematically objectified in that way. We ought therefore to demand of institutions such as property that they allow for benign ways of treating the body as an object which we have a reasonable interest in engaging in, while blocking the pernicious ways of doing so that cause persons to be wronged. In this way, institutions have a role in shaping the context within which we interact. They do so by instituting rules to ensure that we do not wrong each other.

Before fleshing out in more detail how one might approach the design of such institutions, it will be necessary to provide a more detailed account of the way in which context matters to whether a given use of the body is benign or pernicious. I suggested above that there are three levels of context which factor into our assessment of the permissibility of an act. The first was the institutional level, as I suggested that certain regulatory structures have a role to play in

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<sup>1</sup> Nussbaum (1995)

<sup>2</sup> *Ibid.* p265

shaping our attitudes to each other in certain interactions. Second, there are also conventional social values that may have bearing on this. Finally, there are features of personal relationships that affect the meaning of our interactions with one another. Certain conventional structures can fulfil a similar role to institutions, by putting in place conventional rules for behaviour which help us to navigate our interactions with one another to avoid wronging each other. I will argue, however, that these institutional and conventional structures do not perfectly map the underlying moral structure of our interactions. Though they may put rules in place to ensure that we avoid wronging each other, there are circumstances where it is possible to break the institutional or conventional rules without wronging another person. This insight will help us towards a better understanding of property as an institutional structure.

So far, we have rejected the approach to self-ownership which held property to be fundamental, on the basis that absent Locke's theological underpinnings, there was inadequate motivation for transposing property rights onto the person as we understand them to range over ordinary objects. Kant's theory offered an alternative explanation of property as grounded in the fundamental right to enact our purposiveness in the world. However, I argued in chapter 3 that there are reasons to challenge the sharp distinction the Kantian account insists on between the spheres of person and object. Following the insight that as embodied beings, there are certain contexts in which it is appropriate to use the body in its capacity as an object, we need an account of the institutions which regulate our behaviour that can take account of this fact. As suggested in the introduction, the contexts in which we have reason to treat aspects of the body as an object include some where we treat the body as property. We therefore need an explanation of property which can explain why some aspects of the body might be alienable as property, while others may not be. Recognising a distinction between the underlying moral features of interactions on the one hand, and the way in which our conventions and institutions construe these as regulated through a transactional system of claims on the other will help us towards constructing such an account. The first step in establishing this distinction and its relevance to understanding property will be through an analysis of consent. Consent features as an important component in the concept of ownership. Having ownership of an object typically excludes others from being able to use that thing unless one consents to them doing so. As we saw in chapter 2, it was this feature of property which lent intuitive appeal to the concept of self-ownership, because we take people to have rights of a similar form over their own bodies. Gaining a better understanding of the normative significance of consent with respect to our bodies will provide more clarity on the relevant points of similarity between ownership of property and ownership of one's body.



## 4.1. CONSENT

The first question to address is which are the relevant moral features of an interaction which institutional structures ought to protect? Nussbaum provides some suggestions in this direction, but does not give a full account of what the crucial features of the context are which mark the difference between benign and pernicious objectification. Among the features she mentions as salient are that the objectifying act is mutual, consensual, that the subject has either consented to it, or does not mind it, and that there is a general recognition of the person as more than a mere object.<sup>3</sup> One straightforward way of answering the question as to what makes the difference between a morally permissible use of the body and a morally impermissible one would be to invoke the notion of consent. On a simple interpretation, one might argue that any use of the body which a person has consented to is morally permissible, while any act that she has not consented to is impermissible. Indeed, a common view of consent is that an act of consent renders permissible those acts that would otherwise be impermissible. On that description of consent, one might think it possible to explain that an objectifying act is benign if consented to, and if carried out in the wider context of a relationship where each partner takes seriously the importance of gaining the other's consent before doing anything to their body. This might also provide an important distinguishing feature between persons and objects – that in order to permissibly treat a person as an object, one must first gain her consent, while the same clearly does not apply to treating objects as objects.

There are, however, some difficulties with that straightforward view of consent as the crucial difference-maker. One difficulty is that it strongly downplays concerns about pernicious structural effects of the kind raised by MacKinnon and Haslanger.<sup>4</sup> Recall that Nussbaum's critique did not go so far as suggesting that objectification is never problematic in the way that they describe, only that the fact of treating-as-object is not sufficient to explain why those forms of objectification are wrong. An important message from MacKinnon and Haslanger's work which ought not to be ignored is that there are certain structural features that govern our relations to one another which can make some interactions problematic despite the fact that those interactions involve each party giving their consent to what is done to them. Another difficulty is that there are some contexts in which it is permissible to do something to someone despite the fact that they have not given their consent to it. Nussbaum's example of a person using her lover's stomach as a pillow is a case in point. If this happens while the lover is asleep and has not given his consent, Nussbaum suggests there is still nothing concerning about this

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<sup>3</sup> The fact that Nussbaum does not take actual consent to be necessary for permissibility of physical contact is evidenced in the following passage: "If I am lying around with my lover on the bed, and use his stomach as a pillow there seems to be nothing at all baneful about this, provided that I do so with his consent (or, if he is asleep, with a reasonable belief that he would not mind)" p.265

<sup>4</sup> Cf. Haslanger, (2012), MacKinnon, (1989)

way of treating the lover, as long as one has reason to think he won't mind it.<sup>5</sup> There are countless examples of physical touches given in the context of intimate relationships which involve no clearly identifiable act of consent, and yet which we take for granted as entirely permissible. If the act of consent is neither necessary nor sufficient for an interaction to be morally unproblematic, then we need a different account of the features of interactions which our institutions ought to protect and encourage.

Recall that one of the features listed by Nussbaum was whether the person who is objectified is generally treated as more than a mere object in the wider context of the relationship. Simply stating this somewhat begs the question. If the question was whether objectification compatible with proper recognition of the person, this just tells us that objectification is fine in circumstances where it is compatible with proper recognition of the person. In order to understand where objectification can occur without wronging, we first need to be able to explain what counts as wronging.

In this section, I argue that the act of signalling consent should be understood as a convention we use to ensure that our actions towards others do not involve wronging them. However, the act of consent or lack of it is not the criterion that determines whether or not a person has been wronged. Moreover, I will argue that the mechanism of consent has a transactional character to it. I mean by this that we take the act of consent to trigger an exchange of certain claims, privileges, powers and immunities over one's body, in such a way that we are able to track which acts have been rendered permissible, and which not. We ought to think of this transactional structure as a feature of the convention of consent, which is distinct from the features of the interaction which determine whether or not a person is wronged by the interaction.

To illustrate this by example, consider a person standing in a public place. We would ordinarily think it impermissible for someone to come and stand on his foot. If we think that the man has a claim against having his foot stepped on, we could give an account of the form of this claim in Hohfeldian terms. If the man has such a claim, it is plausible that it has a complex internal structure, which allows the man to waive that claim with respect to certain people at certain times, by giving consent to others to step on his foot. The widely accepted Hohfeldian structure provides an analysis that explains this complexity by describing rights as ordered arrangements of basic components. The four basic categories of component are the privilege, the claim, the power and the immunity.<sup>6</sup> A Hohfeldian explanation of the specific right the man has over his feet would be as follows: the man has a privilege to use his feet as he sees fit; he has a claim against others making use of his feet; he has an immunity against others altering his claims and privileges regarding his feet; and he has the power to waive, annul, or transfer his

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<sup>5</sup> Nussbaum (1995) p.265

<sup>6</sup> Wenar (2015)

privileges and claims over his feet. For a stranger to simply step on his foot without asking would be for that stranger to violate a claim that he has against her doing this. The stranger, however, might ask the man for consent to step on his foot (perhaps he is wearing platform shoes and she wants a better view of a crowded concert they are both attending). If the man consents to this, he waives his claim against the stranger standing on his foot, and gives her the corresponding privilege of doing so. He can of course withdraw this consent at any time, thereby reinstating his claim and withdrawing her privilege.

If we understand the mechanism of consent as operating on the Hohfeldian form described above, the transactional character of consent starts to emerge. What I mean by this is that consent involves an exchange of some Hohfeldian incidents between people. Using the typical legal analogy of viewing Hohfeldian property rights as sticks in a bundle, we might think of the operation of consent as a swapping of sticks. The comparison to property here is apt because in terms of the way in which claims and privileges are exchanged, the operation of consent is relevantly similar to the Hohfeldian analysis of the exchange of incidents that is characteristic of property transactions. From a Hohfeldian perspective, a transfer of property happens at the point at which the property rights are transferred, rather than on transfer of the physical object in question.<sup>7</sup> One might object to lumping together property exchanges and consent in this way by insisting that what we mean by the term transaction is actually the transfer of the second-order Hohfeldian incidents. Those are the powers to waive, annul, or transfer your claims and privileges over the thing in question, and the immunities against others altering those claims and privileges.<sup>8</sup> It may be that what is distinctive of property, as opposed to other sets of Hohfeldian rights, is that it involves alienation of these second-order powers and immunities. It is that kind of irreversible alienation, so the objection goes, which we should call transaction, not merely the waiving of first-order claims and privileges. I accept that there may be a significant distinction between the alienation of second-order incidents and alterations of the first-order incidents. The significance of this distinction warrants more discussion, and will be addressed in more detail in chapter 6. It is partly in recognition of this distinction that I say that this understanding of the mechanism of consent has a transactional character to it, rather than labelling it a transaction in the very same sense as exchanges of goods.

It will help to clarify why I think the similarity between the form of the exchange of incidents in consent and that in property transfers warrants categorisation under the same term if I now explain what I take to be the significance of labelling this exchange of incidents transactional. The Hohfeldian view of the operation of incidents described above assumes that a person has to do something in order to effect a change in the structure of her rights. If she has

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<sup>7</sup> Though the terms of some transactions might be that the exchange of rights is triggered by the physical handover of the object.

<sup>8</sup> For the distinction between second- and first-order incidents, see Wenar (2015).

a claim against a certain interference against her body, she must do something to trigger the waiving of the claim which makes the interference permissible. As we saw above with Nussbaum's example of the sleeping lover's stomach being used as a pillow, there may be cases where a person does nothing to waive any such claim, and yet we do not think the action impermissible. Nussbaum suggested that either consent, or a reasonable belief that the lover will not mind that interference could explain why the act is not problematic. Véronique Munoz-Dardé has argued that the purpose of consent is to provide assurance that one is not going to wrong someone by acting with or on them in some way.<sup>9</sup> Combining Nussbaum's suggestion and Munoz-Dardé's arguments about the purpose of consent, this section suggests that we ought to understand the significance of consent as a pragmatic way of conveying to each other reasonable beliefs about whether a given interaction with another person will wrong them. However, the act of consent is not necessary for a person to acquire reasonable belief to that effect. There may be other features of a person's wider relationship with another or of a specific social situation which are sufficient to provide such a reasonable belief. The fact of having a reasonable belief that the person will not mind is not, in itself, sufficient to ensure that one does not in fact wrong them by interacting with them in the way one reasonably believes they will not mind. Whether or not a person has a reasonable belief about the permissibility of a certain interaction has bearing on the extent to which we ought to hold them culpable for a violation if the way in which they interact with another person does turn out to wrong them. It does so partly because the fact that a person has a sincere and reasonable belief that her sleeping lover won't mind having his stomach used as a pillow, and would otherwise have refrained from doing that, indicates that she is acting out of proper regard for her lover as a person who must not be wronged. What actually makes the difference as to whether someone is wronged by a given interaction, however, is not the fact that the person doing it had a reasonable belief that the interaction would be welcome, but rather whether or not the subject of the interaction could reasonably reject the intrusion which they feel aggrieved by.

Returning to the example of the man who has his foot stepped on will help to bring out this distinction between the transactional operation of claims and wronging. Consider again the man and his foot. To recap: the man, wearing platform shoes, is standing in a crowded public place watching a concert. A woman who wants to see the show, but cannot see over the crowd, wants to step up a little higher so she can see better. There are a few possible ways the scenario could go:

- 1) The woman asks for the man's consent to stand on his feet. The man says no, so she does not step on his feet.

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<sup>9</sup> Munoz-Dardé (2016)

- 2) The woman asks for the man's consent to stand on his feet. The man says yes, so she steps up onto his feet.
- 3) The woman stands on the man's feet without asking for his consent or communicating with him in any way. The woman is not particularly heavy, and the man is wearing steel-capped boots, so she does not injure him or cause him any pain, but he is alarmed and annoyed at the intrusion.
- 4) The woman stands on the man's feet without asking for his consent or communicating with him in any way. But the man just so happens to love it when people stand on his feet, *especially* when people do it without asking for his consent.

On the straightforward approach which holds that consent determines whether the man is wronged or not, we would consider the woman's act of stepping on the man's feet to wrong him unless he has given his consent to that act. If the act of consent makes the act permissible in this way, then the woman does not wrong the man in scenarios 1 and 2, but she does wrong him in 3 and 4. Moreover, the wrong she perpetrates in 3 and 4 is the very same wrong, namely, that she stepped on the man's feet without him having done anything to make this permissible. However, there does seem to be a significant difference between 3 and 4, namely that the man enjoys the intrusion in 4, while he finds it alarming and annoying in 3. We can bring out the difference further by imagining in 4 that the woman suddenly realises that what she stepped on was a person's foot, steps off the man's feet, and turns to apologise to him. While she is trying to apologise, he responds by telling her there is no need for an apology, as he didn't mind at all. If we were to ask the man whether he thought the woman had wronged him, it is plausible to suggest his answer would be no. And his reason for giving this answer would be that the intrusion was a welcome one for him. This is where the standard view goes wrong: It would have us insist to the man in scenario 4 that the woman had in fact wronged him, because he hadn't at any point consented to her action.

Someone might respond in defence of a standard view of consent in the following way. Although the man did not verbally consent to the woman stepping on his foot, he may have triggered the consent in some other way, for example by expressly going out with the intent or hope of getting his foot stepped on. There are two kinds of argument that might support this response. The first is to say that there was some point at which the man performed an act of consent to make it permissible for someone to step on his foot. Munoz-Dardé points out a problem with this kind of argument, which is that it is very hard to pinpoint what kind of act this might have been, and at what point it occurred.<sup>10</sup> This is particularly evident if we suppose that the man had not gone out with the hope that someone might step on his feet, and had

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<sup>10</sup> Munoz-Dardé (2016)

forgotten how much he enjoyed that happening. So he was taken by surprise when the woman did it, but was nonetheless immediately glad that she had. A second possible argument would be to invoke the notion of tacit consent. For example, Feinberg suggests that tacit consent is given when a person fails to dissent where there is every opportunity to do so, and behaves in appropriately cooperative ways:

“As preliminary caresses are exchanged, A finds at each successive stage enthusiastic encouragement from B, who is all coos and smiles, though no words are exchanged, and no permission requested. After the fact he would be rightly astonished at the suggestion that he had acted without B’s consent. To fail to dissent when there is every opportunity to do so, *while behaving in appropriately cooperative ways*, is universally understood in such contexts to express consent. The consent is tacit as opposed to explicitly stated, but nevertheless directly received as opposed to merely presumed, guessed, or inferred, and quite actual as opposed to dispositional, hypothetical, or fictitious.”<sup>11</sup>

Munoz-Dardé allows that this may be a plausible way of explaining why no wrong is committed in certain interactions where there is otherwise no clear individual signal of consent. However, she argues that invoking the idea of tacit consent runs together the notions of consent and consensual behaviour in a problematic way. This is because the idea of tacit consent still assumes that there was some distinctive act of consent which made the interaction consensual. In other words, it still tries to identify a particular mechanism used by the individual to change the status of the interaction from impermissible to permissible. The idea of tacit consent is still too reliant on the idea that there is some switch that needs to be flicked in order to effect this normative change. Munoz-Dardé suggests that we should instead view consent as a useful social tool which allows us to negotiate consensual behaviour, that is, behaviour that is voluntary and cooperative. As long as behaviour is consensual in this sense, no wrong has been done, and we need not think there was any act of consent that made the act permissible. I agree with Munoz-Dardé on this point. Clearly though, we take the convention of signalling consent to have some normative force. In what follows, I will further explain how this transactional notion of consent connects to the criterion for wronging in order to shed light on the normative value of the convention of consent.

Before doing that, I want to clarify a point about the view of consensual behaviour as voluntary and cooperative. If we take Feinberg’s criteria of failing to dissent where there is every opportunity to do so and acting in appropriately cooperative ways, we can see that these features fail to provide an adequate explanation for the cases above. What if in scenario 3 the man did not ask the woman to step off his feet, but instead suffered in silence, thinking that on balance

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<sup>11</sup> Feinberg (1989) p.184

he would rather endure the intrusion than take on the hassle of confronting the rude woman. The woman, let's suppose, doesn't even realise that she has stepped on his foot – perhaps she mistook it for a step. The appropriate response to this case, I suggest, is to say that the woman wronged the man, even though he failed to dissent when he had every opportunity to do so. It might also be said that he acted in a cooperative way, to the extent that he did not push the woman away, or attempt to unbalance her by moving his foot. A response in defence of Feinberg might be that simply failing to push someone off your foot doesn't count as acting in an appropriately cooperative way. In order to meet that criterion, one would have to actively participate in the interaction in some way, by contributing through positive action towards the other person, rather than inaction. If we go that far, however, then when we consider scenario 4, it now looks like the man in that case did not act in an appropriately cooperative way. He may have failed to dissent where there was every opportunity to do so, but we have already established from case 3 that that is not a sufficient criterion for making the action permissible. The result is that failing to dissent and acting in an appropriately cooperative way do not adequately explain what makes this action morally permissible or impermissible. The answer, rather, seems to be the man's own attitude to the act. If he finds it agreeable and experiences the intrusion as welcome, then he is not wronged by it. If he finds it alarming and reasonably feels aggrieved at intrusion, then he is thereby wronged.

If we leave the moral analysis of the interaction at that, however, it would leave out a significant aspect of the way in which we might judge the woman who stepped on the man's foot. That is, in scenario 4, it might be claimed that the woman had acted wrongly by stepping on the man's foot, regardless of whether he in fact welcomed that intrusion or not. There are at least a couple of ways this point could be put. The woman might have been careless, not realising that what she was stepping onto was a person's foot, as opposed to a bit of curb. In that case, one might reprimand her for being reckless in not paying enough attention to the people around her. Alternatively, she might have realised full well that it was a person's foot she was stepping onto, and simply not cared whether or not that person would mind the intrusion. Especially in that latter case, our intuition would be to say that the woman had acted wrongly insofar as she showed a complete disregard for the man and an unwillingness to let considerations about his feelings have any bearing on her actions towards him. In order to explain the way in which the woman might have acted wrongly even though the man in fact welcomed the intrusion, we can invoke the significance of having a reasonable belief as to whether one's actions towards another will be welcome or not. We can use that notion to link the idea of it being whether the man reasonably rejects the interaction that determines whether a bodily intrusion wrongs him, and the question of what it is to act with proper regard for a person. One might think that acting with proper regard for the person on this view would mean

always acting in ways which that person finds agreeable, or at least does not reasonably feel aggrieved by. But as the above example shows, it matters to our moral assessment of the situation whether that happens by chance or not. Acting with proper regard for other people involves taking adequate steps to ensure that we do not act towards others in ways that will wrong them. We can cash this out in terms of a requirement to act with a reasonable belief that the ways in which we come into contact with others will not cause them to be reasonably aggrieved.

Part of what seems to motivate Feinberg's idea of tacit consent is the thought that the criteria for what counts as consensual must at minimum be identifiable to both parties to the interaction. So the marker of what makes the interaction permissible must be externally verifiable. There must be something that is clear to both agents which signals that a certain interaction between them is morally permissible. Following Munoz-Dardé, I've suggested that the thing that determines whether a person is wronged is something internal to the agent to which the action is done. It is not necessary that the marker of wronging must be directly accessible to both agents involved. The reason that people assume the criterion must be public in this sense is linked to another widely held assumption. That is that what we take to be the markers of consent under law must perfectly track the underlying normative structure of the interaction. Because the legal indications of consent have to be publically recognisable to all parties involved, it is therefore assumed that the moral features of the interaction must be public in the same way. Furthermore, there is an assumption that laws of consent derive their authority from tracking the moral structure of our interactions in this way. We ought instead to view the relationship between institutional and conventional systems of consent and the underlying moral structure of interactions differently. Rather than mirroring the underlying moral structure of our interactions, transactional mechanisms such as consent provide a way of solving certain problems of how to navigate the moral permissibility of our interactions with others. Where consent is concerned, it is partly because of the difficulty of knowing whether one's action towards another will wrong her that we rely on a system of consent to find out which actions are permissible or not.<sup>12</sup>

Some important questions need to be addressed in order to give substance to that suggestion. First, what determines whether one is reasonably aggrieved or not? Secondly, what counts as a reasonable belief that one's contact with another will not cause them to be aggrieved, and how does one acquire such a belief? There are a number of factors that are relevant to answering these questions, ranging from the social context in which the contact happens, to the way in which a society values certain aspects of the body, to personal facts about those involved in the interaction. If I am on a tube at rush hour, for example, there is a general expectation

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<sup>12</sup> See Munoz-Dardé (2016)



that this will be a crowded environment in which it is unavoidable that I will have to sit or stand in close physical proximity to the other commuters around me. If a person squeezes on to the packed carriage that I am in and ends up standing with his shoulder pressed against mine, though I may find it unpleasant and wish there were more room, it would not be reasonable for me to reject and feel aggrieved at that particular intrusion. It would be a mistake to think that the man had wronged me by coming into physical contact with me in that way, even though I found the contact unpleasant and had not given my consent to it.<sup>13</sup> Given that we understand that it would not be reasonable for a person on a rush hour tube to be aggrieved by a person standing shoulder to shoulder with them on a crowded carriage, as a commuter, the belief that one would not wrong someone by pressing one's shoulders against theirs is a reasonable one. It is therefore compatible with paying adequate regard to other persons to squeeze one's shoulders up against theirs in this social context, without first asking them for consent to that physical touch. Both questions can thus be answered using Scanlon's test of reasonable rejection.<sup>14</sup> One could ask, for example, would it be reasonable to reject a principle stating that one does not require a person's consent in order to come into contact with her on a crowded tube? By considering this question from the perspective of those who stand to gain from such a principle, from those on whom it might place some burden, and by considering whether there are alternative principles which would provide a better outcome for all, we can come to a considered view that it would not be reasonable to reject such a principle. The following discussion of how we are to interpret what counts as a reasonable belief, and what counts as being reasonably aggrieved is meant to highlight the kinds of considerations we bring to bear when making this kind of Scanlonian appraisal.

Contrast that to a stranger coming and standing with his shoulders up against yours in an empty tube carriage late at night. In that case, the shift in context is such that it would be reasonable for me to feel aggrieved at that physical contact. Even if the man believed that this contact would be welcome, this would not be a reasonable belief in the absence of any communication from me, given the social context. In that case, the man would wrong me by rubbing shoulders with me, and it would be appropriate to blame him for having acted wrongly as he lacked a reasonable belief that I would welcome the intrusion. We can see how the fact of my reasonably feeling aggrieved and the man having a reasonable belief that the contact would be welcome come apart if we modify the case to suppose that I went out expressly hoping that

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<sup>13</sup> The man may be in the same position as me as regards his attitude towards being in physical contact with strangers in that way, in which case, if one required consent to touch each other in that way, we would both be involuntarily wronging each other.

<sup>14</sup> Scanlon (1998) p.153: "An act is wrong if its performance under the circumstances would be disallowed by any set of principles for the general regulation of behaviour that no one could reasonably reject as a basis for informed, unforced, general agreement."

someone would rub shoulders with me in that way. In that case, although it might be reasonable for me to feel aggrieved by such an intrusion, I in fact feel quite the opposite, and really welcome the physical contact. I am not wronged by the physical contact, as it was what I was hoping for all along. However, in the absence of any signal from me that this was welcome, the man still lacked a reasonable belief that I would not reasonably be aggrieved by that contact. It would be appropriate for us to blame him, on that basis, for failing to act with adequate regard for me as a person. That is, he acted without regard to the question of whether or not I would mind his physical contact.

The way that we value certain parts of the body can also have a role to play in this account. On the crowded tube carriage, it may be inevitable that a person will have strangers come into contact with her. But there are certain parts of the body which imbue that contact with a greater significance than others. Even where contact is inevitable, it may make a difference which part of another person's body it is which is touching her. For example, it may be reasonable for her to feel aggrieved at someone's hand touching her backside, even if that touch is not intended as an affront to her, and it is inevitable that *some* part of the other person will be in contact with that same part of her body. Given the significance that we generally place on the act of a hand touching a person's backside, that is a kind of touch which it is reasonable to feel aggrieved by if it happens when it is not welcome. Given the crowded conditions, however, it would not be reasonable for her to feel aggrieved if the person moved their hand away so that only the side of their hip was in contact with her backside. If we shift the context again to one in which the woman is in an intimate relationship with the person who places his hand on her backside, he may have a reasonable belief based on experience of the dynamics of their relationship that she will not mind that physical contact from him. These examples illustrate the way in which facts about the social context, the way in which we attach value to certain parts of the body, and the context of interpersonal relationships can affect when and where we think it reasonable for people to believe that some contact would be welcome or unwelcome, and where and when a person might reasonably feel aggrieved by such contact.

The above allows us to identify criteria for determining when a person has been wronged or not by some unwanted physical contact without invoking the idea of an act of consent. As we saw above, it does not follow from the fact that a person has not consented to some physical contact that it wrongs them. However, even where the unconsented-to contact was in fact very welcome, we can still have reason to blame a person for touching another in some way without having a reasonable belief that the other person would not mind that contact. This gives us a way of understanding what it is to treat other people with adequate regard for them as persons. That requires considering how others will react to our physical contact with them, and ensuring to avoid any physical contact with them which they will reasonably feel aggrieved by. This could be summarised as a guiding principle not to come into physical contact with others unless one

has a reasonable belief that they will not thereby be reasonably aggrieved by it. If you act with total disregard for the feelings of others towards your physical contact with them, you are failing to pay adequate regard to them as persons. But recall that it is compatible with this that the actual contact you make with another person might not in fact wrong them. This applies in the kind of case where the person who is touched really welcomed that touch, such as the woman on the empty tube carriage who was hoping somebody would come and press themselves up against her. In that case, the pressing-up-against-her itself does not wrong her. And yet the person who did that without a reasonable belief that the woman on the carriage would welcome this acted wrongly in the sense that he failed to act with adequate regard for her as a person.

One might think it odd to claim that the man acted wrongly by failing to pay adequate regard to the woman as a person, but did not thereby wrong her. A point of clarification is warranted here. If the person welcomed the physical contact but was reasonably aggrieved by the fact that the man acted without a reasonable belief that she would welcome that kind of contact, then we could say that the man wronged her by disregarding her feelings in that way. However, if she also derives part of her thrill from the man disregarding her in that way, so that that aspect of the interaction itself was welcome, then I suggest that she is not wronged by the lack of regard paid to her. One might object that it is possible for a person to be wronged even if she enjoys the act which constitutes the wrong against her. But this would lead us to the somewhat paternalistic position of having to insist to the person who all along hoped to be treated this way that she had been wronged, regardless of her considered attitude to the interaction. Moreover, it is not clear why we should want to insist on the fact that the woman had been wronged, if we can still allow for the possibility that the man acted wrongly by acting towards her in that way, without necessarily wronging her. The way in which he acted wrongly, by failing to pay adequate regard for her as a person, could be compared to the way we think someone acts wrongly if they drink and drive even if they never harm anyone by doing so. We set rules which are designed to protect people from being wronged, and take the breaking of those rules seriously even in cases where, as a matter of luck, nobody else was wronged by the action. The wrong is thus explained in terms of the breaking of an important convention, rather than the wronging of a person.

At this point, we can return to the suggestion that consent provides a transactional mechanism to regulate our behaviour towards one another. One might question what the point of consent is given that it was possible to provide a moral analysis of physical interactions without invoking that mechanism. We can now answer this question by referring to the importance of acting with a reasonable belief that one's contact with another will not cause them to feel aggrieved. Although there are many situations where facts about the context will make it obvious enough whether one has a reasonable belief to that effect (such as the example

of rubbing shoulders with strangers on crowded public transport), there will be many other situations where we lack the requisite knowledge to reasonably have such a belief. In those cases, we need a reliable way of finding out whether the person one intends to touch will welcome that touch or not. The somewhat obvious solution is to ask them whether or not they consent to that interaction. There are many kinds of interaction where we insist on people gaining each other's affirmative consent before beginning to engage in that interaction. These kinds of interactions are typically ones where we think the stakes are very high, in the sense that it is very bad for a person to experience that interaction if it is an unwelcome one for them. Sex is perhaps the most obvious example of this. We generally insist that it is crucial to obtain a partner's consent before sex. But as Munoz-Dardé points out, there are also many contexts in which people engage in sex without there having been any identifiable act of consent by either party, and which we take for granted as a normal part of sexual life.<sup>15</sup> She suggests distinguishing between the act of consent, and the idea of the act being consensual. I have suggested here that an interaction is consensual if it is one which neither party would reasonably reject. Instating an institutional system of consent enshrined in law to insist that people obtain a clear act of consent from a partner before they engage in a certain act allows us to set the bar high for what counts, in the eyes of a third-party adjudicator, as having a reasonable belief that one's act will not wrong the other person. Our reasons for setting the bar so high are the high stakes involved in that particular kind of activity.

As I have argued above, consent can be conceived as a transactional mechanism which allows us to signal the exchange of specific claims, privileges, powers and immunities in a way that enables us to hold people accountable for certain actions. However, that transactional system does not perfectly map the underlying moral structure of interactions, because some interactions may be morally permissible without any act of consent. This kind of institutional structure can nevertheless have bearing on the moral realm in the following way. By setting the legal bar for what counts as having a reasonable belief that the act will be consensual, it can contribute to fostering an environment in which people will only engage in sex without obtaining an explicit act of consent if they have a very high degree of confidence that the act will be consensual. Note that the point of the enforcement of laws of consent is not to prosecute in every case where a person fails to obtain an act of consent. Rather, it uses the act of consent or its absence as a way of establishing whether a person's claims have been violated where there has been a complaint that an interaction was non-consensual. The consequences of a person being mistaken about whether a given act they perform on or with another is consensual will be severe from the legal perspective if they have failed to obtain an act of consent. In that sense, a robust institutional enforcement of consent plays a role in shaping the standards by which we

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<sup>15</sup> Munoz-Dardé (2016)

evaluate what counts as having a reasonable belief that one's interactions are consensual in various contexts.

The point of providing an analysis of the importance of consent was partly to elucidate the idea of what counts as acting compatibly with proper regard for the person, and what role institutions can play in shaping the answer to this question. I have suggested that the Hohfeldian analysis of the way in which we exchange claims, privileges, powers and immunities with each other provides a way of publically tracking which interactions are permissible that is transactional in form. It is this transactional form which allows us to hold each other publically accountable for certain interactions, by pointing to evidence of which specific claims have been waived or not in a given case. I argued that this transactional form is distinct from the underlying moral structure of our interactions. Nevertheless, the way in which we enforce certain transactional structures through institutions can help to set the bar as to what we take to be a morally acceptable way of treating people. The explanation for the way in which we enforce certain systems of consent through institutions thus makes reference to the importance of protecting people from certain kinds of wrong, but does not exactly map onto the structure of those wrongs.

#### 4.2. THE BODY AS FIRST PROPERTY

Returning to address the subject of property more directly, the previous discussions on objectification and consent have brought us closer towards understanding of how similar the body is to property. The chapter on objectification suggested that there are some uses of the body where we have good reason to treat the body as an object, and that we can do so compatibly with adequate regard for the person. I argued that the institutions we use to regulate our behaviour towards one another have a role to play in shaping the context within which we interact in such a way as to protect people from being wronged in various ways. There may be some institutional structures which make it more likely that interactions in which people's bodies are treated as objects contribute to a problematic lack of regard for the person. Others could have the opposite effect, by helping to secure a wider context of respect for persons which would allow for non-problematic uses of the body as an object. In the chapter on consent, I suggested that there was a distinction between the act of consent at the transactional level, and the underlying features of an interaction which are salient to the question of whether some physical contact constitutes a wrong against a person or not. Given that distinction, we can understand laws which enforce a transactional system of consent as an institutional structure which helps to shape the normative context of what counts as paying adequate regard to the person, but which do not map perfectly onto the underlying moral feature of interactions. When it comes to considering possible structures of property rights, we can begin to analyse the

question in terms of whether treating aspects of a person's body as property could provide the right institutional context for treating persons properly.

One way in which property is linked to consent is through its transactional structure. Property is standardly understood in Hohfeldian terms as constituting a cluster of claims, privileges, powers and immunities held against others with respect to some object. It is impermissible for a person to interfere with the property of another unless the owner of that property has done something to waive some of his property claims with respect to that person, such as consenting to that interference. The pattern of claims that a person holds over property, and the mechanism for allowing others to interfere with her property, share the same form as the claims which we attribute to people over their own bodies. Judith Jarvis Thomson points out this similarity as follows:

“Ownership is a cluster of claims, privileges, and powers in respect of the thing owned; so that anyone who makes use of your house, typewriter, or shoes, without your consent – for example, anyone who hits any of those things with a log without your consent – infringes a property claim of yours. We have similar rights in respect of our bodies. Anyone who makes use of your body without your consent – for example, anyone who hits it with a log without your consent – infringes a claim of yours.”<sup>16</sup>

In light of this similarity, Thomson suggests viewing our bodies as First Property, and other things that we own as Second Property. Drawing the link in this way captures the intuitive sense in which we think of our bodies as similar to property. Namely, we take it to be an important aspect of my body or my property being mine that I be the one who gets to decide what is done with it. Moreover, unwanted interference by others with my body or my property restricts my freedom to do what I like with what is mine. To that extent, Thomson's claims above are initially intuitively plausible. They also accurately describe the way in which the mechanism of consent can function with respect to both property claims and claims that pertain to the use our own bodies. However, the identification of the way in which consent can function in the same way to regulate claims over property and claims over our bodies still leaves us with the same puzzle with which we started at the beginning of this thesis. One of the examples which illustrated that puzzle was a person who treats her hair as her property by cutting it off to sell. The puzzle arises from the fact that if someone were to take the hair she had already cut off without her consent, we would treat that as theft. However, if a stranger on the street cut it from her while it was still attached to her head, we would intuitively treat that not as theft, but as assault. Both incidents involve someone making use of the same object without the owner's consent, and yet we take the claim infringement involved more seriously when the hair is still attached to the woman's head. If we formulate the similarity between the body and property as

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<sup>16</sup> Thomson (1990) p.225

Thomson does above, the question now becomes why we ought to take the lack of consent more seriously in one case than in the other.

Thomson's distinction between First and Second Property is meant to provide an answer to that sort of question. Thomson recognises that there are important ways in which our bodies are different from ordinary objects, even if the form of claims over first and Second Property is the same. Part of the difference, she argues, lies in the fact that our rights to First Property are fundamental. That is, the claims which are infringed when someone interferes with your body without your consent are fundamental moral claims which we would have independent of any institutional structure or private commitments.<sup>17</sup> Moreover, she argues that claims to First Property are required in order to make claims to Second Property worth anything to us.

I argued in the previous section, however, that it is not necessarily the case that a person infringes a fundamental moral claim of mine if she makes use of my body without my consent. I suggested instead that the criterion for whether a certain use of my body wrongs me is whether I reasonably feel aggrieved by it or not. If we accept the distinction I suggested between transactional claims and the underlying moral structure of interactions, then we may accept Thomson's description of the significance of consent as it pertains to the body only at the level of the conventional or institutional systems we use to regulate uses of the body. It will not provide an accurate characterisation of the structure of our fundamental moral claims. In order to understand what distinguishes the body from ordinary objects as a special kind of First Property, we will therefore need an alternative account of what makes the body special. In particular, we will need to explain how the importance of the underlying moral structure of our interactions with others places constraints on the kinds of transactional claims structures which we construct to regulate certain uses of the body. The aim of this thesis is to argue that while there are certain activities where it may be permissible or even necessary for us to treat aspects of the body as property, in those very same cases, a full understanding of the activity must take into account the fact that the body is not *mere* property. The challenge is to explain how the underlying normative structure of our interactions relates to the prospect of being able to transact with aspects of the person as property. This chapter brings us a step closer towards that goal by clarifying the nature of the analogy between the body and property and highlighting crucial points of disanalogy between the two. The discussion in this chapter is focussed on the way in which ownership of something gives rise to claims against unwanted interference by others. Some of the more contentious questions around treating the body as property are about whether or not we ought to be able to alienate some parts of the body as property. Those questions about alienability will be addressed in the next few chapters.

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<sup>17</sup> Ibid.

It will be useful first to return to the question of whether one could explain the puzzle at the heart of the ponytail case by viewing property in the body as being of greater value than property in external objects. One way of making this case would be as follows: although the hair and the book are both property, when the hair is attached to the person, this fact adds value to it over and above the monetary value of the hair. This means that a person always has the kind of property right over her hair that would allow her to sell it on the market for a certain value. But if a person were to cut off her hair without her permission, we treat the crime more seriously than petty theft because we take into account the added value that the hair has while attached to the person. On this view, we would still treat the crime as theft, but a more serious theft than stealing a book of the same market value. What we would need to know in order to make sense of this claim would be why the fact of being attached to the person adds value to a piece of property in this way. In a sense, this gets to the heart of the question posed to the proponent of self-ownership: what is it about calling someone an owner of herself that explains her value as a person?

Thomson's distinction between the body as First Property and ordinary objects as Second Property attempts to provide the kind of explanation that is required. Her motivation for distinguishing these categories is the recognition that there are relevant similarities between the body and property, and yet that our bodies are special in some way that distinguishes them from ordinary objects:

“There are differences as well as similarities between ownership of the likes of a typewriter on the one hand and ownership of one's body on the other. There is a lot of me left if I sell my typewriter: all of me is left. What is there left to me if I sell my body? My soul? Anything at all? On some views, I just am my body, so to sell my body is to sell myself. On *any* view, I am more intimately related to my body than I am to my typewriter.

To mark the similarities, I will say that people own their bodies. To mark the differences, I will say that people's bodies are their First Property, whereas everything else that they own – their houses, typewriters, and shoes – is their Second Property.”<sup>18</sup>

This distinction is suggestive rather than explanatory. Thomson does not here explain what the value of the body consists in, nor does she provide a full explanation as to why we ought to view the body as a special kind of property. She does, however, suggest that seeing ourselves as owners of First Property can help us to understand the operation of claims involved in a certain kind of wrong perpetrated against the body, which she calls trespass. It is in the analysis of this kind of wrong that Thomson thinks the analogy between the body and property can be illuminating. According to Thomson, “Trespass is a claim-infringing bodily intrusion or

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<sup>18</sup> *Ibid.* p.226



invasion.”<sup>19</sup> The category encompasses any infringement of a claim against bodily intrusion, however weak or strong, and regardless of whether the intrusion causes harm. Thomson provides an example of such an intrusion:

“I am sitting in the library feeling bored. Across from me a young man is taking notes busily. Such a lovely young man! So I go round the table and kiss him on the back of the neck. This is an infringement of a claim and an instance of a subclass of claim infringements I will call ‘trespass’.”<sup>20</sup>

Thomson suggests that using the term trespass to designate this sub-category of claim infringements fits well with use of the term in early English law, where “Trespass was the remedy for all forcible, direct and immediate injuries, whether to person or property”.<sup>21</sup> She stresses that her use of the term trespass is restricted to forcible, direct and immediate contact with the human body, and does not apply to infringements to Second Property, though she does allow for touch to a clothed body to count as trespass.<sup>22</sup> She explains the claims involved in trespass as follows:

“For X to have a claim against Y that Y not do alpha is for Y to be under the behavioral constraint described in Part I, and we are under that behavioral constraint in respect of bodily intrusions or invasions committed on others. Other things being equal, I may not kiss you on the back of the neck, or cut off your leg, without your consent.”<sup>23</sup>

Thomson explains that the source of these claims does not lie in the fact that trespass causes harm, fear, or insult, though some instances of trespass may do any or all of those things. Rather, she argues that the claims infringed in trespass are fundamental. They are fundamental in the sense that the claims involved in trespass provide the necessary basis for other important claims that we hold, such as claims against harm and claims to Second Property. Claims against trespass, she suggests, are at the centre of the realm of rights. If the fundamental nature of claims against trespass is supposed to explain the difference between First Property and Second Property, the suggestion would seem to be that having ownership of one’s body is fundamental to having ownership of Second Property. And that explanation in turn might help us to explain why we ought to view the body as a special kind of First Property. I argue in this chapter that Thomson is right to draw an analogy between the form of ownership claims that we attribute to individuals over their bodies and property, but that she fails to provide a full explanation of the nature of this analogy. In particular, her argument that claims against trespass are

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<sup>19</sup> *Ibid.* p.205

<sup>20</sup> *Ibid.*, p.205

<sup>21</sup> Thomson quotes William L. Prosser, *Law of Torts*, 4<sup>th</sup> ed. (St. Paul: West Publishing Co., 1971), p.28-29.

<sup>22</sup> Thomson (1990), p.207

<sup>23</sup> *Ibid.* p.208. The behavioural constraint in question is that other things being equal, Y may not do alpha to X unless X consents to Y doing alpha.

fundamental fails. In order to shed light on the analogy in a way that will help us to explain both the points of similarity and difference between the body and property, it will be necessary to recognise the distinction between a transactional system of claims and the fundamental moral nature of interactions between persons sketched out in the previous section on consent.

In defence of the idea that claims against trespass are fundamental, Thomson prompts us to consider what it would be like for a person to have claims against harm, but lack the claims infringed in trespass. For such a person, she argues, “the most he could be thought to have in respect of harm, compatibly with lacking the claims infringed in trespass, is a claim to not be caused harm by means that do not involve bodily intrusion”. Thomson argues that this follows from what she calls the Means Principle for Claims: “if A has a claim against others that they not cause him harm, then (...) he has a claim against others that they not commit such bodily intrusions or invasions on him as would thereby cause him harm.”<sup>24</sup> This principle, however, is not sufficient to establish that the general category of trespass claims is fundamental to having claims against harm. It would be compatible with having claims against harm and with the Means Principle for Claims that a person lacked claims against trespass of the kind that do not cause harm. It does not follow, for instance, that I must have a claim against being kissed on the neck in order to have a claim against being stabbed in the neck. All that the Means Principle for Claims establishes is that if I have a general claim against being harmed, I must have claims against all those kinds of bodily intrusion that cause or constitute harm. This only identifies a subset of claims pertaining to some specific ways in which it is possible to harm a person, namely, ways that involve bodily intrusion.

Thomson’s mistake becomes most apparent when she elaborates as follows: “A’s moral status is very thin if he lacks claims against bodily intrusion. In particular, you not only infringe no claim of his if you commit harmless, nonpainful bodily intrusion on him, you infringe no claim of his if you cause him harm or pain *by* committing bodily intrusion on him.”<sup>25</sup> The latter does not follow, because in order to have a claim against being harmed, all we have to show for there to have been an infringement of that claim is that I was in fact harmed. Thomson seems to be assuming that the significance of the claim infringement involved in being stabbed in the neck must be grounded in the significance of the intrusion of the knife entering into my neck. On her account, in this kind of stabbing, there must in fact be two claim infringements: The first is the claim infringement of the knife going into my neck, and the second, dependent on the first, is the infringement of the claim I have against the harm caused to me by the knife going into my neck. This might be the case, but the Means Principle for Claims does not show us that it must be. It is entirely possible to hold that the fundamental claim in this case is just one against being harmed, and that we have a claim against being stabbed in the neck because

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<sup>24</sup> *Ibid.* p.211

<sup>25</sup> *ibid.* p.212

that constitutes harm. In order to stab me in the neck, my attacker must also come within 2 feet of me with a knife. Does it follow from this that I must have a claim against people coming within 2 feet of me with a knife? No.

Thomson offers a similar argument for the importance of trespass claims to give weight to claims over Second Property. She argues that claims over Second Property would not be worth much to us if we lacked the claims infringed in trespass: “Consider A’s property claims over his shoes. Suppose I want those shoes. I must not just walk off with them, for that would be theft, an infringement of a property claim of his. The thing for me to do is to wring his neck to get him to give them to me, for doing that is no infringement of any claim of his.”<sup>26</sup> This point relies on the assumption that claims against trespass are necessary for a person to have general claims against harm. But as I have argued above, there is a way of interpreting general claims against harm as fundamental without necessarily invoking any prior claims against trespass. If we can do that, then we might agree that claims over Second Property would not be worth much to us if we lacked claims against harm, but we needn’t think that claims infringed in trespass are fundamental to the worth of claims to Second Property. Moreover, the description of the case assumes that the system of property rights in question makes no provision for the status of a person’s property after her death. Grant for the moment that claims against trespass are required in order to have a general claim against being harmed. So grant that in this case, if a person lacks claims against trespass, he also lacks the claim against his neck being wrung. Whether Thomson infringes anyone’s claims by taking his shoes after she rings his neck depends on the structure of property rights attributed to the individual in that particular society. If she really infringes no claim of anyone’s at all in doing so, she must be acting in a society where all property reverts to the status of un-owned at the time of death of the property owner. Moreover, there must be a recognised system of appropriation whereby taking the shoes off a dead person counts as a legitimate way of acquiring property rights in those shoes.

Thomson might respond that the case is not supposed to engage with contingencies concerning the details of actual legal frameworks, but is rather meant to establish a point about the conceptual necessity of claims against trespass if we are to make sense of many of the other sets of claims we take to be important. Even so, the argument is not sufficient to establish the fundamentality of claims against trespass. For we can conceive of a system of property which made provision for protecting people’s property rights from this kind of murder-theft without granting them either claims against trespass or claims against harm. One way of doing this would be to make it possible for a person to write a legally-enforceable will determining what will happen to his property after his death. Instead of his shoes becoming un-owned and up-for-grabs after his death, if he had written a will bequeathing his shoes to his local Oxfam shop,

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<sup>26</sup> *Ibid.* p.212

the property right in the shoes would transfer to Oxfam at the moment he is killed. In that case it might be true that Thomson would infringe no claim of *his* in taking his shoes, but she would thereby infringe a claim held by Oxfam. It would therefore not be true that she could murder the man with impunity in order to take his shoes, just because he lacked claims against trespass. This would be one way of making his claims to Second Property worth more to him, by making him less vulnerable to murder-theft, because murder-theft would still constitute an infringement of the claims of some other party. Alternatively, even if the man had written no will, or no provision had been made for the legal recognition of such documents, a society might refuse to recognise taking objects off a dead body as a legitimate way to appropriate some un-owned object. The reasons given for this need not make reference to the badness of murder as a claim-infringement in itself (for we are still granting that this society does not recognise claims against trespass or murder), but only to the importance of protecting a person's robust property right to his shoes.

Perhaps this misses Thomson's point, which is that our conception of the importance of property rights is dependent on the person continuing to exist in order to hold those rights. And so in order to care about property rights in that way, we antecedently have to care about the person's continued existence being protected by holding claims against physical interference. If we think it important that I be protected from murder-theft, that is just because we think it important that I be able to go on living so that I can continue to own things, regardless of whether the people who would like to kill me want my things or not. That may be so, but then we are back to the original question, which was in what way does the person matter? Can it make sense to say that the person matters only because being able to own Second Property matters? Thomson's answer would appear to be no. In particular, she argues that claims infringed in trespass are fundamental in the following sense: "we would have had all of the claims infringed in trespass even if private commitments or law had not given us any of them." She goes on to ask, "What contributes to our having them and would have made us have them even in the absence of private commitments and law? Presumably this other source has to consist in some feature of *us*, and we need to know what it is."<sup>27</sup>

Thomson argues that there are two features of us that are the source of us having these claims, "on the one hand that we are subject to moral law, on the other hand that we have inherently individual interests."<sup>28</sup> The way she argues for these two features is by considering what kind of beings we would have to be for us to lack the claims infringed in trespass. She establishes the first feature on the basis of the Kantian idea that a person's capacity to conform her conduct to moral law is a necessary and sufficient condition for the moral law to apply that person. Thomson suggests that this capacity is a distinctive feature of human beings, so human

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<sup>27</sup> *Ibid.* p.212.

<sup>28</sup> *Ibid.* p.222

beings must therefore be subject to moral law. She then considers whether the moral law could take the form of either Ethical Egoism or Act Utilitarianism. In each of those possible moral worlds, she argues, it would have to be the case that people lacked the claims infringed in trespass. That is because in Ethical Egoism, if it were in B's interest to murder A, that would have to be morally permissible. The same would go for it being in A's interest to murder B. And so under that moral law each would lack the claims infringed in trespass. Similarly, in Act Utilitarianism, the moral law would dictate that each individual must act to maximise the good. There are many possible cases in which maximising the good would require the sacrifice of one individual. In those instances, it must be the case that no moral claim of the individual is infringed when she is sacrificed. Thomson's strategy is to ask whether we can understand these worlds as having a structure of moral law that it would make sense to apply to the kinds of beings we are. She argues that we cannot, because it is a deep fact about us that we are the kinds of beings that have inherently individual interests. In order for a moral law to make sense for the kinds of beings we are, it must take into account and reflect this deep fact about us.

It is on the basis of this argument that Thomson asserts that claims against trespass must be fundamental in the sense that we would have them even if law or private commitments had not given them to us. Moreover, Thomson argues that the cluster of claims, privileges and powers a person has over her body are sufficiently like the clusters we have in respect of ordinary objects such as houses, typewriters or shoes.<sup>29</sup> Because of these similarities, she suggests there is no good reason to object to saying that a person owns her body, though the distinction between First and Second Property is meant to recognise that there are important differences between bodily ownership and object ownership. As mentioned above, the basic similarity is supposed to consist in the following:

A) "Ownership is a cluster of claims, privileges, and powers in respect of the thing owned; so that anyone who makes use of your house, typewriter, or shoes, without your consent – for example, anyone who hits any of those things with a log without your consent – infringes a property claim of yours."

B) "We have similar rights in respect of our bodies. Anyone who makes use of your body without your consent – for example, anyone who hits it with a log without your consent – infringes a claim of yours."<sup>30</sup>

This similarity provides the root of the analogy between First Property and Second Property in Thomson's account. The assumption seems to be that it captures the essence of our notion of ordinary ownership while also expressing the seriousness of the claims we hold with respect to our bodies. I have already argued, contra B), that it is a mistake to suppose that use of the body

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<sup>29</sup> *Ibid.* p.225

<sup>30</sup> *Ibid.* p.225

without consent necessarily wrongs the person. On further reflection of the structure of property claims, the statement in A) does not apply in all cases of Second Property, either. Given these mistakes, this cannot be the correct way to explain the analogy between First Property and Second Property. If there is a useful analogy to be drawn between First and Second Property that can help to explain how these claims arise from the important moral features of persons, we need a better understanding of what the analogy consists in. In what follows, I will focus my attention on the relation between the second feature that Thomson identifies about us – that we have inherently individual interests – and her two claims in A) and B). I will suggest that B) does not straightforwardly follow from the claim that we have inherently individual interests. In order to understand how this feature relates to the claims we have over our bodies, we need to provide a more detailed account of what our interests are and how they ground certain claims.

The mistakes in A) and B) will become most evident as we delve a little further into Thomson's concept of trespass as a claim-infringing bodily intrusion or invasion. Though she reserves the term trespass for intrusions on the human body, she recognises that the concept of trespass is based in the idea of an impermissible crossing of a boundary. This is presumably meant to be analogous to the crime of trespass on a person's land. Following Thomson's terminology of First and Second Property, we might distinguish between trespass on the body and trespass on land as First Trespass and Second Trespass. If First and Second Trespass are meant to be analogously related as in A) and B), we might explain the respective claim infringements as follows:

T<sup>2</sup>A) Any person who intrudes on a land-owner's land without her consent commits the claim-infringement of Second Trespass.

T<sup>1</sup>B) Any person who intrudes on a person's body without her consent commits the claim-infringement of First Trespass.

Turning our attention first to T<sup>2</sup>A, this gives an overly simplistic reading of land trespass, which ignores the complexities of the way in which claims against trespass are taken to operate under various different jurisdictions. In UK civil law, for example, trespass to land consists of any unjustifiable intrusion by a person upon the land in possession by another. Legal justifications for intruding upon a person's land include licence to enter by law, justification by right of way or easement, justification by licence of necessity and various powers of entry granted to officers of the law, such as the police.<sup>31</sup> However, trespass to land is only considered to be a criminal

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<sup>31</sup> House of Commons Library, Standard Note SN/HA/5116, updated 30 October 2014, author Pat Strickland, Section: Home Affairs Section

offence under certain specific statutory provisions, such as in cases of mass trespass, trespass by hunt saboteurs, trespass by squatters, or nuisance caused by raves.<sup>32</sup> So far, though, one might think that the UK law accords with the statement of T<sup>2</sup>A. However, if we analyse in more detail the possible legal justifications for intruding on a person's land, we can start to see the ways in which these begin to undermine T<sup>2</sup>A. In Scotland, for example, the Land Reform (Scotland) Act 2003 grants people rights of access to privately owned land: "(a) for recreational purposes; (b) for the purposes of carrying on a relevant educational activity; or (c) for the purposes of carrying on, commercially or for profit, an activity which the person exercising the right could carry on otherwise than commercially or for profit."<sup>33</sup> A person has these access rights provided they are exercised responsibly, in accordance with the Scottish Outdoor Access Code. This Act renders T<sup>2</sup>A false in Scotland, for the land-owner there has no general claim against a person intruding on her land without consent. It should be noted that there are several exceptions to the right of access, for example pertaining to land on which there are buildings, private gardens, or crops. In the case of land which qualifies under those exceptions, it would be true to say that a person who intrudes on a land-owner's land without her consent commits a claim-infringement of second trespass. But the point still stands that it is not a general feature of private land ownership in Scotland that it accords the owner claims against intrusion to that land.

There are certain features of Scotland as a country which help to make a compelling case to justify these provisions of access rights to privately owned land. For one, Scotland has a very high concentration of private land-ownership, with approximately half of Scotland's private land owned by fewer than 500 land-owners.<sup>34</sup> In particular, the prevalence of large privately-owned estates covering a significant proportion of the countryside raises concerns about the ability of other citizens to make use of the land for leisure and recreational activities. Part 1 of the Scottish Outdoor Access Code makes explicit reference to the importance of these kinds of activities:

- 1.1. Scotland's outdoors, extending from the parks and open spaces in our towns to the remote and wild areas of land and water in the Highlands, provides great opportunities for open-air recreation and education. Open-air recreation provides people with great benefits for their health and well-being and contributes to the good of society in many other ways.

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<sup>32</sup> Part V Criminal Justice and Public Order Act 1994 (CJPOA) s 61-80

<sup>33</sup> Land Reform (Scotland) Act 2003, part 1, chapter 1, sections 1-3

<sup>34</sup> Registers of Scotland Land Mass Coverage Report Statistical Report January 2014 - December 2014 Date of publication: 31 March 2015

The point of the example of Scottish access laws is to highlight the fact that the way in which we can justify frameworks of private property claims is by considering how well those frameworks balance competing interests. Where private ownership of land is concerned, we may think it is in the interests of individuals to be able to wall off a garden in which to enjoy a sphere of privacy, so we attribute to those owners claims against intrusion by others into the garden. Beyond that, we might think it important to protect citizens' interests in being able to engage in a reasonable level of leisure activity in the countryside, and so not attribute to land-owners a general claim against intrusion that stretches beyond their private garden. The statements in A and T<sup>2</sup>A are therefore too simplistic if they are meant to apply as a general rule to private property. Moreover, it cannot be the case that they identify some fundamental feature of property which explains the analogy between First Property and Second Property.

If we are to find the root of the analogy here, I suggest we will have to proceed with an understanding of claims to First Property as constructed in a similar way to the interest-based evaluation of the shaping of the claims to Second Property sketched above. This is not because the concept of First Property must be exactly modelled on the concept of Second Property – that would leave us with no explanation as to the importance of the distinction between First and Second property. Rather, we need to understand better the relation between the fact that we have inherently individual interests, and how those interests give shape to the claims we take ourselves to have over our bodies. As mentioned earlier, I will argue that the simple statements in B and T<sup>1</sup>B do not straightforwardly follow from this fact, at least not if they are meant to pertain to fundamental moral claims.

Let us return to Thomson's case of the man in the library. Because she thinks of claims against Trespass as fundamental moral claims, Thomson insists that trespass can be welcomed before or after the fact, and yet still constitute a claim-infringement. She illustrates this point with the example of someone who "hopes that another will make a sexual advance but is afraid to make clear that the advance would be welcomed."<sup>35</sup> This implies that if the young man had noticed Thomson enter the library, and had been hoping all along that she would kiss him on the neck but was too shy to make this clear, she would nevertheless have committed the claim-infringement of trespass against him when she did so. That is, she would have wronged him by kissing him on the neck without his consent. It is clear from this passage and from Thomson's argument about the fundamentality of claims against trespass that she takes these claims to have a Hohfeldian structure at both the moral and institutional level. As we have seen, she argues that our moral law must give us claims against trespass on the basis that we are the kinds of beings who have inherently individual interests. If there are institutions which grant us clusters of claims, privileges and powers over and above the ones we find in fundamental moral law,

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<sup>35</sup> Thomson (1990), p.209



they must also attribute to us claims against trespass in order to be coherent (in the case of claims against harm) or to be worth much to us (for ownership of Second Property). Drawing on the previous chapter on consent, however, we can challenge the idea that the way in which we have inherently individual interests must yield this structure of claims against trespass at the fundamental moral level. In the library, for example, suppose the young man had secretly been yearning for Thomson to kiss him on the neck, though he didn't dare make any signal to indicate this to her. In this case, at least, it would seem to be very much in his interest for Thomson to plant the kiss on his neck. Can we square this with the claim that his nature as a being who has inherently individual interests means that he must have a moral claim against her doing so until she has gained his consent? There is a sense in which this view of the structure of the moral law ignores the distinctiveness of his specific interests as an individual.

As Thomson would have it, the moral law here prescribes that she must not do to the young man what he wishes she would. In acting in accordance with his (unexpressed) wishes, she would be violating a moral claim of his. On Thomson's view, the only thing that could make the kiss permissible would be the young man making some public act of consent in order to waive his claim against that form of trespass. Considering that the setting is a library, this consent requirement may be quite costly for the young man. If the consent has to be public enough for it to be evident to Thomson that the young man desires a kiss from her, it may be very difficult for him to achieve this without also indicating to others that he wishes she would kiss him. This might cause embarrassment or confusion, or draw attention to him which he would rather not have. Moreover, given that the library has rules against loud talking, it might be very difficult for him to convey his consent successfully to the correct target of his affection. On Thomson's view, the moral law places certain costs on the young man in order for him to make it the case that this act on his body not constitute a moral wrong against him. If these costs make it so difficult for him to successfully convey his consent that he doesn't succeed in doing so (perhaps he is too shy, or fails to catch Thomson's eye), then we have arrived at a situation where the young man is not fully in control of the moral claims pertaining to his own body. If the young man is not fully in control of the moral claims pertaining to his own body, this puts into serious question the claim that this is a moral law based on the importance of our inherently individual interests. It is not fully within the young man's power to make it the case that the kiss on the neck that he has an interest in receiving does not wrong him. From this perspective, Thomson's moral law starts to look oddly paternalistic, protecting people from things they would really rather have happen to them.

The notion of providing protection to people from intrusions they would in fact rather indulge in is not in itself an objectionable idea. The way in which Thomson describes the claim infringements involved in trespass makes sense at what I have called the transactional level.

That is, it makes sense for us to attribute that structure of claims to people as a way of protecting them from being wronged in various ways. But it is a mistake to think that a person has necessarily been morally wronged in every case of trespass. In order to understand the nature of the analogy between the body and property, I suggest we need to approach it through an analysis that takes into account this distinction between the transactional level of claims and the underlying moral features of interactions. If we accept that the transactional framework of claims does not perfectly map the underlying moral features of our interactions, then there may be many different possible ways of structuring the transactional level which are compatible with protecting the underlying moral features of interactions. Some of the key questions around whether or not we ought to treat various aspects of the body as property can be framed in this way. Ought we to attribute to persons the power to transact with claims over their bodies in the same way as with ordinary pieces of property? Instead of asking whether we have a fundamental moral power to alienate parts of ourselves that way, we can ask whether our institutions ought to allow people to transact with aspects of their bodies like property. I suggest that we need to take a similar approach to questions of how to structure ownership claims over the body as the one I briefly sketched above with the example of Scottish land rights. That will involve considering how certain institutional structures serve our interests. In particular, we will need to balance the interests we have in treating some aspects of the body as property with the importance of providing adequate protection from being wronged in serious ways.

I argued in the previous chapter that what matters in the moral realm is the voluntariness of the interaction. In our example, whether Thomson wrongs the young man or not by kissing him on the neck depends on whether the young man reasonably rejects the intrusion, or whether he welcomes it. However, that is not to say that there is no place for having a Hohfeldian system of claims that operates on the transactional model outlined above. The reasons we have for attributing such clusters of claims to individuals arise out of the fact that an accurate moral assessment of the interaction requires insight into the internal state of mind of the subject of the bodily intrusion. This yields some practical problems concerning the way we go about interacting with others around us. For example, in the library, if the young man is sitting silently in his seat wishing that Thomson would kiss him, in the absence of any strong indication of his desire, Thomson will not know ahead of time whether her kiss to his neck would constitute a wrong against him or not. She would accordingly be taking on a certain amount of moral risk in deciding to kiss him. If she is lucky and he welcomes the kiss, then she will not have wronged him. If she is unlucky and he resents the kiss, she will have wronged him. The obvious solution to avoiding this risk is to communicate with the young man. The way in which we place importance on avoiding being wronged in this way forms the basis of the case for a system of communicated consent which operates on the Hohfeldian form for claims transactions.

Drawing on the arguments I set out in the previous chapter, we can set this out as follows. It is reasonable to think that we each have a basic interest in being protected from unwanted bodily intrusions. One way of securing this protection for individuals is to have an institutional framework which attributes to each a general claim against bodily interference (which, borrowing Thomson's terminology, we could call a claim against trespass). It is undoubtedly in the interest of each that individuals should have the power to be able to waive these claims with respect to specific acts and specific people, in order to engage in legitimate cooperative activity with others. In the face of the difficulty of knowing whether one's advances will be welcome or not, individuals also have an interest in being able to eliminate the risk of their actions towards others constituting trespass. Thomson presumably has an interest in having some way of checking whether or not she would be guilty of trespass if she were to kiss the man on the neck. It therefore serves our interests to have an institutional structure that attributes to individuals a cluster of claims, privileges and powers which allows us to conceive of them transacting with those claims in a way that allows all parties to the interaction and a third-party observer to track which specific actions have been rendered permissible.

This allows us to provide the following analysis of the library case. If the young man had stayed silent and still while Thomson kissed him on the neck, the lack of communication of consent means that he did not waive his claim against trespass, because to do so requires some publically recognisable act of consent. From the point of view of the institutional structure of claims, Thomson's kiss would therefore constitute an infringement of trespass. However, it does not follow from this that the man is wronged by Thomson's kiss. In this sense, the transactional institution imposes a certain cost on the young man by attributing this structure of claims to him. The cost is that he is less likely to get the would-be-welcome kiss from Thomson than he would be absent those claims being attributed to him (given the library setting and assuming that Thomson is the kind of person who takes seriously the obligation to avoid committing trespass). From the perspective of these claims transactions as an institutional structure, however, this result is not as problematic as when we considered the prospect of the moral law imposing costs in a similar way. This is because the moral law, if it is based on our inherently individual interests, ought to yield judgements which make reference to the way in which each individual's distinct interests are affected in each case. The job of our institutions, however, is to provide us with a system of claims that provides protection for interests and which can fairly be attributed to everyone in the same way. This means that the justifications we offer for a given institutional structure will have to involve weighing the reasons that go in favour of and against protecting certain claims, given the competing interests of all individuals who will be subject to that structure. In this case, then, we attribute to the young man a claim against having his neck kissed, which requires him to make a certain effort to waive. Though this effort is costly to him,

we can compare what costs would be imposed on other people if we did not attribute to people the claim against being subject to this sort of physical contact. Assuming that most people would want to avoid being subject to this kind of uninvited contact, lacking this claim would leave those people vulnerable to being subject to a kind of non-voluntary contact that they would experience as unwelcome, unnerving, or perhaps even threatening and could reasonably reject. Lacking these claims would leave those people unprotected from being wronged in that way.<sup>36</sup>

An alternative might be to have a system under which it would be possible for people to opt in to being attributed those claims, for example by carrying a clear sign on their person to signal to others that they do not welcome that kind of contact. Instead of signalling consent to waive a claim, people under that institution would have to make a signal to indicate them putting the claim into operation. We could think of this system as analogous to the way that laws of trespass are shaped under Scottish law, where individuals are granted a general privilege of access to privately owned land, but where provisions are made for land owners to fence off parts of their property as private gardens, giving them a claim against others accessing those private spaces. Applied to the body, that system would impose a greater cost on those who wished to avoid such contact than a consent-based system would place on the young man who did wish to be kissed. It would require more effort to always carry a clear sign against kissing than it would to have to signal consent to being kissed when one wanted it. Moreover, for a person who failed to display such a sign, the result would be to make them vulnerable to suffer the wrong of unwanted contact. For the young man, however, if he did not manage to signal his consent to being kissed, the result would be that he would be attributed a claim against some contact he would enjoy. Comparing these possible options against each other, we can come to the conclusion that it would be reasonable to reject the presumed-consent system in favour of the affirmative consent system. Note that the kind of reasoning offered here is similar to the reasoning we could give to justify different forms of law for trespass on land discussed above – it is a matter of comparing the claims that individuals can reasonably make on each other in terms of the costs and benefits inferred on them by our institutions.

The appeal of labelling the body First Property was that it recognized some relevant point of analogy between the kind of ownership we have over our bodies and the kind of ownership we have over ordinary objects, while signalling that the body is special in some way that distinguishes it from other ordinary things. Thomson's answer as to what differentiates First Property from Second Property is that claims against trespass on the body are fundamental.

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<sup>36</sup> What I mean by unprotected here is that there would be no institutional mechanism for holding the perpetrator accountable. Of course one might argue that the moral law itself gives some protection against this kind of contact, insofar as one hopes people will be motivated to avoid committing wrongs against others. But there is a well-established distinction between a person wronging another, and a person violating the rights of another. At a trivial level, I may wrong someone if I insult them, but I do not necessarily violate a right of theirs in doing so. The question of which moral wrongs we think ought to be protected by claims rights under our institutions, and in what way, is an important question.

They are fundamental, according to Thomson, in the sense that we would have them independent of any institutional arrangements or personal commitments attributing them to us, and in the sense that meaningful claims to Second Property are dependent on the existence of First Property claims. I have argued that the Hohfeldian structure of trespass claims described by Thomson is not fundamental in either of those senses. However, I suggested that it is nevertheless worth analysing the analogy between the body and property through the idea of trespass as a claims violation. The question of what should count as trespass in both cases helps to clarify the structure of ownership rights which we might attribute to people over their bodies and land respectively at the transactional level.

I argued that the justification for granting owners various degrees of control over access to land or the body involves weighing the ways in which different ownership structures serve to balance competing interests. This is where having a clear view of the distinction between the levels of transaction and interaction can help to explain the significance of the difference between First and Second Property. Part of the reasoning provided to justify the importance of claims against bodily trespass was the way in which a person might be exposed to being wronged in a serious way if she lacked those claims. I have argued that whether or not a person is wronged by some physical contact with her body depends on whether she feels aggrieved by contact that she could reasonably reject. There are some forms of interference which cause us to feel more deeply aggrieved than others. There may be a number of reasons for this, ranging from the level of pain the contact causes to sociological facts about the way in which we value certain aspects of ourselves. Note that some of those factors may be contingent in the sense that there might be no fundamental moral reason as to why an unwanted touch to a certain part of the body is felt as a deeper violation than any other. But the fact that social practices which may themselves be irrational or unjustified affect the strength of our reactions against certain kinds of touch does not make the reactions themselves unreasonable.<sup>37</sup> This can help us to differentiate between the importance of protecting some claims against trespass more robustly than others where different aspects of the body are concerned. It can also help us to explain why we ought to structure ownership claims over First and Second Property differently. The way in which the balance of interests was struck in the Scottish land ownership case considered the interests of the land-owner in having exclusive use of his land as well as the interests of

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<sup>37</sup> An example to illustrate this point is the social significance that is imposed on natural black hair. As Phoebe Robinson recounts, “The message that society sends to black women is that their hair does not belong to them but is fair game to be discussed, mocked, judged, used, and abused, and it serves as a home for people’s preconceived notions about blackness, as if it is an abstract concept that is not connected to living, breathing, and feeling human beings.” (in ‘You can’t touch my hair and other things I still have to explain’, 2016, p.4). The fact that black women’s hair is socially designated as a feature of ‘otherness’ contributes to the fact that many black women reasonably feel deeply aggrieved when people touch their hair non-consensually, in a way which constitutes a more serious wrong than for a white woman to experience the same unwanted touch.

members of the public in having access to the countryside in order to engage in outdoor pursuits. To grant land-owners exclusive use of their land would place a significant burden on non-land-owners by effectively barring them from enjoying the countryside. For the land-owners, however, the burden of allowing members of the public to access their land on the condition that those members of the public exercise their rights of access responsibly is not so great. We could argue on that basis in Scanlonian terms that it would be unreasonable to reject the principle that grants members of the public access to privately-owned land, especially given the provision allowing the land-owners to wall off certain private gardens and buildings which are exempt from the access rule.<sup>38</sup>

If we consider the question of how to regulate access to human bodies, we might grant that some people have an interest in having open access to the bodies of others. But the burden that a general rule of access would place on those who would suffer from unwanted contact would be much greater than in the land case. When a stranger enters onto a person's land, they may have no interaction with the landowner. Under the Scottish rules, the provision for walling off private gardens ensures that a landowner is able to protect herself from ever having to interact with strangers on her land, if she wishes to avoid that. The body being a constitutive part of the person, however, interferences with the human body are such that they will always constitute an interaction with the person. And as I have shown, it is at the level of the interaction where a person is vulnerable to being wronged. The seriousness of the wrong a person would be exposed to if she lacked certain ownership claims helps to make the case that it would be reasonable to reject a system which left her unprotected against interference from others.

This approach gives us a preliminary way of analysing the difficulties posed by the examples discussed at the outset of this thesis. On the one hand, we can see that there is a certain continuity between the form of transactional structures of claims to the body, and transactional structures of claims to ordinary objects as property. This will allow us to explain why it is that if I ought to be able to sell my hair, I have the ability to treat my hair as property even before it is cut from my head. Chapter 6 will provide a more detailed discussion of that point. But it also allows us to explain why the incident of the stranger cutting off a chunk of my hair in the street ought to be taken more seriously than a case of petty theft. That is because the taking of the hair while it is on my head involves an interaction between the two of us involving my body. My hair is not simply an object like any other, as it is also a part of me. In cutting off the chunk of my hair, the stranger in the street engages in a bodily interaction with me which is non-voluntary. If, however, my hair were to be stolen after I had cut it off myself, because the hair is no longer a part of me, although this may violate my claims over the hair, there would be no non-voluntary bodily interaction between the thief and me. These considerations could

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<sup>38</sup> Scanlon (1998)

form part of a case for having institutions under which claim-infringing interferences with property which do not involve a bodily interaction are treated under a different category than claim-infringements that also involve a bodily interaction. Understanding the distinction between claims-transactions and the underlying moral features of interactions helps to shed light on the relevant points of analogy and disanalogy between the body and other objects.

We have seen that if the analogy between First Property and Second property is to be illuminating, it needs to help us to answer two questions: 1) In what ways is the body similar to property? And 2) In what ways is the body dissimilar to property? I have argued that the analogy of trespass as a claim-infringing bodily intrusion or invasion is most helpful for explaining claims violations under an institutional framework that regulates our behaviours towards others. In that sense, trespass helps to give an answer to question 1, insofar as we can think of the structure of claims over one's body as similar in form to the structure of claims over property. However, I argued that this structure of transactional claims did not perfectly map the underlying moral character of interactions between people. The question of whether a given bodily intrusion constitutes a moral wrong against that person is therefore separate from whether it involves a transactional claim infringement. I suggested that we can give justifications for transactional frameworks of claims by examining the reasons that support or go against a given framework. The reasons that we give may make reference to the importance of protecting certain moral features of the interactions between people. In this sense, the institutional claims can be understood as grounded in the underlying moral features of our interactions, without being reducible to them. This provides us with a way of approaching question 2 above. We can start by noting that claims transactions involving parts of the body that are still attached will necessarily involve an interaction with the person in addition to the transaction of claims. Where external property is concerned, however, a transaction of property claims over an object need not necessarily involve any interaction with the person who is the owner of that object. This is one important respect in which the body is dissimilar to property, at least where attached body parts are concerned. That insight gave us a way of explaining why we take intrusions to the body more seriously than interferences with detached pieces of property, even if the form of the claims violation is the same.

Many of the most contentious questions to do with treating the body as property, however, are about the ways in which we are able to alienate parts of ourselves. Having identified a similarity in the form of claims over the body and over property, the next important question to address is how far that similarity stretches when it comes to the mechanisms we can use to alienate ownership claims over certain kinds of thing, including the body.





I have argued that accounts of self-ownership based on a fundamental right to property in the person fail to provide an adequate explanation of why property rights should be taken as paradigmatic of the autonomy rights of persons. One possible alternative approach was to insist on a firm distinction between the person and property, such that persons are subjects that own external objects, but no part of a person can be the object of such a right. As an example of this kind of approach, Kant's theory of property drew a distinction between natural bodily rights and acquired property rights. The way in which Kant sought to justify the existence of acquired property rights was through the necessity of such rights for individuals to enact their purposiveness in the world. As such, Kant's theory grounds property rights in some fundamental natural right to autonomy, and views spheres of external property as extending a person's sphere of autonomy. This theory is insufficient on two counts. First, it cannot account for the intuition that if I cause some part of myself to become detached from me (for example by cutting off some of my hair), that detached part of me is still mine, rather than someone else's. Second is the way that it views property rights as connected to a person's purposiveness, leading to the conclusion that interferences in property constitute interferences in purposiveness. In this way, the Kantian account still draws an implausibly strong link between property in external objects and the morally important feature of persons. I suggest we need an account of the justification of property claims which avoids drawing the link between property ownership and autonomy too closely, and yet can explain the significance of property ownership in relation to the features of persons which we take to be morally important. In that way, it should be able to explain why ownership of some objects (including certain aspects of the body) ought to be fully alienable, while others ought not to be. This chapter shows how an institutional approach to property can provide this kind of account. By an institutional approach to property, I mean one that rejects the idea that property is fundamental, but does not rely on an underlying natural right to justify the institution of property.

The discussion of the analogy between First and Second Property in the preceding chapter began to explore a more nuanced way of understanding this link with the help of the distinction between interaction and transaction. That allowed us to clarify the similarity in form between ownership claims over the body and ownership claims over ordinary objects, while explaining why there is something more serious about violations of bodily ownership than violations of property ownership. This provided a basis for thinking of the body as a special kind of property. So far, we have been investigating the nature of the analogy between the body and property from the perspective that property provides a sphere of exclusion from some thing. Ownership

claims provide protection from unwanted interference by excluding others from use of one's property, while allowing the owner the flexibility to give permission for others to access or use the property on the owner's own terms. There is, of course, another important aspect to property rights, which is the possibility of alienation. For most of the ordinary objects that I own, the fact that they are my property means that I may sell them or give them away if I want to. Many of the most contentious questions to do with treating the body as property are about whether or not I may alienate aspects of myself in the same way. Having identified a similarity in the form of ownership claims over the body and property, the next important question to address is how far that similarity stretches where alienation is concerned. The key question to answer is this: if we attribute to persons the same form of transactional claims over their bodies as they have over property, where ought we to place the limits on how persons can transact with those claims?

I suggested above that we typically take property transactions to involve alienation of an irrevocable kind. While consent allows us to waive certain claims and grant others privileges to use our bodies in various ways, it also allows us to reinstate those claims and revoke those privileges at any time by withdrawing consent. When we think of alienating some item of property, whether this is done through the convention of gift giving or through a commercial contract of sale, the alienation is considered irrevocable. There is, however, another convention we use in order to transact with claims over oneself in a way that is similarly irrevocable. We do this when we make promises. Much as consent provides us a way of waiving claims against certain intrusions, promising allows us to give other people claims to us delivering the object of our promises. We saw above that consent plays a key role in the concept of ownership. To own something means that others may not interfere with it unless you consent to them doing so. The next two sections explore a similar link between property and the practice of promising. This is salient to the central questions of this thesis because many of the most contentious ways of treating the body as property are controversies about alienating aspects of oneself in ways which are problematically binding. If one uses the framework of property to alienate claims over a particular use of one's body, so the concern goes, that alienation will be binding, while in most cases where one simply consents to a certain use of one's body, that consent is revocable at any time. If promises also bind us to putting aspects of one's body to use in a certain way, it will be fruitful to investigate the link between alienation of property and promising in more depth in order to explain why certain ways of binding oneself to the alienation of claims through an institution such as property might be problematic.

An interesting explanation of the link between conventions of promising and property is provided in David Hume's account of property. Hume explains the possibility of alienating relations of property as dependent on a practice of promising, as it is only through promising that stable trades in property can arise. Hume's account provides a justification of private

property based on the pragmatic benefits of a convention recognising secure holdings of external objects. Property is theorised as a pragmatic social practice that enables the provision of some social good, rather than positing property as a necessary solution to an autonomy-based problem, as the Kantian account did. It thus provides a way of justifying conventions of private property with reference to individual interests, without basing that justification on a fundamental natural right. This provides a general justification of some system of private property which avoids the pitfalls of both the Nozickian account of self-ownership and the Kantian account. Hume's account thus provides a basic theoretical framework for justifying that we have some system of private property without drawing a problematic moral link between property ownership and agency. Though it doesn't prescribe what form an institutional system of property ought to take, the way it links promising and property will help us to shed light on how to go about explaining which conventional practices ought to be enforced through institution, and how.

Building on the significance of the link between promising and property in the conventional account, part 2 proceeds with an analysis of a contractualist account of promising. Scanlon provides an illuminating account of promising which explains how conventional and non-conventional elements combine to give rise to promissory obligations. This distinction between the conventional and the non-conventional in Scanlon's account informs the institutional approach to property. It does so by helping us to clarify the link between the underlying moral structure of obligations and the way in which facts about conventional social practices shape and limit those obligations. This interaction between the moral and the conventional is key to informing where to place limits on the institutional enforcement of certain kinds of agreement.

#### 5.1. PROPERTY AND PROMISING IN HUME'S CONVENTIONAL ACCOUNT

Hume provides an explanation of property that is founded in the interests of private individuals, but which does not view property rights as a necessary feature of moral law. In this respect, Hume's theory is less morally demanding than Locke's, but nevertheless seeks to provide a justification of private property, rather than merely explaining the historical emergence of systems of property. We saw in chapter 1 that Locke's theory required a moral element deeply rooted in theological assumptions. In Hume's account, justification is arrived at through the idea that the stability of a convention of private property holdings is in the interests of the individuals who abide by the convention. This provides both the explanation for why such conventions arise, and the reason for holding such conventions to be justified. The justification

for a convention of private property holdings is therefore independent of there being any state enforcement of such a system.

There is a certain trade-off for the fact that Hume's theory is based on weaker moral assumptions than Locke's, however, which is that it is unable to provide a full explanation of the move from pre-judicial conventional systems of property holdings to complex frameworks of property law appropriate to large societies. Insofar as it lacks the tools to explain the link between the importance of some convention of private property and how any specific institutional system of private property ought to be shaped, one might take that to be a weakness in comparison to Locke, who provides a detailed account of the move from property rights in the state of nature to enforced systems of property in civil society. As Jeremy Waldron suggests, the inability of the Humean approach to explain everything that might be built on the foundations of property means that it is unlikely to generate the strong claims of entitlement to property required for a robust political theory such as Nozick's libertarianism.<sup>1</sup> However, we have already seen that theories that seek to draw a continuous link from some fundamental natural right through to specific institutional frameworks of property encounter serious problems of their own. From that perspective, rather than being a weakness of Hume's account, I suggest we should view this as a strength. This is because the problems we encountered with the approaches that made a strong link between some fundamental natural right and possession of external objects arose partly because those approaches were committed to overly rigid conclusions about the importance of property rights, whether those were taken to be held over external objects or aspects of ourselves. This lack of flexibility meant that those accounts were unable to provide an adequate explanation for the ways in which our attitudes towards treating some objects as property change depending on the kind of object in question. I will argue that Hume's convention-based approach, in allowing for this flexibility, provides us with a better foundation on which to build an institutional approach to property.

The suggestion is as follows. Hume's account allows us to explain the emergence of a convention of private property in a way that provides justification for the existence of some stable system of private property holdings. From that conventional account, a separate question arises of how to enforce and regulate such a convention. This invokes a normative question of a different kind: how ought we to design the institutional structure of property? It is at that juncture that I suggest we need to invoke the insight from the Kantian account that institutions shape the context in which we act, and ought to be designed to regulate our behaviour towards one another in such a way as to ensure proper regard for the person. In order to do that, the process of figuring out where to place the limits on a specific system of property will have to take into account the underlying features of interactions which cause people to be wronged as

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<sup>1</sup> Waldron (2013)

well as relevant facts about the wider institutional and sociological contexts which have a bearing on this. In that sense, though initially based in conventional justification, the structure of specific institutions of property is explained by reference to the underlying moral features of interactions. It is through understanding the way in which the conventional and the moral can combine in such justifications that we can move towards an institutional account of property which is both grounded in a general justification of private property and can provide the tools to address specific questions of how to shape specific frameworks of property for a given society.

Property, for Hume, “is nothing but a stable possession, derived from the rules of justice, or the conventions of men, it is to be considered as the same species of relation [as the relation of cause & effect]”<sup>2</sup> Property only exists insofar as we attribute the relation of property as holding between a person and a given object when that person stands in a certain physical relation to the thing, and has the ability to use it. Property is thus an artificial relation constructed through human convention, as Hume supposes that people in the state of nature would recognize that it is in their interests to respect and uphold a stable system of possession. Such a system of possession arises pre-contractually in a way analogous to how languages evolve; not through explicit rules or agreements, but naturally through a sort of ‘magical thinking’ that if I respect the possessions of others, they will respect mine. The main problem that causes such a convention to be generated is our basic interest in possessing things, coupled with the recognition of the precariousness of possession of external objects:

“...and when they have observed, that the principal disturbance in society arises from those goods, which we call external, and from their looseness and easy transition from one person to another; they must seek for a remedy by putting these goods, as far as possible, on the same footing with the fixed and constant advantages of the mind and body. This can be done after no other manner, than by a convention entered into by all the members of the society to bestow stability of what he may acquire by his fortune and industry.”

“The possession of all external goods is changeable and uncertain; which is one of the most considerable impediments to the establishment of society, and is the reason why, by universal agreement, express or tacit, men restrain themselves by what we now call the rules of justice and equity.”<sup>3</sup>

We see here that property is not conceived as based in any pre-existing natural right, nor does Hume assume that there is any morally significant way for an individual to act on the world which would bestow on him the right of acquisition. Rather, he suggests that we can think of

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<sup>2</sup> Hume (1978 [1740])

<sup>3</sup> *Ibid.* p.206

these artificial relations coming to be recognised as a pragmatic solution to the precariousness of possession. The convention of property in this sense has no more moral significance than a convention of people coming to drive on the left hand side of the road in order to avoid collisions with traffic travelling in the opposite direction.<sup>4</sup>

Particularly interesting is the way that Hume characterizes the problem of the instability of possession, and the approach to solving that problem. Note that the precariousness of possession of external things is explicitly contrasted to ‘the fixed and constant advantages *of the mind and body*’. It will help to try to clarify the contrast that Hume is making between external objects and the advantages of the mind and body, as several distinct ideas are evoked in the passages quoted above. The main problem of instability of possession of external goods is said to arise from the facts that:

- (a) External goods are easily transferred from one person or another (whether voluntarily or not), and
- (b) Possession of external goods is ‘changeable and uncertain’ – this could mean that the relation of possession is hard to track as it changes from one person to another, or that the nature of the relation is changeable, ambiguous, or indeterminate.

Contrast (a) to the advantages of the mind and body, which we might think of as the capacity of an individual to be in control of and make use of her various physical and mental faculties. Though it is true that a person can be coerced into doing various things against her will, this capacity itself cannot be transferred in the same way. And even if I agree to perform a certain action for another person, I still retain the capacity I have over my body to make it perform that action, whether or not you have any right to demand it of me. It is also not possible to abandon my body or my mind in the same way that I can simply drop an object and walk away from it.<sup>5</sup>

Note that point (b) refers specifically to the relation of possession, rather than the external goods themselves. This highlights another significant contrast with the mind and body. Namely, that there is no ‘relation’ between *me* and my body or my mind, in the same way that there is perceived to be a relation between a person and an external object. The analogy to cause and effect is instructive here: Hume argues that we construct the relation of cause and effect between two distinct events that are perceived in constant conjunction with one another. The relation

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<sup>4</sup> See e.g. Lewis (1969) on conventions as providing solutions to a coordination problem.

<sup>5</sup> Though it is arguably possible to conceive of a scenario that could be considered to be an abandonment of one’s body or mind, such as a person undergoing general anaesthetic. If consenting to surgery, this could possibly be considered analogous to the patient granting the surgeon something close to the kind of powers the patient would otherwise have over her body. E.g. it is now the surgeon, not the patient, who has the capacity to physically make the patient’s arm move.

of possession arises in similar circumstances, where two distinct objects (a person and an external object) are perceived to be conjoined to one another through the perception of the person's actions upon the object and her physical proximity to it. There is no need to construct such a relation between the self and the body or mind, because these are not distinct objects, but rather make up one entity – the person. Consequently, there is no ambiguity as to the nature of the connection between my actions and my body or my mind, or how strongly my actions might connect me to my mind and body. Unlike external objects, I can never operate at any distance from my mind or body, and neither is it possible for anybody else to dispossess me of my control of my mind or body.<sup>6</sup> As such, no question arises as to which person it is who is “so situated with respect to it, as to have it in [his] power to use it, and may move, alter or destroy it, according to [his] present pleasure or advantage.” It is in this sense, on Hume's account, that the convention of property seeks to achieve the same stability for possession of external things as we enjoy with the ‘fixed and constant advantages of the mind and body’.

On the one hand, property arises on Hume's account as a way of establishing an artificial relation between individuals and objects that approximates the security of a person's possession of her mental and physical capacities. However, the establishment of a convention of secure possession alone does not yet enable people to pursue their interests to the full. Holders of property will also want to engage in mutual exchange. This necessitates a mechanism to enable the transference of property from one person to another by consent.<sup>7</sup> This works straightforwardly for immediate trades, where consent can be given and objects exchanged between individuals on the spot. However, a problem arises with objects that are either too far away to transfer immediately, or for the delivery of general quantities that do not bear a direct relation to a specific mass of the goods in question (Hume's example is the quantity of five hogsheads of wine).<sup>8</sup> The problem is a lack of assurance that the goods will be delivered, because once the trader has your payment, it would no longer be in his interests to actually deliver the agreed quantity of wine. Hume proposes the convention of promising as a solution to this problem. Promising allows people to undertake obligations to one another in such a way that they can be held to account for not keeping their word. This provides more security in the trade because it is now in the interest of the wine trader to deliver the promised quantity of wine, or suffer the consequences of a damaged reputation, making it less easy for him to trade with others in future.

It is interesting to note that Hume explicitly invokes trades in human services and actions in the same context: “Besides, the commerce of mankind is not confined to the barter of

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<sup>6</sup> There may be possible exceptions to this, such as through hallucination or other types of mind control, but these may be seen as departures from the natural state of things.

<sup>7</sup> *Ibid.* p.220

<sup>8</sup> *Ibid.*, p. 223

commodities, but may extend to services and actions, which we may exchange to our mutual interest and advantage.”<sup>9</sup> While property arose to secure the same kind of stability that we enjoy over our minds and bodies, here we see the opposite idea being invoked. Namely, an interest in being able to trade services and actions on the same basis as trade in external objects. Of course, the nature of the trade is slightly different, because an external object may literally change hands, making the previous owner powerless to act upon it as the new owner takes possession of it. However, it is not the physical trade of an object that is at issue, but rather the transference of the relation of property. Hume makes this very clear when he explains that we find it hard to grasp the transference of this intangible relation. It is for these reasons that we tend to symbolise the transference of property through the physical delivery of an object:

“In order to aid the imagination in conceiving the transference of property, we take the sensible object, and actually transfer its possession to the person, on whom we would bestow the property. The supposed resemblance of the actions, and the presence of this sensible delivery, deceive the mind, and make it fancy, that it conceives the mysterious transition of the property. And that this explication of the matter is just, appears hence, that men have invented a symbolical delivery, to satisfy the fancy, where the real one is impracticable. Thus the giving the keys of a granary is understood to be the delivery of the corn contained in it: the giving of stone and earth represents the delivery of a manor.”<sup>10</sup>

It is remarkable how close Hume’s account is to the scientific view of property made popular in the 20<sup>th</sup> century, that property is rights not things. Although Hume is writing not in terms of rights, but rather in terms of the perceived relation of property, it is this relation that later provides the basis for a justification of a formally enforced system of rights under state authority. Hume clearly does not consider the transference of property to consist in the transference of the physical object – rather, the transference of property consists in the transference of the relation of property that holds between the person and the object. This happens simultaneously with consent, regardless of when the physical transfer happens.

When such trades become secured through promise, what then is the object of the promise – is it the transference of the relation of property, or is it the deliverance of the object? One might think that if transference of property happens simultaneously with consent, the object of the promise must be the deliverance of the object. On that view, the moment the wine seller consents to accept my money in return for 5 hogsheads of wine, she thereby transfers to me the relation of property to that quantity of wine. But as Hume points out, the general quantity of 5 hogsheads doesn’t yet pick out a specific, identifiable portion of that wine (the winemaker may not even have produced it yet). So it would seem that we don’t at that time have enough

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<sup>9</sup> *Ibid.*, p. 223

<sup>10</sup> *Ibid.*, p. 220



information to identify which actual physical volume of wine is mine, only that I have a claim to the vendor delivering me a barrel containing 5 hogsheads of the stuff. Furthermore, some objects don't strictly require deliverance. For example, if I buy a distant plot of land from a farmer that I am to take possession of in 3 months' time, it would seem odd to say that the promise that secures the deal is the promise to deliver the land to me. Rather, it would make more sense in both cases to say that the promise made is to not contest the transference of the relation of property. This ties in with the difficulty we have in tracking the transference of property – because the relation is intangible, and verbal consent to transfer can be given in an instant, there is no way to prove after the fact that anything was transferred, other than to rely on witnesses to the act of consent. Here again the exchange of symbols helps – the fact that I hold the key to your wine cellar provides a physical piece of evidence that you transferred your property in the cellar to me. Written contracts fulfil a similar role – they provide material evidence that consent was given and that the transfer of property happened. Such contracts function precisely to secure against either party renegeing on the agreed conditions. It thus makes sense to conceive of the object of the promise as being to honour the original conditions of the trade by not contesting the transference of the relation of property that has been consented to.

We can understand The Humean explanation of the way in which conventions of property arise as given in two steps. The first step is the recognition of the relation of property to establish secure possession of things. Once secure possession can be established, the question of the interest in trading becomes salient, which leads to the second step of building in a mechanism to alienate secure relations of property. The second step is particularly important, because the idea of alienability is central to our ordinary understanding of property as something one can dispose of or trade with. It is this feature of property which is at the crux of the question of how similar the body is to property. It is not the idea of security of possession which makes it contentious to think of the body in terms of property, but rather the idea that if the body is property, one must therefore be able to alienate it as property. So the question as to which aspects of ourselves we ought to be able to treat as property really comes down to this question of what aspects of ourselves we ought to be able to alienate.

It is of particular interest to our purposes, then, that on the Humean account, alienation of property is closely tied with another convention, that of promising. This is not only because it helps to shed light on how the mechanism of alienating claims works. Many uses of the body which come under scrutiny when carried out either for commercial gain or under terms enforced through contract also cause concern when they are the object of a promise. So, for example, although sex between consenting adults is non-problematic, serious questions are raised around the moral status of sexual promises, as well as the practice of engaging in sex for

money.<sup>11</sup> It will be worth exploring this parallel in more detail in order to gain a better understanding of the reasons one might give in favour of limiting the alienation of certain kinds of ownership claims.

One of the key insights from Hume's account was the way in which it shed light on the question of alienation. In particular, it was suggested that there is no principled reason to distinguish the concept of alienating objects and alienating claims over oneself. This was because what was alienated was not any object we call property, but rather an artificial relation. What was required in order to secure a transaction of alienation was a way of providing assurance that the alienator would not contest the transaction of the artificial relation to the new owner. Hume suggested that this could be done through the conventional practice of promising. In that way, the artificial relation of property between a person and an object could be transferred to another. But it was also suggested that the mechanism of alienation could happen in the same way for trades in human services. What was traded in that case between A and B was a claim that B could hold against A that she perform the agreed service. In either case, what is alienated is an artificial relation of possession between a person and an object or between a person and her labour. In preceding chapters, I argued that the form of the operation of transactional claims over one's body and over property was the same with respect to owners controlling the way in which others are excluded from one's body or property. The link between property and promising in Hume's account shows us that the similarity in the operation of claims over the body or other objects applies to alienation as well. This leads to the question of what institutions we ought to use to formalise those transactional claims, and in particular, to what extent we ought to enforce various ways of alienating those claims.

### 5.2. THE CONTRACTUALIST ACCOUNT OF PROMISING

The previous chapter explained how a Humean conventional account of property can provide a justification for having some system that recognises private property holdings. An advantage of this conventional account was that it was able to provide a justification for some system of private property without assuming that property is fundamental nor grounding property in some fundamental natural right. Those latter features were the source of the pitfalls we had identified in the Lockean and Kantian accounts, respectively. A shortcoming of the conventional approach was that it was not able to prescribe what specific shape a framework of private property ought to take in any given society. It was questions pertaining to these specific details that motivated the need for an alternative account of the foundations of property in order to provide us with a way of answering those questions. For example, ought I be able to

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<sup>11</sup> e.g. Liberto (2017)

treat my hair, my kidneys, or my reproductive organs as my property? If so, to what extent ought I to be able to alienate those features of myself or my body? In the absence of a principled reason for distinguishing which kinds of object can be treated as property, and which not, it remains an open question to what extent we ought to be able to treat parts of the body as property, especially where that involves alienating ownership claims over parts of oneself. One of the most illuminating features of the conventional account was the way in which it explained the link between the conventions of property and promising. Hume argues that the convention of promising is required in order to be able to secure trades in property relations. In light of this, I pointed out that there is significant overlap between questions of what kinds of behaviour it is inappropriate to promise to do and what kinds of behaviour it is inappropriate to engage in for money or under contract.

The link between alienation of property and promising, I suggest, provides us with a fruitful way of proceeding to figure out how to answer the questions left open by the conventional account of private property. If we want to understand where we ought to place limits on the ways in which people may alienate aspects of themselves, we need to understand the ways in which a promise or contract binds a person to performing the content of the agreement, and the different circumstances under which we think a person ought to be released from such an obligation. This analysis will inform how the institutional approach can help to provide answers on the extent to which people ought to be able to alienate aspects of themselves in the same way as ordinary property. The approach will involve examining the reasons that speak in favour of treating certain parts of the body as property, as well as the reasons that count against it. I have called the approach an institutional approach because it recognises that it is not possible to derive a full account of these reasons from a theory of pre-social rational interests. Rather, it will need to take into account the way in which existing institutions and social practices influence the reasons we have to enforce certain kinds of binding agreements. In order to provide the tools to determine where to place the limits on certain kinds of alienation, we need to understand how certain facts about the institutional and social context relate to the reasons that arise from the underlying moral structure of our interactions.

Scanlon provides a contractualist account of the force of promissory obligations and the circumstances under which a person would be released from a promissory obligation. This contractualist approach is of particular interest because it provides a moral account of the source of promissory obligations, while recognising that there is a conventional element to the practice of promising. Although the convention works in such a way as to generate a moral obligation, it is sometimes possible to violate the convention without wronging someone. Moreover, there are certain kinds of reasons which cause someone to be released from a promise. It is the way in which the conventional aspect of promising plays a role both in

generating a promissory obligation and influencing the extent to which the obligation is binding which will be particularly informative for the institutional approach to property. It allows us understand better the relation between social conventions and moral wrongdoing. This allows us to construct an approach to property which can explain why we ought to place limits on certain ways of alienating bodily ownership claims which draws on the importance of the underlying moral features of certain interactions while taking into account the way in which existing social conventions set the context for this moral analysis.

Scanlon locates the source of promissory obligations in the fact that promising is a way of giving assurance to others that one will do what one has promised. His argument for the source of promissory obligations is based on his contractualist moral theory. This involves asking which principles 'for the general regulation of behavior' it would not be reasonable to reject under certain conditions.<sup>12</sup> Scanlon's test of reasonable rejection involves considering the principle in question from a number of perspectives, including from the perspective of those who stand to benefit from the principle, those who would be constrained by it, and those who would stand to benefit under an alternative principle. By considering the generic reasons that stand against any given principle, and by comparing those to reasons that could be given to reject alternative possible principles, Scanlon suggests we can come to a view about which of the available principles could not reasonably be rejected.<sup>13</sup>

There are two important things to note about this contractualist method. The first is that by generic reasons, Scanlon means that we must take into account commonly available information about what people have reason to want when we are considering the wider consequences of the general acceptance of a principle. Our assessment of its rejectability must therefore be based on more than the interests of people affected by it in a specific case. Generic reasons include wanting to avoid bodily injury, being able to rely on assurances given by others, and having control over what happens to one's own body.<sup>14</sup> The importance of considering such generic reasons is linked to the fact that the general authorization or prohibition of a class of actions can have an impact which is wider than the direct consequences of the actions that are preformed or not performed as a result. As Scanlon points out, "if we know that we must stand ready to perform actions of a certain kind should they be required, or that we cannot count on being able to perform acts of another kind should we want to, because they are forbidden, these things have important effects on our planning and on the organization of our lives whether or not any occasions of the relevant sort ever actually present themselves."<sup>15</sup> He emphasises that it is important to recognise that principles defining distinctive rights over one's

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<sup>12</sup> Scanlon (1998) p.315

<sup>13</sup> *Ibid.* p.213

<sup>14</sup> *Ibid.* pp.203-204

<sup>15</sup> *Ibid.* p.203

body could play a role in altering a person's view of herself and her relation to others. This insight will be crucial for constructing an institutional approach to questions of self-ownership. That approach will involve assessing the ways in which different regulatory structures could impact a person's power of control over her own body in relation to others. Those considerations will be key to the overall assessment of the reasons we have to want to treat the body as property in various ways, and in what contexts it would be reasonable to reject allowing people to do so.

The second point is that in the assessment of the kinds of demands which a principle might place on people, it does not follow from the fact that it would be reasonable to reject a certain demand that the demand itself was unreasonable. This point can be seen most clearly through a clarificatory example provided by Scanlon. In the example, we imagine two people swimming from a sinking ship, call them A and B. There is a life jacket floating in the water, which A gets to first. The circumstances are such that the life jacket can only keep one of the people afloat, and whoever is left without it will drown.<sup>16</sup> Scanlon considers whether it would be reasonable to reject a principle which allowed B to wrestle the lifejacket from A by force. If we assess the costs involved in such a principle, granting that B is physically stronger than A, the consequence for A of a principle permitting B to wrestle the lifejacket from A by force would be the loss of A's life. Conversely, the consequence for B of a principle which prohibited B from doing that would be the loss of B's life. We might think on the basis of that comparison that there is no way of determining which principle it would be reasonable to reject. But as Scanlon points out, "the strength of a person's objection to a principle is not determined solely by the difference that the acceptance of that principle would make to that person's welfare." In other words, it is salient in the example that A already has the lifejacket, even if it is in a sense arbitrary that she got to it before B. Let's modify the example so that when B catches up to A, she asks him whether they can play a game of rock, paper, scissors to determine who should get to keep the lifejacket. B might reason that it was complete chance that A happened to fall into the water closest to the lifejacket in the first place, and that neither of them has a stronger claim to survival than the other, so at least the game gives them each an equal chance of survival. Providing B makes this request in good faith and has no cunning plans to cheat the game, this is a perfectly reasonable request. However, it would also be perfectly reasonable for A, being already in possession of the lifejacket, to refuse that request. She might respond along the lines of, "I am currently in a position where my survival is guaranteed, but if I lose the game I will certainly die.". Although B's request is a reasonable one, this is compatible with it being reasonable for A to reject that request. If we change the circumstances to suppose that A and B arrive at the lifejacket simultaneously, then we may well think that neither can reasonably reject a principle

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<sup>16</sup> *Ibid.* p.197

for determining who gets to keep the lifejacket which gives them both an equal chance of getting it. This example allows us to see that certain non-moral facts about agents' circumstances (such as A's happening to already be in possession of the lifejacket) can have a bearing on whether it would be reasonable for them to reject the way in which a given principle places demands on them. When it comes to determining principles for applying property rights in a certain way, this will allow us to see how certain contingent facts about social structures or value-systems can affect what principles it would be reasonable to reject.

Scanlon applies his contractualist method to explain the source of promissory obligations. After considering several ways of formulating a principle which would underpin promissory obligations, he proposes the following principle of fidelity:

*Principle F:* If (1) A voluntarily and intentionally leads B to expect that A will do X (unless B consents to A's not doing so); (2) A knows that B wants to be assured of this; (3) A acts with the aim of providing this assurance, and has good reason to believe that he or she has done so; (4) B knows that A has the beliefs and intentions just described; (5) A intends for B to know this, and knows that B does know it; and (6) B knows that A has this knowledge and intent; then, in the absence of special justification, A must do X unless B consents to X's not being done.<sup>17</sup>

By putting this principle through the test of reasonable rejection described above, Scanlon concludes that the reasons that promisees and promisers have to want such a principle are sufficient to establish it as a duty, because it would not be reasonable for potential promisers to reject it.

As a preliminary point of interest, we can identify a link between Principle F and the way in which the convention of promising was connected to providing assurance for trades in property relations in the Humean account. Scanlon points out that Principle F is general enough to ground a duty for A to do X regardless of whether either A or B happen to be members of a community that uses the conventional form "I promise". There may be any number of ways of fulfilling criteria 1 to 6 through one's actions or expressions towards another. Accepting payment for 5 hogsheads of wine, shaking hands on a business deal, or simply coming to a verbal agreement might be sufficient to fulfil the criteria for incurring a duty under principle F. This is the sense in which I suggested in the previous chapter that some conventionally accepted signal for the transference of property could constitute the same kind of assurance as one gives with a promise.

It is important to note that the way in which Scanlon seeks to provide a moral explanation of the source of promissory obligations diverges significantly from Hume's, which explains the force of promises entirely through convention. Though both view promising to some extent as

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<sup>17</sup> *Ibid.* p.304

a convention which serves to give assurance, Hume argues that the force of the convention as a principle to regulate behaviour is explained entirely by the fact that if a person breaks his promise, he is likely to get a reputation for being unreliable, thus affecting his ability to get others to do what he wants on the strength of his promises.<sup>18</sup> The explanation for the force of promising is therefore purely pragmatic on Hume's account. Scanlon's approach, by contrast, provides an explanation of the way in which using a convention to provide assurance gives rise to a moral obligation. For Hume, duties to keep one's promises fall squarely on the side of the artificial virtues, as he does not think that such a duty can be naturally intelligible. Scanlon, on the other hand, explicitly states that his argument is intended to show that promissory obligations fall under the class of the natural virtues.<sup>19</sup>

Hume's account of property provided a way of justifying that we have some system of private property by explaining the relation between the convention of property and questions of justice. In that way, Hume's explanation of the nature of the convention of recognising property relations was able to provide a justification for the existence of some system of private property, though it did not stretch as far as prescribing the details of how to shape specific regulatory frameworks for property relations. When it comes to the question of what we ought to be able to alienate, we need some further principles to give us answers as to what kinds of trades we ought to make possible through the framework of property. Given the similarity of the form of alienation of claims effected by a promise or a property transfer, I suggested it would be worth investigating the reasons which give rise to promissory obligations, and the reasons which constrain such obligations. The strength of Scanlon's test of reasonable rejection is that it gives us a mechanism through which to compare the reasons in question in order to establish which principles cause individuals to be bound to certain commitments and in what way. Moreover, it does so in a way which requires us to take into account the way in which the existence of certain regulatory frameworks to enforce principles which either permit or prohibit certain classes of action have a general impact on those who are subject to the regulation. In this sense, it provides us with a way of moving towards the kind of justification that was lacking in Hume's account for specific frameworks of private property. It is not just the connection between property and promising which is instructive for our purposes. Scanlon recognises that there is an element in his account of promising that is conventional, despite the fact that he locates the source of promissory obligations in a contractualist morality which is not dependent on the existence of social practices. It will be instructive to understand just what is conventional and what is not conventional in the account. This will help us to understand how it is possible to combine an assessment of how current institutions and practices shape our interests with an

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<sup>18</sup> Hume (1978 [1740])

<sup>19</sup> Scanlon (1998) p.315

analysis of the moral justification for certain principles in order to construct an approach that can answer the normative questions of how we ought to shape regulatory institutions such as property.

Scanlon argues that there are two ways in which the existence of a social practice can give rise to moral duties. The first is when there is some public good which can only be achieved through the coordination of the actions of individuals who are acting independently and without direct communication with one another. If an individual benefits from the public good provided by such a practice, then they may have an obligation on the grounds of fairness to other members of the group who contribute to and benefit from the practice to support and not to undermine the practice.<sup>20</sup> Though Scanlon accepts that this might provide one moral reason to keep one's promises, it is not the main reason, nor is it a necessary one. Instead, Scanlon argues that the conventional element of the practice of promising consists in the fact that although the validity of Principle F is independent of social circumstances, the importance of it relative to other moral considerations will depend on social circumstances.<sup>21</sup> So the importance of Principle F will depend on how often people find themselves in circumstances where it is deeply important to them to secure that kind of assurance. In a society which had assigned roles for dealing with most important matters, it would not be so important to individuals to be able to give and receive assurances of the kind given by a promise. Scanlon explains the significance of the distinction between an account having a conventional element of this kind, and of the Rawlsian kind sketched above:

“If a convention or social practice is taken to consist in the fact that people accept certain rules or norms and typically act in accordance with them, then we need a mediating moral principle to explain how such practices can be morally binding and generate specific obligations. If, on the other hand, the conventional element in an account of a certain obligation consists in the fact that people in certain times and places have reason to value certain things, then there is no need for a mediating principle: such a fact can lead directly to moral conclusions through the standard process of moral argument with which we are already familiar.”<sup>22</sup>

The way in which Scanlon's account of promising is not dependent on convention is that Principle F generates an obligation regardless of whether either A or B are part of a community which recognises the practice of promising, or something like it. The test of reasonable rejection, he argues, is enough to establish the moral validity of that principle regardless of any facts about existing conventions in the societies of A or B. However, the importance of that principle and

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<sup>20</sup> Scanlon (1998, p.316) cites Rawls as providing a good argument for this type of practice-based obligation.

<sup>21</sup> *Ibid.* p.317

<sup>22</sup> *Ibid.* p.317



of the obligations it generates will depend on the reasons that A & B have arising from their social circumstances to value the giving and receiving of assurance in that way. What Scanlon means by the importance of the principle is how central it is to the regulation of behaviour in a given society. In a society where all important matters are guaranteed to be provided for by a rigid system of assigned roles, the circumstances where principle F comes into play will be relatively trivial, and so one might think the obligations it generates will pertain to matters of little importance.

To illustrate this point, take the example of a friend promising to give me a lift to a job interview. In that scenario, it will be very important to me to gain the assurance that she will turn up on time, unless I consent to her not doing so. If my friend were to fail to turn up, making me late for my job interview, that would be a breach of a serious obligation she had incurred through her promise. If, however, it was my friend's job to drive me to my interview, the sanctions she would incur from her employer by failing to perform her job properly might give me sufficient assurance that she will turn up. This would particularly apply in a society where it was just unheard of for people to turn up late to work. In that scenario, I wouldn't have reason to want to secure special assurance from my friend that she will turn up on time. It just wouldn't even occur to either of us that she might not. My friend might, however, promise to bring my favourite playlist to play in the car on the journey, and I might have reason to value gaining her assurance that she will do so, perhaps because that extra service is not part of her job. The importance of the obligation incurred through that promise would be less than the importance of the promissory obligation to get me to the interview on time. This is because the reasons I have to listen to my favourite music on the way to the interview are less weighty than the reasons I have to value getting to the interview on time. If the society were structured such that all cases where I have reason to want to be given assurance directly from another person for her doing X are of this relatively trivial kind, then the importance of the convention of giving those assurances will be a peripheral kind of moral practice. So the importance of promissory obligations may range from trivial to very important indeed depending on what other legal or conventional structures exist to govern interactions in a given society.

Part of the significance of this conventional aspect on Scanlon's account is that the level of importance of a given promise is linked to the circumstances under which one may be released from it. Recall that clause (6) of Principle F stated "in the absence of special justification, A must do X unless B consents to X's not being done." This recognises that there are certain circumstances under which it would not be reasonable to hold a person to be bound by her original promise. For example, in the case of my friend promising to drive me to the job interview, if her son had fallen seriously ill and she needed to drive him to hospital, that would constitute special justification for my friend being released from the obligation to drive me to

the interview. In that circumstance, on the basis of Principle F, I would no longer hold any claim against her that she drive me to the interview. What counts as special justification will depend on the content of the promise in question, and the importance of the reasons I have for gaining the promissory assurance. If, for example, my friend had promised to play my favourite playlist in the car on the way to the interview, we might think it sufficient for her to be released from the promise that her young son had gotten hold of her MP3 player before she left and it would have caused a huge tantrum to take it off him. Though the threat of a huge tantrum and the upset it will cause the toddler might be enough to release my friend from this kind of promise, we would not usually think this enough to release her from the promise to drive me to the interview on time. A more pressing reason would be required to meet the threshold for what counts as special justification in that case, given the importance of the reasons I have to get to the interview on time. In a society in which most of the important matters at stake were already governed by assigned roles, most of the promises made would be ones for which the threshold for release from the promissory obligation would be relatively low. That is the sense in which the importance of principle F in that society would be less relative to other moral considerations.

The centrality of the practice of promising to a given society helps to illuminate the conventional aspect of promising, as contrasted to the moral obligation generated through Principle F. The conventional practice of saying the words 'I promise' functions as shorthand for the giving of assurance in the way laid out by Principle F. The conventional practice thus functions to generate the moral obligation by ensuring that the promisee is led to believe that she can rely on the assurance of the promiser, because both recognise that this is the purpose of using the phrase 'I promise'. But there are circumstances under which uttering the words 'I promise' might fail to trigger the obligation. One example suggested by Scanlon is of a notoriously unreliable friend who borrows some money and promises to pay it back. Knowing my friend and how unreliable she is with money, even if I think she is making the promise sincerely, because I don't believe she will ever fulfil the promise, she does not succeed in leading me to expect that she will pay the money back, as per clause (2) of Principle F. As a result, Scanlon suggests, my friend invokes no moral obligation towards me, even though she might think she has done. Nevertheless, we may have other reasons to think that my friend ought to pay me back, such as obligations of gratitude.<sup>23</sup> One such reason, however, might be the value of the practice of promising itself. Suppose we live in a society where most of the important matters that are at stake are regulated through promises, and keeping to one's word is the main factor in our sense of personal honour. If, a week after making the promise, the friend assures me she will pay me the money soon and I respond by telling her I never expected her to, she will come to realise that she did not succeed in generating a moral obligation towards me that

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<sup>23</sup> Scanlon (1998) pp.313-314

she pay me back. However, having uttered the words “I promise”, she may realise that she is still bound by the conventional value of keeping one’s word. If that value is central to her society, it may show disrespect for the value of keeping one’s word if she were to fail to pay the money back, even if she would not wrong me by doing so. Having used the practice in good faith to attempt to generate an obligation, proper respect for the practice would oblige her to fulfil it, whether or not she in fact succeeded.<sup>24</sup> In this sense, it could be possible to violate the convention of promising, without wronging the person to whom the promise was made. We see here again how conventional practices can be instrumental in shaping some of the moral features of our interactions with others, and yet that the conventional aspect of normative rules does not map perfectly onto that underlying moral structure.

### 5.3. THE PROBLEM WITH IRREVOCABLE ALIENATION

To return to the central concern of this thesis, we have been investigating analogies between ownership of property and ownership of the body with a view to understanding what aspects of ourselves we ought to be able to treat as property. On the one hand, the Humean account views conventions of property over external objects as arising from an interest to mimic the security of a person’s possession of her mental and physical capacities. I suggested that we can think of conventional recognition of the property relation as providing assurance that others will regard some objects as being under your control in the same way that one has natural assurance that one has exclusive control of one’s own thoughts and movements. This is one respect in which one’s relation to property is similar to one’s relation to one’s body – because it is deliberately modelled on it. Another respect in which one’s use of the body could be held to be similar to property on the conventional account was in the alienation of claims. The need to swap or trade physical objects required some mechanism for recognising and securing trades in artificial relations of property, once those had been secured by convention. The mechanisms for initiating the transference of a relation, and then securing it, were consent and promising, respectively. These are the same mechanisms an individual can use to give others a privilege to interact with her body in various ways, and to give others claims held against her that she perform certain actions with her body. In that sense, the way in which we attribute to people the power to operate claims over the body or over property was the same.

Where questions about the similarity of the body to property become particularly contentious is around the idea of alienating aspects of oneself as though it were property. The most common topics of debate in this area include activities such as selling one’s organs, selling sex, or engaging in contract surrogacy. What makes these debates particularly puzzling is the

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<sup>24</sup> *Ibid.* p.325

fact that these activities often only become contentious when they are done for money. Among those who object to these activities being done commercially or under contract, many would accept that a person should be able to donate a kidney, have sex in private, or offer to carry a baby to term for another couple as an act of generosity.<sup>25</sup> One explanation for the difference in attitude between such activities when done non-commercially might be that we take the operation of consent very seriously for these uses of the body. Specifically, the way in which we engage in claims transactions in consent concerning such activities is usually revocable. A person is taken to have the power at any time to revoke consent she has previously given for access to her body. Transactions of property rights, however, have a more permanent character to them. If it is the irrevocability of the alienation which causes concern, this brings us back to the link between promising and the alienation of property relations. If by promising to do X, A gives B assurance that she will do x unless he consents to her not doing X, then A gives B a claim against her that she do X which it is not in A's power to revoke. Indeed, some of the very same activities which raise concerns when conducted under contract or as a commercial transaction are considered to be contentious when they are made the object of a promise. Questions around the validity of sexual promises are a case in point.<sup>26</sup>

Recall that on the Humean account, the possibility of engaging in trades required first a convention of promising, or giving one's word. This was because the relation of property was difficult to track, and so although transference of it happened immediately upon the owner's consent to the transference, there would be little material evidence to show that this had happened. Giving one's word that one would not renege on the transference was a way of assuring a trading partner of the security of his new property relation to the object in question. As we saw, exchanging physical symbols, such as the keys to a granary, was a way of providing some physical evidence of the trade. And contracts or deeds of sale could be understood as yet another form of material evidence of the transference of the property relation. The significance of the material evidence was that the trade could be enforced by a third party, should any dispute arise. Such contracts, then, can be understood as a certain way of giving assurance that one will not renege on the alienation of the relation of property in a way which is enforceable by a third party. They provide assurance that one will not withdraw one's consent to the transference of the claims. Modern contracts work in the same way – a person who enters a contract is bound to certain contractual conditions which transfer various claims over her behaviour to another person. If she violates the terms of the contract, it can be enforced by a third party to either commit her to performing the initial duties set out in the contract or incur

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<sup>25</sup> Although surrogacy is perhaps the most contentious of those three absent any commercial contract. In France, for example, even altruistic surrogacy agreements are considered unlawful.

<sup>26</sup> Liberto (2017) argues that sexual content does not cause a promise to misfire, but that the content of some successful promises is such that a promisee is morally obligated not to accept the promise, and, if she does accept, to release her promisor from the promise.

some set penalties. In this sense, contracts act as a particularly enforceable kind of assurance that A will do X unless B consents to her doing otherwise.

If the concern around alienation is that the irrevocability of the claims transaction is particularly concerning when this pertains to some kinds of activities but not others, it will help us to clarify why being bound by agreement in certain ways causes concern. Hallie Liberto has argued that promises with sexual content are problematic because they are overextensive.<sup>27</sup> An overextensive promise, on Liberto's account, is one which involves the promiser transferring discretionary control to the promisee over an aspect of the promiser's behaviour that is exceedingly burdensome to perform, either qualitatively or quantitatively. Promises are qualitatively objectionable, according to Liberto, if their content is of the wrong kind to be transferred to another person's discretionary control. Promises to have sex are qualitatively objectionable because they involve a commitment to allow the promisee to do something physically or emotionally invasive. Liberto emphasises this by asserting "The decision to have sex should always be our own – not made for us by proxy."<sup>28</sup> We may well agree with Liberto about the importance of the decision to have sex not being made by proxy, but it is not clear that following through on a promise to have sex just because one promised to do so either entails that the decision to have sex was made by proxy or that the content of the promise would be exceedingly burdensome to perform. Note that if A promises to have sex with B at time t, this does not transfer discretionary control to B over whether or not A in fact has sex with him. Rather, it transfers the control to B over whether or not to release A from the promissory obligation. It is still importantly up to A whether or not to break her promise. Still, we might think that being under an obligation to engage in sex at time t whether or not A wants to do so at that time places A in an overly burdensome situation. Her options are constrained such that she can either break the promise or have sex which she does not want to have, which we are to assume will be a terrible experience for her. As Liberto puts it, "Without promissory release, a promisor does not have the option to both refrain from keeping his word and also avoid committing a wrong."<sup>29</sup> If the terms of the promise are such that A must have sex with B, and B is the only one who can make it the case that A is not obligated to have sex with him, Liberto implies that there would be something coercive about B holding A to the promise, thus insisting that she must have sex with him at t, even if she doesn't then want to have sex. On this basis, Liberto argues that B has an obligation to either refuse such a promise from A or to release her from the performance of it.

At this point, we can challenge two of the assumptions embedded in Liberto's argument. The first is that if A were to have sex with B only because she took herself to be obligated to do

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<sup>27</sup> Liberto (2017)

<sup>28</sup> *Ibid.* p.398

<sup>29</sup> *Ibid.* p.400

so, and not because she had any independent desire for it, this would constitute B making the decision for her by proxy. The second is that having sex absent a promise-independent desire to do so would always be qualitatively exceedingly burdensome. To the first assumption, we can concede that the point of a promise is to give the promisee assurance that the promiser will do x in the absence of other reasons for doing so. In that sense, if A promises that she will have sex with B, this gives B assurance that A will do so even if she has no other reasons (such as her own desire) to do so. More than this, the promise acts as a defeater in cases where A might have reasons to refrain from doing what she promised. When it comes to time t, A is not supposed to weigh up other reasons in favour or against having sex with B in order to come to a decision. The fact that she promised to do so is supposed to defeat any other reason that might weigh against performing what was promised. But that is not enough to establish that A's decision is being made by proxy for her, only that the reason she takes to be decisive is of the form "because I promised B I would do x". It seems plausible that A could take this as her own reason for doing x. One might think, however, that there is still reason for concern if B holds A to her promise because he wants to have sex with her even though he knows she has no independent desire to do so, and will only be doing it because she promised. Liberto suggests that it would be qualitatively burdensome for A to have sex with B only because she promised, because having sex is physically invasive. But it is unclear why the fact of the act being physically invasive is itself enough to motivate the claim that engaging in that act absent independent desire would be exceedingly burdensome. It is surely plausible that one might go through the motions of sex with someone absent any particular desire to do so without experiencing that as exceedingly unpleasant or burdensome.

The mere fact of the act being physically intrusive is not enough to explain why it would be qualitatively too burdensome to perform absent a promise-independent desire to do so. If there is something problematic about a person being held to a promise with sexual content, the context in which they are to be held to it surely matters. Liberto uses the example of John and Jane, both young adults in college. John is on the football team, and Jane promises to have sex with him if his team wins an upcoming game. Liberto argues that it would be problematic for John to hold Jane to the promise if after the game she no longer wants to have sex with him. Reading this example, we are likely to assume various things about both John and Jane: they are perhaps relatively sexually inexperienced, and it is likely that if John holds Jane to the promise, he will be pursuing his own satisfaction with no regard to Jane's comfort or lack thereof. Indeed, I think we can agree with Liberto that there would be something problematic to John holding Jane to the promise if the sexual encounter would be a terrible experience for Jane. But if we imagine instead that John and Jane have a well-established sexual relationship which they are both very familiar and comfortable with, it is plausible to think that Jane could make such a promise to John, and John could hold her to it without there being anything

problematic about it. Even if Jane isn't particularly in the mood when John holds her to her promise, we might think it plausible in that context that she could have sex with John because she promised she would do so, without it being a terrible experience for her. There would be little reason to think, in that case, that being held to the promise would be excessively burdensome for Jane, just by virtue of the promised act being one which is physically intrusive. We ought therefore to reject Liberto's claim that sexual content by its nature causes a promise to be overextensive in the sense of being qualitatively excessively burdensome.

We can agree, however, that there may be certain features of particular sexual interactions which would make it excessively burdensome for a person to be held to her promise to engage in that encounter. What makes a difference is the extent to which the experience would be a very bad one for the promiser to undergo. So if it is the case not just that Jane doesn't have any particular reason or desire other than the promise to have sex with John, but rather that she has started to feel apprehensive or uncomfortable about having sex with him, such that to do so would be a very bad experience for her, then it may be excessively burdensome for her to be held to the promise. One might think that the possibility of this being the case could be enough to establish that the category of sexual promises as a whole is problematic, because such promises leave promisers vulnerable to being obligated to undergo something excessively burdensome. However, if performing the content of the promise will in fact be excessively burdensome for the promiser, there is already scope within Scanlon's contractualist account of promissory obligations to deal with this problem. Namely, such circumstances could count as 'special justification' of the kind which releases a person from a promise according to principle F. This might seem like an odd way of interpreting the promise if it left it in the form, "I promise to do x unless I change my mind about doing x", which is of course no promise at all. But it is not the fact of Jane changing her mind which would release her from the promise, but rather whether she has a reason of the right kind not to have sex with John. One such reason would be that having sex when she really doesn't want to or is apprehensive about it would be a very bad and possibly traumatising experience for her.

Contrast this to the case in which Jane simply doesn't have any particular desire to have sex, is a bit tired, or would rather watch the next instalment of her favourite TV programme. We could explain the difference between the two cases by drawing on the characteristics which I argued were relevant to whether an interaction is consensual or not. I suggested that an interaction would be non-consensual in a way which would wrong a person if she reasonably felt aggrieved by it. In a context where Jane is uncomfortable about the idea of having sex with John such that the experience would be a bad one for her, the sex would not be mutually consensual. For a person to be obligated to have non-consensual sex would be excessively burdensome. The fact that this would be excessively burdensome for her amounts to special

justification for the promiser to be released from the promise to have sex at that time. Now consider the case in which Jane lacks the desire to have sex (perhaps she is tired and would rather watch the next instalment of her favourite TV show) but also knows that it would be a perfectly comfortable experience for her, perhaps even a pleasurable one. In that case, although she might decide to have sex with John only because she had promised to do so, the resulting sex would still be consensual in the relevant sense. It would therefore not be excessively burdensome for Jane to be held to her promise in that case. It is not the fact that sex is physically intrusive which makes the difference as to whether it is excessively burdensome to perform, but rather a person's attitude to the act under specific circumstances. For some, having sex when they don't want to will be a terrible, even traumatising experience, while for others, while there might be other things they would rather do, having sex only because they promised to do so will still be a comfortable and consensual experience. In the former case, having changed one's mind about having sex at the promised time would constitute special justification for being released from the promise, while in the latter case it would not. In neither case would John be obligated to release Jane from the promise. In the former case, Jane would already be released from the promise on the terms of principle F, and in the latter case, there is nothing problematic about John holding Jane to have sex with him only because she promised to do so.

If the concern about promises with sexual content was that sex is the kind of activity for which it is important that one be able to change one's mind about consenting to it, we can see that the contractualist account of promising includes a get-out clause for being able to change one's mind if the sex will not be consensual. There is therefore no reason to think that promises with sexual content are problematically over-extensive. Above, I suggested that what is taken to be problematic in certain kinds of promise or contract is the irrevocability of transacting with claims over one's behaviour where we think it crucially important that one be able to revoke access to one's body granted to another. The way in which I argued that this form of concern is unfounded in the case of sexual promises is that on the contractualist account, the principle that grounds the promissory obligation already allows for revocability where we take it to be important to protect people from suffering a non-consensual interaction.

This can help us to understand more clearly why certain contracts might give cause for concern. If we understand contracts as assurance-providing agreements, then if A were to engage in a contract with B to do X, then on the terms of Principle F, absent special justification, she would be obligated to do X unless B consented to her doing otherwise. In that sense, the contract would invoke a moral obligation in the same way as a promise would. However, a distinctive feature of many contracts is that they set out the terms of agreement in intricate detail. Those terms might include specific detail for the conditions under which A could be released from the contract without B's consent. The way in which those details are set out might exclude some of the reasons which we would ordinarily take to constitute special justification of



the kind that would release one from a promissory obligation to perform the same activity. There may be good reason for certain kinds of contract to do this. The reasons that would ordinarily be sufficient to release someone from a promise might be ambiguous or unknown to the promisee, and so a contract might provide a valuable way of explicitly setting mutually agreeable terms for release in advance. But despite having agreed on those terms in advance, there may be some circumstances which are such that even if a person had agreed to remain bound by the contract under them, we would nevertheless think that she would be wronged in a serious way if not released from her obligation to fulfil the specific terms of the agreement. The circumstances under which that would be the case include ones where enforcement of the contract would compel the person to engage in an activity which was non-consensual in the way suggested above.

#### 5.4. WHICH TRANSACTIONS OUGHT WE TO ENFORCE?

This gives us a preliminary way of analysing the extent to which the enforcement of certain kinds of contract would be problematic. If they involve the alienation of claims in a way that is irrevocable even under the circumstances in which the alienation of claims through promise would be revocable on the contractualist account, then they leave the individual open to being wronged in a potentially serious way. I have argued that the conventions we use to track the operation of claims over oneself do not map perfectly onto the moral account of wrongings. Over and above our conventional ways of tracking the transaction of claims, there is a separate question of how we enforce certain conventions through the institutions which enforce the regulation of our behaviours. We should not expect either the institutional or the conventional levels to map the contractualist picture of moral wrongings. However, the way in which we justify constructing our institutional structures in one way or another will make reference to the importance of protecting individuals from being vulnerable to serious wrongings. The account we give to justify certain institutional arrangements will have to involve weighing up the way in which those institutions serve our interests in being able to transact with our bodies in various ways against whether such arrangements provide adequate protection to individuals from being wronged. Whether we ought to make provision for enforcing certain ways of trading with aspects of the body as though it is property will be largely dependent on how important we take those types of agreements to be in the pursuit of our interests. That is, how central those kinds of agreements are to regulating certain uses of the body, given facts about existing conventions or institutions that could provide a similar function.

In order to begin to flesh out this approach, we need to start by identifying which important matters could be regulated by a principle of alienable self-ownership, and how well such a

principle could regulate those matters, given some facts about our existing social practices. To take one of the examples above, we need to provide organs for transplant operations. Those who are in need of a new kidney have a very pressing reason to value getting assurance from a potential donor that the transplant will go ahead. From the donor's point of view, there may be several reasons to value being able to give assurance that they will go ahead with the transplant procedure. One reason might be to reassure a nervous relative that they are not going to change their mind at the last minute. Another might be to secure some compensation for loss of earnings or other expenses incurred in the process of donating a kidney, or indeed to secure a commercial fee for the kidney. Granting that both potential donors and transplant patients have reasons to value being able to give and receive assurance about the transplant going ahead, the question we need to address is which conventions or institutional arrangements are best placed to provide that assurance.

In order to do that, we need to take into account certain facts about the institutional arrangements available to us in order to determine which could not reasonably be rejected. Treating people as owners of their own kidneys, and allowing contracts of sale between a donor and a patient would be one way of giving such assurance. In particular, if this were really considered an alienation of the donor's property right over the kidney in the sense that one can sell an ordinary object, once the sale had been agreed and evidenced through contract, the original owner of the kidney would not be able to revoke the agreement. Once the sale had been agreed, the patient could be considered to already own the kidney inside the donor. In this sense, the assurance provided would be a particularly strong kind of enforceable assurance. Moreover, allowing people to engage in such sales commercially at potentially high prices might lead to an increase in supply from people willing to sell their kidneys for some extra income. Those two features of allowing this activity to be regulated under the framework of property sales might make that institution particularly appealing to patients in need of a new kidney. This institutional arrangement would also be appealing to a certain class of potential donors, namely those who have an interest in gaining income from the activity. There is a class of people that it would place important burdens on, however. The existence of such markets might place undue pressure on those who are very poor to engage in this risky business. This would raise a concern of the kind explored above, that the existence and enforcement of such contracts might pressure people to agree to undergo a bodily intrusion which they would experience as deeply uncomfortable or possibly traumatic. Those considerations might lead us to think that it would be reasonable to reject allowing kidneys to be sold as property in favour of providing assurance for the provision of organs for transplant in a different way.

In the UK, for example, current regulation for the donation of human tissue and organs allows for compensation to donors to cover loss of earnings and other reasonable expenses incurred to undergo the procedure, but does not allow a donor to materially benefit in any way

from payment beyond that compensation.<sup>30</sup> Moreover, it is possible for patients to advertise and arrange paired or pooled donations to match up patients who have a family member who is willing to donate a kidney for their sake but who is not a biological match for them.<sup>31</sup> These measures are aimed at keeping the supply of donated organs sufficiently high, while ensuring that no person is pressured by their financial circumstances to undergo the risky and invasive process of donating a kidney. By engaging in this kind of analysis of the structural features of the institutional arrangements we already have in place, and by comparing them to the features of the alternative model of allowing people to sell their kidneys, we might well conclude that given some facts about our social and economic structures, we do not have reason to value a framework of property that would allow individuals to sell their kidneys.

There may be other uses of the body, however, for which we do not have alternative institutions to adequately cater to relevant interests, thereby establishing the importance of being able to sell that aspect of oneself. Markets in human hair might be an example of this kind. There are people who have an interest in being able to buy good quality wigs made from natural hair. There are also people for whom selling their hair is a good source of income. There are several facts about such markets that distinguish them from the kidney case above. The first is that prices offered for human hair are likely to be much lower than those offered for a human kidney. A result of this is that having the option to gain income by selling one's hair would put proportionally less pressure on people who are very poor than the pressure to sell a relatively highly-priced kidney. The second is that a person's hair is much less important to her than a kidney, given that having hair makes a mainly cosmetic difference to a person's life, whereas losing a kidney places one at higher risk of serious illness should the second kidney fail for some reason. These reasons might lead us to conclude that it would not be reasonable to reject a principle of allowing markets in human hair. A further complicating factor in the evaluation is the way in which social facts about how we actually value hair could have a bearing on this conclusion. We could imagine, for example, a society in which there was a deep social stigma attached to having a shaved head. This stigma might be severe enough to affect a person's ability to function well in society, to affect her sense of self-worth or her well-being. If this sense of stigma made it the case that those who sold their hair were mainly very poor, because this trade was really only considered a last-resort source of income, then it would be a structural feature of the market that it would expose those who are very poor to a serious level of social stigma.<sup>32</sup>

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<sup>30</sup> Human Tissue Act, 2004

<sup>31</sup> By finding other patient/donor pairs in a similar situation, it is possible to ensure a biological match between the donors and patients across each original pair.

<sup>32</sup> In addition to any stigma that may or may not attach to the fact of being very poor.

This point brings our attention to the way in which certain social conventions concerning uses of parts of the body may affect our assessment of institutional arrangements for regulating their use. Some anthropologists include hairstyles among the list of cross-cultural universals, meaning that all cultures attach some social significance to how people wear their hair.<sup>33</sup> There are clearly, however, significant variations in the norms surrounding hairstyles in different cultures. For example, different hairstyles might be an indicator of class-status or sub-culture affiliation in the UK.<sup>34</sup> Among certain religious groups, such as the Sikh community, hair is attributed a religious symbolism and is considered one of the five outward symbols of faith.<sup>35</sup> The importance of uncut hair as an outward symbol of faith is linked to a sense of cultural identity in the Sikh diaspora, and having uncut hair is considered a key symbol of the transmission of cultural values between generations. In light of this, some young British Sikhs report causing their parents embarrassment when they cut their hair, because the parents see it as an outward sign that they have not brought up their children properly.<sup>36</sup> Such variations at the conventional level are significant to the assessment of institutional arrangements for regulating uses of the body. That is because the existence of certain conventions may affect a person's attitude to an act such as cutting her hair. For a non-religious British person, it is likely to be a fairly trivial thing to enter into a binding agreement to have a significant length of one's hair cut off at a future point in time. For a British Sikh, however, the awareness of the stigma that cutting his hair could bring on him and his family within their community might cause him to regret a prior agreement to cut his hair in such a way that holding him to that agreement would cause him to undergo a bodily intrusion which he may reasonably experience as deeply uncomfortable. We can combine this kind of analysis of existing conventions with an assessment of socio-economic distributions in order to determine what kind of markets are likely to exert pressure on certain classes of people in ways that are excessively burdensome. To construct an artificial example to illustrate this point, we can imagine a society with a very high rate of youth unemployment in which there is a prevailing convention that in order to look professional, people wear their hair short. In this society, there is a minority Sikh community who value uncut hair in the ways described above. There is also a market in which very high prices are offered for long human hair. The combination of economic factors of a very restricted range of employment options (further restricted by discrimination against Sikhs who keep their hair long for looking 'unprofessional') exerting pressure on young Sikhs to turn to selling their hair for income, and the conventional norms around the value of hair in their community would contribute to such markets placing an excessive burden on young Sikhs. This is an illustration

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<sup>33</sup> E.g. see Murdock (1940)

<sup>34</sup> c.f. Fox (2004) p.284

<sup>35</sup> Singh (2010)

<sup>36</sup> *Ibid.* p.206

of the way in which such facts may lead us to think of a particular institutional structure as one it would be reasonable to reject.

These examples show the way in which it is necessary to take into account facts about our existing institutions and social conventions, as well as what we take to be fundamentally morally important in our interactions with one another in order to come to a view about how we ought to shape the institutions we use to regulate uses of the body. Note that in this analysis, it is possible to take into account some facts about how we contingently value certain things as a matter of social convention, without committing to whether we ought to value those things in that way. This was brought out by the example of selling hair above. We were able to take into account the fact of there being some special value or stigma around a certain aspect of the body when considering the potential impact of markets in human hair on those who would be likely to sell their hair in those markets. That allows us to see how the ways in which a society places value on or stigmatises certain aspects of the body can affect what we have reason to value. It is not the stigma itself which is viewed as a moral concern on this approach, but rather the effect of the stigma on those who will suffer it, and the role an institutional structure might play in distributing the effects of that stigma disproportionately on those who are already vulnerable.

#### 5.5. FUNGIBLE AND NON-FUNGIBLE PROPERTY

This method of assessing how social conventions affect our attitudes to certain kinds of interaction is not restricted to the realm of the human body. We can apply the same analysis to the way in which cultural attitudes shape our relations to external objects. Chapter 3 rejected the sharp distinction between persons and objects by bringing attention to the fact that there are many contexts in which we have good reason to treat the body as an object. The example of selling hair is a case in point, where there seems to be nothing problematic about a person treating her hair in the same way one might cultivate flowers to sell at market. If there is nothing problematic about this, it is partly due to the fact that we conventionally treat hair as having mainly aesthetic value and as something which is disposable. Both of those features fit well with treating hair as the kind of thing that can be bought and sold, and make it less likely that someone who has agreed to sell her hair will be left vulnerable to suffering an interaction which she would reasonably feel aggrieved by when she is compelled to cut her hair in order to fulfil the transaction. We may have similar cultural attitudes pertaining to ordinary objects which run in the other direction. There are some kinds of conventions surrounding the use of external objects which cause us to think of them as non-fungible due to the way in which we think of those objects as bound up with our sense of personhood. Radin suggests that most people possess objects which are closely bound up with personhood because they are part of the way

we constitute ourselves and manifest our character.<sup>37</sup> Examples include wedding rings, heirlooms or homes. The measure of the significance of a person's relationship with an object is the extent to which the pain caused by its loss could be relieved through compensation. To mark the differences, she suggests using the term 'personal property' for items which could not be adequately compensated for with a replacement or through insurance proceeds, and 'fungible property' for items the loss of which can be adequately compensated for in monetary terms.

This gives us further reason to reject a view that draws a sharp distinction between the person and property, because we relate to some objects as deeply tied to our concept of personhood. We can use the institutional approach to explain the difference in our attitudes to interferences with certain kinds of property depending on where they fit on the scale between 'personal' and 'fungible'. Consider, for example, a wealthy collector of Pokémon cards. The aim of this collector is to collect one of each type of Pokémon card ever made. As part of her collection, she owns several gold foil Charizard cards. At a collectors' meeting where she is displaying some of her cards, someone steals one of her gold foil Charizard cards. This does not bother the collector; in fact she takes some satisfaction in thinking that she may have indirectly helped someone else who was clearly desperate for that card to add to their own collection. We still would think that the thief had done something wrong in violating institutional rules against stealing, although he had not wronged the collector. Contrast this to the case of a man who has been displaying his grandma's jewellery at an antique's roadshow and explaining his sentimental attachment to it. If a person were to steal the jewellery, causing the man to be devastated at the loss of this irreplaceable heirloom, we could judge that the thief had both violated the institutional rules against stealing and wronged the man by causing him to feel distressed at his loss. The recognition that both external objects and parts of the body can range on a scale between personal property and fungible property will have implications for where we think we ought to be able to transact with our bodies as property as well as how institutions should impose restrictions on certain types of object property.

At the intersection of where property becomes personal and the personal becomes fungible we encounter a layer of complexity which can lead to confusion in the rationalisation of political decisions which regulate uses of certain objects. The current debate around restrictions on the wearing of religious symbols in secular public spaces in France is a case in point. Recent bans on wearing the so-called burkini on public beaches were defended by many, including the French Prime Minister Manuel Valls, who argued that the burkini was not a harmless swimming costume, but rather a provocation, a sign of the surge of radical Islam and its

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<sup>37</sup> Radin (1982)

intention to impose itself in the public space.<sup>38</sup> Although the beach bans were overturned, this attitude towards the garments used by some Muslim women to cover their bodies has been widespread. They are considered to be primarily a public symbol of religious affiliation. As such, the burkini has been described as an ‘ostentatious symbol of purity’.<sup>39</sup> In the current political climate and background of recent attacks perpetrated by militant extremists, the rhetoric in favour of such bans has been that the wearing of religious symbols in public spaces serves to entrench divisions at the cost of social integration. Notwithstanding the mistake of conflating symbols of Islam with militant extremism, the insistence that the burkini or the hijab is primarily a symbol of religious affiliation is based on a misunderstanding of the significance of the hijab to those who wear it. This is evidenced strikingly in the psychologist Frantz Fanon’s description of the experience of Algerian women who decided to remove their hijabs in order to fight on the side of the National Liberation Front in Algeria’s war for independence. Fanon describes the women having the impression of their bodies having jagged edges, a feeling of being cast adrift, their limbs appearing to stretch out indefinitely. When crossing a road, she would misjudge the distance to be crossed. The uncovered body seemed to be escaping, disintegrating into pieces. The women reported feeling underdressed, naked. There was an intense feeling of being incomplete, and a terrifying loss of integrity.<sup>40</sup> This is where the crux of the misunderstanding arises between those who think of the hijab as primarily a religious symbol and the significance of the hijab for those who wear it. As De Smet comments, from a western point of view, these are just items of clothing which can be removed. But for many Muslim women, they are experienced as a sort of second skin which is impossible to remove without feeling naked.<sup>41</sup>

The European Court of Justice recently ruled that it is lawful for employers to prohibit employees from wearing religious signs or apparel when in contact with customers if such a rule is relevant to the proper functioning of the business, and as long as it does not directly discriminate against the symbols of any particular religion over others. Where such a rule imposes indirect discrimination on grounds of religion or belief, the indirect discrimination may be justified if it is proportionate to the interests of the business which the prohibition protects.<sup>42</sup> Religious symbols such as cross necklaces might be considered items of personal property due

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<sup>38</sup> Valls (2016): “Voilà la question, absolument pas anecdotique, qui était au cœur du débat sur le burkini, contraction du bikini et de la burqa. Ce n’est pas une tenue de bain anodine. C’est une provocation, l’islamisme radical qui surgit et veut s’imposer dans l’espace public !”

<sup>39</sup> De Smet (2016)

<sup>40</sup> Fanon (2011 [1959]) p.19-50: “Impression de corps déchiqueté, lancé à la dérive ; les membres semblent s’allonger indéfiniment. Quand l’Algérienne doit traverser une rue, pendant longtemps il y a erreur de jugement sur la distance exacte à parcourir. Le corps dévoilé paraît s’échapper, s’en aller en morceaux. Impression d’être mal habillée, voire d’être nue. Incomplétude ressentie avec une grande intensité. Un goût anxieux d’inachevé. Une sensation effroyable de se désintégrer.”

<sup>41</sup> De Smet (2016)

<sup>42</sup> Asma Bougnaoui and Association de défense des droits de l’homme (ADDH) v Micropole SA.

to their significance to the wearer as a symbol of faith, rather than as a mere adornment. But the above shows that the significance of the hijab to those who wear it places it much closer towards the personal end of the scale than symbols like necklaces. This should factor into our assessment of the extent to which the indirect discrimination caused by a blanket rule against religious symbols that includes the hijab is proportionate. There may be some cases in which it is possible to conclude in favour of such a blanket ban. But it becomes more problematic the more widespread such a practice of banning religious symbols becomes. It might seem reasonable to demand of people that they forgo displaying any outward sign of religious affiliation in public spaces in order to uphold values of secularism and integration. The importance of those social values might lead us to think that it would not be reasonable for a person who habitually wears a cross necklace to reject such a demand. From the perspective of a Muslim woman who wears the hijab, however, it would be reasonable for her to reject such a principle, because it demands of her that she expose herself in a way which she may reasonably experience as deeply uncomfortable. As De Smet points out, regardless of the justifications for wearing the hijab in the first place, once its use is firmly anchored, it becomes integrated with the wearer's own bodily identity. Recall Scanlon's example of the two swimmers. Regardless of how the first swimmer came to be in possession of the lifejacket, the fact that he has it factors into our assessment of whether it would be reasonable for him to reject someone's demand that he give it up. The fact that some women identify with the hijab in this way functions in the same way in our assessment that it would be reasonable for them to reject a principle requiring them to remove the hijab in public. The mistake of those who think it is unreasonable for these women to refuse to remove their hijab stems from a difference in cultural attitudes to the kinds of objects we use as clothes or as religious symbols, but also to a difference in attitude towards hair as a part of the body. The prevailing conventions around hair in the west treat it mainly as a decorative part of the person, and one which is disposable. Items such as hats which cover the head are therefore not seen as essential to the state of being clothed as opposed to naked. For a hijab wearer, however, as Fanon's reports reveal, the hijab can make a difference between her feeling clothed or naked. In this way, the way in which we regulate the uses of some objects as 'mere property' must take into account how the significance of those objects intersects with the conventional significance attributed to certain parts of the body.

### 5.6. SUMMING UP THE INSTITUTIONAL APPROACH

I said above that the purpose of this chapter was to argue that an institutional approach to property was required in order to provide a justification of property which avoids drawing the link between property and the person too closely and yet can explain the significance of property ownership in relation to the features of interactions between persons which we take to be



morally important. By an institutional approach to property, I meant one that rejects the idea that property is fundamental, but does not rely on an underlying natural right to justify the institution of property. We are now better placed to explain exactly what this institutional approach consists in. The Humean account gave us a basis from which to understand property not as foundational, but rather as an artificial convention that arises from individuals' interests in having secure and exclusive use of possessions. This provided a general justification for having some convention recognising relations of property. However, it was an open question from there how one ought to enforce such a convention through institutions, and in particular, what the details of our institution of property should look like. Answering that question requires taking a view from the perspective of the institutions we already have for regulating transactions and interactions with one another, in order to find a way of providing reasons in favour of some particular rules or other governing use of property.

There were several types of questions to be addressed regarding how to shape those particular rules. One was what sort of constraints should be placed on the ability to exclude others from using the different kinds of objects we can own. Another question was what kinds of objects we ought to be able to alienate as property. The institutional approach allows us to start from a Humean justification that we have some convention of private property, and from there to address the specific questions of how we ought to shape our institutions. That analysis has to proceed from the perspective of existing institutional and conventional practices. The process of justifying the extent of what kinds of things we treat as property institutionally has to take into account three distinct levels. One level is the institutions we use to enforce certain rules for interaction. Second is the level of conventions shaped by cultural attitudes which are not enforced institutionally. Finally, there is the phenomenon of wronging at the level of personal interaction. The test of reasonable rejection gives us a way of understanding the conditions under which a person is wronged. They are wronged when they suffer an intrusion which they would reasonably reject. Conventions might add another level of normativity by creating sets of social rules or expectations for how one ought to conduct oneself with respect to others, but it is possible to break these conventions without necessarily wronging anyone. I argued in the chapter on consent that the way in which we take ourselves to transact with claims over our bodies through recognisable acts of consent is one such convention. I argued there and in the chapter on First Property that it would be possible to break that convention by committing something like trespass without wronging a person, if the person one touches in fact welcomes the physical intrusion. However, conventions add a complication into the assessment of whether a person has been wronged because the existence of certain conventions can affect the extent to which a person reasonably feels aggrieved at certain kinds of intrusion. They can thus have bearing on whether and to what extent a person is wronged by a given interaction. When it

comes to regulatory institutions, these again will neither map perfectly on to our conventions, nor onto the underlying moral features of interactions. But in order to justify shaping our institutions in certain ways, it will be necessary to take into account facts about the existing social structure at both the institutional and conventional levels in order to assess how well a certain institutional enforcement of property rules will serve to protect individuals from serious ways of being wronged. The importance of being protected from being wronged in serious ways can provide us with a test for which proposed applications of the framework of property it would be reasonable to reject. While the institutional approach views property itself as neither fundamental nor directly grounded in some other fundamental right, it is in a sense this view of the underlying moral features of interactions which is taken as fundamental to setting the limits on what we ought to treat as property and how. But the way in which those limits are set will nevertheless be influenced by contingent structural features of a given society.

I have suggested that if what we fundamentally have reason to value is avoiding being wronged, this gives us reason to support regulatory institutions that provide mechanisms by which to track and enforce the transaction of claims with regards to certain uses of one's body. Thinking of the claims an individual has over her body in terms of property claims might be one way to provide this kind of protection from unwanted intrusion, while building in the flexibility to allow for consensual interactions. Even if we do think that the concept of property is of central importance to the regulation of our interactions with one another in this way, there remains the important question of how that principle of self-ownership ought to be constrained. Would such a principle have to entail rights of alienation, and full rights to income from one's body, as Cohen and Nozick suppose, or could there be reasons to constrain the kinds of ownership a person is taken to have with respect to different aspects of herself or her body? I have argued that an institutional approach to property provides a way of tackling these questions pragmatically on a case-by-case basis in order to determine where parts of the body could be treated as property just like any ordinary object, and where it would be reasonable instead to opt for institutional arrangements that stop short of attributing full property rights over the body which include the right to sell those parts of oneself.

However, this idea of some principle of self-ownership being constrained in various respects brings us back to the tricky question of the nature of the link between a person's autonomy and her powers of ownership. In the chapter explaining the appeal of self-ownership, I suggested that it was possible to draw a common thread running through various theories of property. That was the suggestion that property provides the concrete subject of a person's abstract powers and attributes. It is through property that we come to regulate our interactions with others in the world of material objects, thereby constructing the the bounds of external autonomy. If this is the case, it would seem that on the institutional approach to property, the extent of ownership powers that an individual is attributed over her own body may vary

depending on certain contingent facts about the structure of existing institutions and social practices. This might lead us to question whether the way in which the institutional approach places constraints on various aspects of self-ownership would amount to imposing problematic constraints on an individual's autonomy, relative to the maximum powers of ownership we could conceive of her having. This question of how to conceive of constraints on ownership powers with respect to different kinds of object, including the body, will be the focus of the next chapter.



Property rights function to secure spheres of exclusive use over given objects for the owners of those objects. As previously discussed, philosophical justifications of systems of private property rights are often grounded in some notion of autonomy, through the idea that having exclusive use of things is either a necessary condition of enacting our autonomous nature in the world, or enhances or extends our autonomy in some way.<sup>1</sup> As such, there is a general acceptance that property rights are important because they are linked in some way to a feature of persons which we find particularly important. Despite this link, there is a general tendency to draw a sharp distinction between the spheres of ‘person’ and ‘object’ such that property rights are held by persons, but range only over objects.<sup>2</sup> In other words, persons are only the subjects of property rights, never the object of property rights. A notable exception to this is the Nozickian theory of self-ownership, based in the Lockean idea that property over objects is grounded in some natural right to property in the person. Instead of positing distinct spheres of rights to fit ‘persons’ and ‘objects’, this view suggests a full overlap between the framework of object property and the type of ownership a person has over herself. A complicating factor that arises when weighing up these opposing positions is that while the boundary of what counts as the person is taken to be constituted by the boundary of the body, it is clear that our physical bodies are objects too, and there are many cases in which we use our bodies in their capacity as an object. These cases challenge the sharp distinction between person and object, and indicate a need to provide a more nuanced explanation of the nature of the link between property rights and autonomy. I have argued that an institutional account of property is better equipped to provide such an explanation. An important question is the extent to which this would require a complete overhaul to the way in which we conceive of property rights, or whether such nuance can be accommodated within current theories of the structure of property rights in legal and political theory. This chapter argues that there is room within the standard view of property rights to provide just such an explanation.

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<sup>1</sup> E.g. Lockean ‘labour-mixing’ theories build up from the assumption of a natural right to acts of self-preservation, Kantian theories justify property rights as an institutional mechanism which is necessary to securing spheres within which to legitimately set and pursue our ends, while Humean theories explain property as responding to a basic interest people have in securing control of objects in a way which mirrors the security and freedom of control people have over their bodily and mental faculties.

<sup>2</sup> I am using the term ‘object’ here in a broad sense to include both physical objects and non-physical objects such as intellectual property, in the way that one might call a novel an object, independent of its physical manifestation in book form.

The standard view of property rights among legal scholars and philosophers alike is a Hohfeldian one. According to this view, property consists of rights, not things, and ownership consists in a bundle of claims, privileges, powers and immunities held against others with respect to some thing. This yields a gradable view of ownership, whereby ‘full’ ownership entails having the maximum number of possible incidents over a given object, and any bundle of property rights that holds less than the maximum possible number of incidents counts as something less than ‘full’ ownership. This understanding of the structure of property rights has strong implications for theorising self-ownership as a principle of autonomy. For if the principle of self-ownership is supposed to be constitutive or explanatory of autonomy, then it would seem that anything less than ‘full’ self-ownership would equate to something less than ‘full’ autonomy.<sup>3</sup> Any denial or restriction of any possible stick in the bundle of property rights that could make up self-ownership would need special justification. This view treats the idea of property as a univocal concept which takes the same form no matter what kind of object property rights are taken to range over. In the literature on self-ownership, this leads to a symmetry being assumed between the power of self-ownership and the power of ownership over ordinary objects – that in both cases, the more incidents of property rights one holds over the thing that is owned, the ‘fuller’ the right of ownership. It is this assumption that underlies some of the most controversial conclusions about self-ownership, such as Nozick’s permissive stance on voluntary slavery, or his argument that taxation amounts to a form of slavery. This jars with critics such as Alan Ryan:

“It is just because we take a relaxed view about people’s rights over their cars, bicycles, books and the rest that Nozick can suggest that if these are my lungs, I can do what I like with them. Conversely, it is just because we don’t take a relaxed view about people’s rights over their bodies that Nozick can suggest that we have no right to tax people against their will, just as we have no right to force them to marry against their will.”<sup>4</sup>

The crux of Ryan’s point is that property rights, coming as they do with powers to alienate, are specifically applicable to ordinary, disposable objects precisely because they have relatively little moral importance. Our bodies, on the other hand, require a different set of rights to adequately reflect their different moral nature. To assert a symmetry between ‘full’ property rights and ‘full’ self-ownership as Nozick does is to try to play these conflicting intuitions both ways.

Ryan and others take this as a point of departure from the idea of self-ownership, satisfied that this tension undermines the case for using the concept of property as a framework with which to theorise a fundamental principle of autonomy. In what follows, I examine the

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<sup>3</sup> C.f. Nozick on voluntary slavery and the right to alienate one’s property in oneself.

<sup>4</sup> Ryan (1992)

Hohfeldian concept of property in more detail to explore an alternative response to Ryan's criticism. I will suggest that there is room within a Hohfeldian conception of property to identify a heterogeneity in the structure of ownership rights when applied to different types of object. The proposal is as follows. For various kinds of ordinary (external) object, it makes sense to conceive of powers of ownership in the gradable way, so that we can talk of a power of ownership being stronger or 'fuller' the more incidents of property rights are included in the bundle of ownership. However, for some kinds of ownership, this gradable view doesn't hold. Rather, there may be some ways for a person to be situated in the ownership relation with regards to some object which can be conceived of as 'full' ownership, and yet which lack certain incidents which in other cases form part of a property right bundle – for instance, the power to alienate one's powers of ownership. I argue in this paper that if there is a sense in which one can be attributed ownership over aspects of one's person or body, then this right of self-ownership will be of this ungradable kind.

Part of this project involves disentangling the notions of 'property' and 'ownership' by examining more closely the structure of relations of ownership – that is, the relations in which an owner stands to the objects she calls property, as well as to other people. This will give us clearer grounds from which to question whether perfect or 'full' ownership necessarily entails alienability. If this heterogeneity can be successfully established, it would do away with the problematic assumption that 'full self-ownership' must consist of the maximum possible number of incidents of property rights. But it will also provide us with a more nuanced framework within which to understand the complex ways in which the spheres of objects, the body and the person overlap and interact.

It will first be useful to clarify a different way of differentiating limits to property ownership, which is not the kind of asymmetry I argue for in this chapter. This is the widely-held view that there are other, competing values which place constraints on property ownership in various cases. An example of this might be the kind of ownership we have over domestic animals. A recent case from the UK illustrates this nicely – in 2010 a woman was caught on CCTV dropping a cat into a wheelie bin. This made the national news and led to a wave of outrage directed at the woman. The woman was reported as saying in her defence, "It's only a cat".<sup>5</sup> This was not accepted as an adequate defence of her actions. Nor would it have made the situation any better, I take it, if she had said, "oh, but it was *my* cat". This is because although cats are the kinds of things people can own, their status as sentient creatures, and our views about the importance of protecting the welfare of such creatures, place limits on the extent of

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<sup>5</sup> Alistair Jamieson. "Woman who dumped tabby in wheelie bin: 'It's only a cat'". *The Telegraph* 25 Aug 2010: <http://www.telegraph.co.uk/news/newstopics/howaboutthat/7963144/Woman-who-dumped-tabby-in-wheelie-bin-Its-only-a-cat.html> (Retrieved 28/03/2017)

the property rights a person can have over a cat. I cannot simply throw my cat in the bin, as I can my pen. Property rights over cats in this sense are limited compared to the property rights I can have over a pen. The explanation of this is just that there are other relevant values that come into play, and which compete with the value of having complete, carte-blanche property rights over one's cat. Although this is clearly one of the ways in which property rights can be limited, this is not the kind of limitation on ownership I will argue for here. Rather, I suggest that in order to understand property as a relational framework, it is necessary to explore further the nature of the relation between the person, the body, and other objects, and to explain the significance of how the person is situated in this relation. And it is the very nature of these relations in different contexts which places internal limits on the way in which ownership can be construed.

### 6.1. PERSONS V PROPERTY

Some initial work is required to explain the motivation for positing the heterogeneous view in the first place. Looking back to Ryan's criticism of Nozick, one plausible way to understand the mistake attributed to Nozick is that it stems from a failure to recognise that there is a sharp distinction between persons and objects. And it is a mistake to treat the body as one among the many objects we can have property over, because when we're talking about rights, the body falls within, or perhaps constitutes, the boundary of the concept 'person'. Once we recognise this, it might seem obvious that the kinds of rights we attribute to persons differ substantially to the kinds of rights that persons can have over objects. Persons are the subjects of rights, whereas things are the objects of rights held by persons. In Ryan's words, we do not take a relaxed view about people's rights over themselves. As such, it would be appropriate to draw a sharp distinction between property (rights over objects) and rights over persons.

One problem with this interpretation is that it ignores a crucial complicating factor, which is that people's bodies are objects too, and there are many respects in which we treat them as such. Moreover, many of the ways in which we treat our bodies or body parts in this way are not due to any intellectual or moral mistake, but rather arise from a reasonable interest in treating them as such. Examples of such cases bring out the way in which the supposedly distinct spheres of person and object are much more closely interwoven than is often acknowledged. Although the link between persons and objects may not be as continuous as assumed in the traditional literature on self-ownership, there is a need to be able to bridge the gap between the two spheres. I will suggest that there is some basis for distinguishing ourselves as inalienable, some aspects of our bodies as *potentially* alienable, and external objects as straightforwardly so. My contention is that the framework of property can help us do this, without entailing a



univocal concept for what counts as having ‘full ownership’ of the self and ‘full ownership’ of ordinary objects.

An example that illustrates the problem of assimilating the body under the abstract concept ‘person’ and distinguishing this sharply from mere objects is the case of blood transfusions. Jean Pierre Baud explains that this distinction came under real scrutiny in French law towards the middle of the 20<sup>th</sup> century, as technological advances changed how blood transfusions were carried out.<sup>6</sup> Under French civil law, the body had been protected under the umbrella of the abstract legal notion of the person. As such, the body and its parts were not considered alienable, except in cases of slavery, where such alienation was just a consequence of the total alienation of the person. In cases where body parts had been severed, these were treated as minor cadavers, with funeral rites accordingly imposed for ‘notable parts of the body’. When blood transfusions became possible at the beginning of the 20<sup>th</sup> century, they were initially carried out arm-to-arm, and were therefore not construed as donations. Instead, they were characterised as a medical procedure carried out by a doctor and made possible by the act of a ‘donor’.<sup>7</sup> But by the 1950s, transfusion procedures in which blood was collected and stored outside the human body before being transfused into the patient had become commonplace. Reluctance to recognise the blood as an object under the law meant that sale of human blood and blood products was not viewed as a transfer of property, but instead labelled as ‘deliverance against payment’ (“*délivrance à titre onéreux*”). Pharmacies did not buy blood in order to sell it on, but rather accepted products to be ‘deposited in dispensaries’. All this equivocating stemmed from an overarching concern to protect the dignity of the person and the sanctity of the body. The legal status of blood was thus largely set out in negative terms, on the insistence that blood was not a commodity and should not be considered to be a medicine – blood was not a *thing*. The result was that human blood and blood products were distributed for 40-odd years without having a determinate legal status. As Baud explains, from a legal point of view, it was as though the blood did not exist. This was made evident in a most serious manner in the wake of the contaminated blood scandal, which revealed that the Centre National de Transfusion Sanguine had knowingly provided transfusions of blood contaminated with HIV to haemophiliac patients in 1984 and 1985. Defence lawyers argued on the basis of the legal non-existence of blood that the plaintiffs had no recourse against having been provided contaminated material. In response, the legislature finally recognised the real existence of

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<sup>6</sup> Baud (2007)

<sup>7</sup> There is already a tension here in the use of language that designates the person offering the blood as a ‘donor’, while refusing to recognise the blood itself as an object donated, a further step which would require recognition that this part of the person had been *alienated*.

human blood, categorising it somewhat inappropriately as a ‘substance hazardous to human health’.<sup>8</sup>

Baud insists that donating parts of one’s body amounts to the kind of act of disposal that we usually take to be the prerogative of a property owner. He explains that some theorists would like us to distinguish between ‘property ownership’ and ‘belonging’ (*‘la propriété’* and *‘l’appartenance’*), such that someone’s hair can be said to belong to her, but can only become her property once cut from her head. For Baud, they are just playing with vocabulary. He argues that any form of ‘belonging’ which justifies the fact that one has the right to dispose of the body part in question must entail all the same features of property ownership. He understands the tension as stemming from a clash between reality and the traditional notion of the sacredness of the human body. It is a clash between that which must be said, and that which it is forbidden to say: “Pour le corps humain, il est des mots interdits et d’autres qui doivent se dire.”<sup>9</sup> For Baud, then, there must be some continuity between ownership/alienability of the detached body parts, and ownership/alienability of those same parts while still integrated within the body.

Baud equally recognises, however, that the picture can’t be as simple as always treating bodily materials as objects like any others. As a case in point, he cites a judgement under French criminal law which prosecuted cases of voluntary contamination of HIV through sex under the title “administration of a harmful substance”. I think most would agree with Baud that it is difficult to accept a definition of sexual relations as an administration of substances. On Baud’s account, the same reasoning applies to distinguish arm-to-arm transfusions from the donation of blood to be stored in a blood bank. The arm-to-arm transfusion should be seen as an act of rescue, according to Baud, much like mouth-to-mouth resuscitation, rather than as a transfer of material from one owner to the next.

These two points bring out the puzzle that needs to be addressed. The body is unique in being a point of transmutability between the abstract realm of persons and the concrete realm of objects. On the one hand, there are some uses of bodies and their parts which require us to treat them as ownable objects. And in these cases, it is not clear that we can simply draw a sharp line to say that ownership only begins once the substance is separated from the body. On the other hand, there are many uses of the body which seem to belong squarely in the sphere of actions undertaken by persons, and which it strikes us as a mistake (an intellectual, as much as a legal or moral mistake) to understand in terms of an administration or transaction of materials akin to the gift or sale of a piece of property. It is precisely here that the question arises about the nature of the link between persons and property. how do our conceptions of property and

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<sup>8</sup> Baud (2007), p. 774

<sup>9</sup> Baud (2007), p. 773

the sense in which we have ownership over our bodies figure in our understanding of how autonomous persons interact with other people and the objects around us?

The way in which persons and property are interwoven in this way no doubt helps to explain why many find theories of self-ownership so appealing, as they purport to provide perfect continuity between property and the person. However, as Ryan points out, this supposedly neat link appears to play on conflicting sets of intuitions, and leads us to question why the standard framework of object-property as we know it is assumed as paradigmatic for understanding self-ownership.<sup>10</sup> The literature on self-ownership is not the only place, however, that contains attempts to tackle this contentious area. Kantian theory, for instance, draws a distinction between rights to your own person (the innate right of humanity) and acquired rights (rights to external objects of choice). Though the latter are not reducible to the rights to your own person, the normative basis of acquired rights is taken to depend on the right to one's own person.<sup>11</sup> Arthur Ripstein explains how property rights depend on the innate right of humanity as follows:

“For Kant, property in an external thing – something other than your own person – is simply the right to have that thing at your disposal with which to set and pursue your own ends. Secure title in things is prerequisite to the capacity to use an object to set and pursue ends.”<sup>12</sup>

Property rights, then, depend on purposiveness, and provide a necessary framework within which people can rightfully enact their purposiveness in the world. The basic idea at the heart of this, that the point of property is to enable us to make use of things for our own purposes by creating and protecting a sphere of exclusive use, chimes with most conceptions of property, as does the claim that the structure of property rights parallels one's rights with respect to one's own person. But the extent to which Ripstein draws the link between purposiveness and property proves problematic. For Ripstein, the link between property and purposiveness is such that *any* unauthorised interference with my property wrongs me by interfering with my freedom:

“Suppose that I break into your home and eat dinner at your table while you are out. (I bring my own food, and clean up after myself.) I do not harm you in any way, but I help myself to a benefit to which I am not entitled. I use your property in pursuit of one of my own ends, an end that you do not share. In so doing, I wrong you (...) The wrong (...) is depriving you of your freedom to be the one who sets the ends that you

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<sup>10</sup> As explained in chapter 1, reaching to a Lockean explanation based on his concept of ‘property in the person’ and the significance of labour-mixing as the method of appropriation does not help, not least because Locke's theory is grounded in deep theological assumptions.

<sup>11</sup> See e.g. Ripstein (2009), p. 57

<sup>12</sup> Ripstein (2009), p.67

will pursue, or that will be pursued with your goods. I enlist you or your means in support of ends you do not share.”

For a Kantian, this constitutes a very serious class of wrong indeed, as Ripstein clarifies:

“There are three limits on the ways in which people may treat each other. First, one person may not interfere with another’s person or property without one’s consent (...)  
To violate any of these limits is to coerce the other person.”

In a perhaps surprising streak of similarity with theories of self-ownership, this Kantian line of thinking also seems to draw the parallel between the person and her property too strongly. If interference with property is coercion, there can be no interference with my property that is not also an interference with my person. If a colleague drinks out of my own mug while I’m out of the office, washes it up afterwards and returns it to my desk so I’m never any the wiser, she might have done wrong insofar as she has violated some property right of mine, but has she really *coerced* me? Just as Nozick’s self-owner becomes partially enslaved by taxation, Ripstein’s sovereign individual is made a slave to the mug-thief. This surely works to obscure, rather than clarify, what is really important about autonomy. If coercion is meant to be a serious wrong done to a person, then it seems puzzling that such a wrong could be perpetrated against someone in her absence. In the mug-thief case, not only am I, the mug owner, entirely absent from the act, it also has no felt impact on my life, the way in which I make decisions, or my capacity to do so, except in the formal, counterfactual sense that if I had wanted to make use of my mug at the time at which the mug-thief was using it, I would not have been able to do so. But it’s not clear why the counterfactual should have such moral clout if we imagine that the mug-thief chose to use my mug rather than that of another colleague precisely because she knew I was out of the office and would have no use for it that day. I can accept that this case involves the mug-thief enlisting my property in support of ends I do not share, but I disagree that this necessarily and directly constitutes a deprivation of my freedom to set the ends that I wish to pursue. After all, it leaves me still free to pursue all the ends that I actually want to pursue with my mug (namely, drinking from it when I am in the office). I reject the assumption that when my colleague uses my mug, in that moment, *I* am pursuing ends that I have not set for myself.

Ripstein’s view assumes that it is a constitutive part of my freedom as a person that I not only be able to set all the ends I want to with my mug without interference, but that I in fact exclusively set (or at least share) all the ends that are ever set over my mug. This assumption leads to the implausible conclusion that in the mug-thief case, there is a sense in which the mug-thief is forcing *me* to have my mug put to use in a way that is not compatible with my will. But notice that ‘not compatible with my will’ here is understood in terms of being a use of the mug which does not figure in the total set of ends which I wish to pursue with my mug. It need not

be a use which is contrary to any of my ends. This gives us a very far-reaching notion of coercion, one under which a great many seemingly innocuous ‘borrowings’ will count as a deprivation of freedom, and therefore a serious moral wrong against the person. My claim is not that such cases never constitute a violation of property rights, but that thinking that property rights perfectly track the structure of autonomy in this way is a mistake. It is compatible to think it important that a system of property can make sense of such cases as violations of property rights, without committing to the stronger claim that all such cases constitute a moral wrong against the person in the form of a violation of autonomy.

Though the theories espoused by Ripstein and Nozick both prove unsatisfactory, it seems clear that understanding property as a relational framework is key to understanding how autonomous persons interact with and in the physical world, and how the nature of these interactions affects or protects our autonomy. In order to do this, it is necessary to explore further the nature of the relations between the self, one’s body, and other objects, and to explain the significance of these relations with reference to existing social conventions. By establishing the heterogeneity thesis described above, I hope to pave the way for a more nuanced understanding of how to bridge the gap between persons and property. The first way to approach this is through an analysis of the standard understanding of the structure of property rights.

## 6.2. OWNERSHIP V PROPERTY

In a series of seminal articles on legal analysis, Wesley Hohfeld argued that the correct conception of property is as rights, not things.<sup>13</sup> He argued that regarding property as things places mistaken emphasis on physical possession; leaves intellectual property unexplained; mistakenly leads to the assumption that rights can be held against things, as opposed to people; and finally, that such a view fails to explain divided control of property.<sup>14</sup> Theorists who followed Hohfeld took these to be decisive reasons to define property as *property rights*, not things. Thus, any interference to a person’s property rights would constitute an interference to her property, regardless of whether any physical interference had occurred to the object over which she held these rights.

Hohfeld also provided an analysis of the structure of rights in terms of four basic components or ‘Hohfeldian incidents’, which combine to fit together in various ways to create complex rights with various parts.<sup>15</sup> This complex structure means that a ‘property right’ on the Hohfeldian view is not a single homogenous right, but instead consists of several distinct

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<sup>13</sup> Hohfeld (1919)

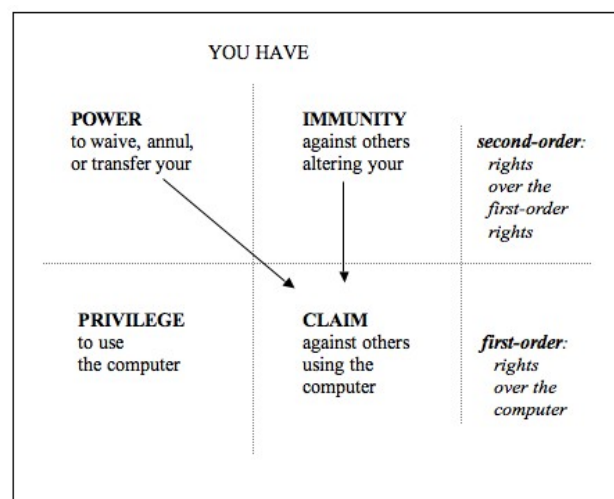
<sup>14</sup> Wenar (1997)

<sup>15</sup> Wenar (2015)

incidents, which are taken to be conceptually independent from one another. It is this Hohfeldian structure that is invoked when property is described as a cluster concept with several indeterminate parts.<sup>16</sup> Though the four main incidents can be said to be determinate, the way in which they apply in different contexts to establish different elements that make up a given right is flexible or indeterminate. The four main incidents in the Hohfeldian structure are as follows:

- (1) Privileges: *A* has a privilege to  $\phi$  *if and only if* *A* has no duty not to  $\phi$ .
- (2) Claims: *A* has a claim that *B*  $\phi$  *if and only if* *B* has a duty to *A* to  $\phi$ .
- (3) Powers: *A* has a power *if and only if* *A* has the ability to alter her own or another's Hohfeldian incidents.
- (4) Immunities: *A* has an immunity *if and only if* *B* lacks the ability to alter *A*'s Hohfeldian incidents.<sup>17</sup>

Leif Wenar helpfully illustrates how these four main incidents can combine together to form what he describes as the ‘molecular structure’ of a property right one could have over a computer:



Wenar (2015) §2.1.6

<sup>16</sup> E.g. see Fried (2004) and Jarvis Thomson (1990)

<sup>17</sup> Wenar (2015)

Wenar's categorisation of the incidents into first- and second-order rights is helpful. He clarifies that the first-order rights (the privileges and claims) are those which hold directly over the object, while the second-order rights (the powers and immunities) are those which concern the alteration of the first-order rights. The second-order rights help to make sense of the idea that property is exclusionary while taking account of the fact that this exclusion of others is not static, but that I, as an owner, can determine where, when, how, and in respect to whom that exclusion applies. The framework thus provides a detailed analysis of the shape of property rights that adequately explains the complex normative structure and function of the concept of ownership. The theoretical merits of this approach have led to it becoming the established theory of property within contemporary philosophy and legal theory.

Despite its merits, however, it is not without problems. One of the implications of the view of property as rights, not things, is that any interference to any of the incidents that make up a given property right counts as an interference to property. Wenar explains how this leads to problematically conservative conclusions in his discussion of interpretations of the Takings Clause of the United States Constitution.<sup>18</sup> The clause reads: "nor shall private property be taken for public use without just compensation." Much interpretation of this clause revolves around determining what constitutes a 'taking' of property. Wenar points out that on the Hohfeldian view, any alteration or annulling of any of the incidents that make up any given property cluster would count as a taking of property, in the sense that this right would have been 'taken' from the bundle held by the original owner. Wenar points out that this would require most existing property entitlements to be left intact, and would severely limit the powers of the state to alter or reform the boundaries of property rights.

In response to this problem, Wenar proposes that we can retain the complex Hohfeldian characterisation of property rights without abandoning completely the idea that property can be *things*, too. In order to do this, Wenar makes the simple distinction between rights and the object of those rights – between *property rights* and *property*. He makes the distinction as follows:

"private property is all those things over which private property rights are held. And private property rights are just those rights in that two-leveled structure of Hohfeldian rights (...) Property is what property rights are rights over."<sup>19</sup>

Wenar suggests that this provides a possible approach to solving the problem of interpretation of the Takings Clause. The distinction between property rights and property allows us to stay firmly within the Hohfeldian framework of property rights, while retaining an interpretation of what constitutes a 'taking' of property that is still firmly grounded in the common-sense concept of removing some object from someone's possession.

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<sup>18</sup> Wenar (1997)

<sup>19</sup> Wenar (2015)

Wenar's analysis allows us to separate the ideas of ownership (or property rights) and property (things). This distinction allows us to make an important first step towards establishing the heterogeneity of self-ownership and ownership of object-property. It makes it possible to challenge the notion that 'full ownership' must entail the largest conceivable bundle of Hohfeldian incidents. To recap, the view that property *is* rights implies a univocal understanding of ownership. To compare two different sets of ownership rights, in order to determine which is fuller, one need only compare the two bundles of incidents to determine which contains the longest list of privileges, powers, claims and immunities. The kind of object owned would not come into question, because the comparison of property just is a comparison of *rights*. The object only figures in a secondary sense – in that the right is held against other people, in reference to some object. Wenar's distinction allows us to put pressure on this simple gradable view of property, because once we've acknowledged that ownership rights may be altered without this entailing a taking of the property in question, we can also suggest that having less than the full abstract list of possible Hohfeldian incidents in a property right bundle needn't entail that one has less than full ownership over a given piece of property. In particular, we can start to press the idea that different kinds of object by their nature impose different conceptual restrictions on what can be considered the maximum number of incidents in the bundle of ownership rights for that property. While it is in one sense conceivable to think of self-ownership in the maximizing way described above, there is a separate question as to whether this is coherently conceivable within a given conceptual theory of the justification of property. It is this latter question which I pursue here, with reference to the institutional approach.

The examples explored in the first section of this paper suggested that there may be cases where it makes sense to treat the body under the framework of property, given our interest in having access to things like blood banks. Clearly the relation between a person and his body is not a relation between two distinct objects, insofar as my body *is* (a constitutive part of) me. And yet, the link is a somewhat complicated one – bodily stuff can become a separate 'thing', and ordinary 'things' can be amalgamated to the body. So there is a certain amount of physical detachability that makes at least parts of our bodies more akin to mere objects, and thus perhaps appropriately subject to the framework of property, on the model described above. But beyond this, as we saw in section 5.1, it seems that a parallel problem to the precariousness of the possession of objects arises in the realm of persons and their actions, too. Namely, it is useful to be able to treat certain undetachable aspects of our person as alienable – to create an artificial relation of *alienability*, where no actual detachability exists. The structural frameworks which allow us to securely trade with others stretch beyond the realm of mere objects – a similar story can be told about how conventions arise to secure individuals' claims against each other for the provision of services. The way in which these arise can be construed as addressing a parallel



problem to that of securing possession over objects. Namely, that the control a person has over her own body or actions is *too* secure, and that we need to be able to construct artificial relations of *alienation* in order to be able to give others secure and determinate claims over one's actions or services.

We can flesh out the mechanisms for this using the Hohfeldian framework as it is usually construed for property rights. Take the example of a person Alice, who agrees to work on Bert's farm for a fee. Suppose that Alice has agreed to work under Bert's orders for the day on general farmyard tasks. To refer back to the basic Hohfeldian incidents described above, we can use this framework to track the changes in the normative relation between Alice and Bert with respect to some of Alice's actions. Namely, before Alice promised to work for Bert that day, Alice would have had a privilege to go fishing if she chose to do so. Now, however, Alice has effectively undertaken a duty to Bert not to go fishing, and so has waived that privilege. Through the promise, Alice has also transferred to Bert a claim that Alice labour on the farm that day, because Alice has undertaken a duty to do so. In entering the agreement, Alice was utilising her powers to alter her Hohfeldian incidents with respect to Bert. In doing so, we can see that Alice has also transferred certain powers to Bert, and thereby lost certain corresponding immunities. For example, Bert now has the power to order Alice to muck out the stables, or to harvest the corn, or to shear the sheep. At the moment that Bert gives any of these orders (providing they fall under the remit of the original agreement), this imposes on Alice a duty to perform the action that has been asked of her, and gives Bert a new claim against her. Alice thereby lacks the immunity from Bert altering her Hohfeldian incidents within these parameters. Again, we could conceive of the object of the promise or contract in this case as being Alice's consent to transfer certain normative relations holding between her and her actions to Bert, and the agreement not to renege on the transference of these incidents.

I am suggesting that the Hohfeldian structure allows us to conceive of a certain artificial relation holding between Alice and her mental and physical capacities. This relation allows us to make sense of exchanges in services and actions by conceiving of Alice engaging in a transfer of the relation of possession of her actions along the same lines as she can transfer her property in external objects. This mirrors the way in which the relation of property was established in the first instance. Just as the relation between person and external object was modelled on the fixed and constant way that I enjoy the advantages of my mind and body, so in turn can an artificial relation of alienability emerge between me and my mental and physical capacities, that is modelled on the property relation. The way in which these two relations mirror each other might be put in simple terms as follows: external objects are too easily transferable, so our control of them needs to be made as stable as possible by approximating the stability of our control over our bodies and minds. The exclusivity of a person's control over her body and

mind, on the other hand, is too stable, so we need a way of conceiving of trades in actions and services in a similar way to the way in which we can easily hand over external objects.

This allows us in a way to square the circle as to whether the shape of property over external objects is derived from the shape of bodily rights, or vice versa. But it allows us to do so in a way that takes account of the fact that such property relations arise as an artificial feature within the account of the justification of structures of justice and authority. We construct these relations because they are a useful way to formalise our interactions and transactions with others in a way that can be publically recognised and enforced by a third party to provide the security and stability to protect our interests.

This picture also allows for the heterogeneity proposed at the outset of this paper. The heterogeneity in the concept of property arises from the way that this account provides a justification of property based on the assumption of certain fundamental interests, and the way in which the property relation mirrors that of the relation to the advantages of the mind and body. The Hohfeldian framework is helpful in this regard. If we take another look at the Hohfeldian incidents, we can see that there is another way of grouping them, which is different to the distinction Wenar makes between first- and second-order rights. Namely, incidents (1), (2) and (4) can be considered static ones. That is not to say that there can be no change in these incidents, rather, these incidents only change when somebody has wielded a power to change them. We might think, then, that the flexibility of an ownership right is really characterised by the powers included in that ownership right (incident 3). These are what allow you to make various uses of your property in cooperation or trade with other individuals, by altering the specific Hohfeldian incidents that hold against others. I suggest that the heterogeneity in the concept of property proposed above can be grounded in a certain understanding of the importance of Hohfeldian powers to the person, and how these relate to the characterisation of property sketched above.

One of the questions that Ryan prompts us to ask is: can I really do whatever I want with my lungs? From our point of view, this is a question of alienation: do I have the right to destroy my lungs, or to give or sell them to somebody else? Before addressing this question about the legitimacy of alienating parts of one's body, it will be easier to address a more general question: if we conceive of a person as having ownership rights over herself, ought she be able to alienate those rights entirely? We should distinguish here between alienating incidents within specific parameters (e.g. Alice transferring to Bert the power to give Alice work orders for the day), and alienating all one's incidents by alienating one's powers over them all. For ordinary objects, full alienation of the second sort usually involves actual transference of the object. This is where Wenar's distinction between property rights and property becomes helpful. With this distinction, we can say that alienation of property rights usually also involves alienation of the property itself. In simple terms, if I transfer to you all property rights over a bottle of wine, you

will most probably also take that bottle of wine home with you (and away from me). So while transference of the relation of property might happen in theoretical terms while I'm still holding the wine bottle in my hands, the object then can be and usually is physically removed from me. In contrast, while it is conceivable to think that a person could alienate all her Hohfeldian incidents to someone else, there is clearly no corresponding physical detachment of the person from her body or mind that can take place.<sup>20</sup> In that case, we might think that alienation of the ownership rights over the person would be possible, but not alienation of the property.

It might seem trivial to labour this point, but viewed in the context of the account we've been exploring, it helps us to make an important distinction. At the heart of the account is the assumption that individuals have a fundamental interest in having secure use of certain external objects, modelled on the kind of security we enjoy over our mental and physical capacities. This is no coincidence, because secure use of our physical and mental capacities is also the precondition of us being able to establish secure use of external objects.<sup>21</sup> Another way to characterise this basic interest, then, is as an interest in being attributed the basic power to exclusively take control of various things (starting with our own bodies/minds and extending out to external objects). This can be seen as the basic power that it is assumed must be attributed to the individual as the political atom in this account. It is by attributing this power to individuals that frameworks of rights provide the security from unwanted interference which is taken in many accounts as the starting point for justifying state legitimacy. The fact that external objects are physically detachable from the person means that when one alienates a piece of *property* to another person, this has no impact on that basic power. It straightforwardly serves our interests to be able to discard some items of property completely. This lack of impact on the basic power is precisely because there is no real connection between the person and the external object.

But now we can contrast this to thinking what it would be to completely alienate all incidents over one's body in the same way. This would be to demand of the state that it no longer attribute to that individual the very same power that the account explains as securing a fundamental interest of the individual. Scanlon has suggested an approach to tackling questions of self-ownership which proves helpful. Scanlon examines the argument that self-ownership entails that taxation is akin to slavery because an individual is entitled to the full amount of what another is willing to pay her for her labour:

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<sup>20</sup> The closest way to approximate this would be in a scenario where the person alienating her ownership powers over herself rendered herself unconscious for the duration of the alienation.

<sup>21</sup> As Judith Jarvis Thomson points out, a person's property rights would not mean much to him if he lacked claims against bodily intrusion. For if someone wanted to steal his shoes, simply taking the shoes would be theft, but wringing his neck in order to get him to hand them over would not infringe any claim of his. (Thomson 1990, p.212)

“To assess this argument we need to ask what makes the idea of self-ownership appealing, and whether the reasons that lie behind its appeal support the idea that individuals are entitled to the full amount of what others are willing to pay for their services.”<sup>22</sup>

This is a method which Scanlon applies to various ideas, including the ideas of equality, liberty and coercion. His approach is “to try to identify the reasons that give these concepts their importance and to ask when these reasons apply.” The considerations which Scanlon thinks give legitimacy to the idea of self-ownership in one’s labour are: “the reasons people have to choose their occupation, to be able to quit a job if they wish, and so on.”<sup>23</sup> Taking these to be the reasons which support the appeal of the concept of self-ownership in one’s labour, Scanlon suggests that these very same reasons support the regulation of markets and some level of redistribution through taxation. This is because unfettered markets and lack of taxation will lead to high levels of inequality, which in turn create negative externalities. The crucial point is that the negative externalities created are ones which threaten people’s abilities to choose their occupation and to be able to quit a job if they wish to – the very considerations which Scanlon takes to be central to the appeal of the concept of self-ownership of one’s labour. He concludes from this that the reasons that support the concept of self-ownership support a system which has inbuilt limits on the claims which certain people can make on the total pot of resources. Taxes are not viewed as deductions from a person’s income, in the sense that some of his money is taken away from him, “Rather, these taxes reflect the limits on the claims to resources that he can come to have within a legitimate system of property and market exchange.”<sup>24</sup> In other words, the reasons that support the basic concept of self-ownership serve to shape the structure of institutional frameworks which are justified on the basis of that concept. And those reasons might place certain internal limits on the claims which an individual can reasonably make within that system.

We can take the same approach here, with the question framed in a slightly different way: what makes the existence of frameworks of property appealing, and what are the reasons behind attributing powers of ownership to individuals? The first reasons we identified above were based in a fundamental interest in establishing security for individuals and their possessions. It was suggested that systems of property can be thought of as creating artificial relations of possession over external objects to approximate the security of a person’s possession of her mental and physical capacities. It was suggested that the powers of alienation that come with property rights can be seen as responding to reasons that emerge after security of possession has been established, namely: the interest in trading with others. It is only once we can establish secure,

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<sup>22</sup> Scanlon (forthcoming), ch.6, p.27

<sup>23</sup> *Ibid.* p.27

<sup>24</sup> *Ibid.* p.28

exclusive possession that the notion of being able to trade possessions makes sense. The reasons that support the possibility of alienation are in this regard dependent on the reasons that support establishing security of possession. This hierarchical way of conceiving of the reasons supporting systems of property allows us to think more clearly about the kind of structure of property rights which could legitimately be supported on the basis of these reasons. In particular, we can suggest that these reasons support internal limits on a system of property rights to ensure that rights to alienation do not go so far as to undermine the basic security of the individual's possession of her mental and physical capacities on which the whole thing was predicated. From this point of view, we can say that there is nothing in the reasons that make the existence of property frameworks appealing that would support enabling the kind of wholesale alienation of a person's body explored above.

This gives us reason to posit a heterogeneity between the ownership powers that we can conceive of the individual exerting over her own mind and body, and the kind that we can conceive of her holding over external objects. Namely, on the terms of this kind of justification of property rights, there is no reason to think that if we allow individuals to subject aspects of their body to the framework of property, this would have to include attributing to the individual the full power to alienate in the same way that ownership rights over external objects include this power. Nevertheless, the analysis of the account showed that there was a mirroring between the power held over one's body and mind, and that held over objects. The way that these are interlinked, I suggest, paired with the challenges posed by the examples discussed in section 6.1, motivate the proposal that it could be useful to make provision for individuals to subject their bodies to the framework of property in certain cases, even if the structure of the power of ownership that is attributed to an individual over her body is not symmetrical to ownership of other objects. Furthermore, this kind of provision would be compatible with the Scanlonian analysis of the basic reasons which support the existence of frameworks of property discussed above.

One might object that one could well accept the Hohfeldian characterisation of artificial relations of alienability being established in the way described above, but still resist bringing this all under the umbrella of property. Instead, we could simply accept that there are different clusters of Hohfeldian rights for different objects, and for persons and their actions, perhaps even for different parts of people in different circumstances, but we needn't talk in terms of property rights in order to understand this. In response, we needn't commit to the strong claim that these rights over our person are property rights in some fundamental sense. What the account above does bring out is the fact that this basic Hohfeldian structure allows one to treat one's body *as* though it is property, by engaging in these artificial relations of alienation. Or, in the cases where parts of the body are physically detached and transferred from one person to

another, by engaging in actual alienation. Once we're engaging in these kinds of transactions, we can say that we are operating within the framework of property, broadly construed. This allows for a transition between bodily rights and property rights via the notion of ownership, without committing to a direct symmetry between the two.

Another reason in favour of positing this asymmetrical mirroring of ownership powers is that it could prove useful for clarifying debates around how far persons can legitimately subject themselves and their bodies to various markets or contracts. We might ask, for instance, how far do certain activities such as prostitution or contract surrogacy involve an alienation of powers that comes close to threatening the basic capacity for control that was identified as a fundamental basis of the justification of ownership? It also allows us to analyse the alienability of physically detachable parts of the body, in order to address the puzzles raised in section 6.1. The Hohfeldian framework coupled with the heterogeneity thesis helps us to identify why certain transactions may be more complex or problematic than others. For example, if I sell my kidney to somebody else while it is still in me, this has implications not only for my powers over my kidney, but also for my ownership powers over the rest of my body. The new owner now has a claim to take possession of that kidney. This affects the claims I hold over the rest of my body against physical interference, including the basic power which we established was inalienable, if the method of kidney extraction is potentially life-threatening. Contrast this to selling a chunk of my hair that is still on my head. This is intuitively less problematic, perhaps because it would not entail an encroachment against other Hohfeldian incidents I hold over the rest of my body in the same way. Moreover, my approach requires us to take into consideration structural aspects of certain markets and the power relations within them. For example, following Scanlon, if we think it important that a person have the exclusive right to decide what happens to her body, this may give us reason to think that nobody else, including the state, may interfere with her decision to sell her kidney. On the other hand, there may be structural features of such markets that make us think again. We may think that the high price offered for a kidney exerts undue force on the decisions of those who are very poor.

In addition, it allows us to make sense of why certain violations of property strike us as more of an affront or threat to the person than others, drawing on the distinction between fungible and non-fungible property elaborated in section 5.5. For example, a burglar who breaks into my home while I'm not there may well be considered to have committed a more serious crime than a thief who steals my car when it is parked on the street, even if the burglar steals something of lower value than the car. A preliminary explanation for this could be sketched out in terms of the kind of property my home is being more closely connected to the security established by the basic Hohfeldian power identified above. For instance, the burglary may have psychological effects on a victim which cause her to feel under threat and thus less in control of her physical boundaries, not only to her home, but to her own body. This would

allow us to make sense of why unauthorised uses of some kinds of object-property may properly constitute an interference with the person, without committing to Ripstein's claim that any such interference constitutes coercion.

This is just a suggestion of how this view could prove useful, but these are complex matters and will need more work to fine-tune the details, in particular through more in-depth engagement with anthropological and sociological work to better understand the impact of conventions on our relations to different types of object and parts of the body. I hope here to have laid the groundwork for proceeding with a view of heterogeneous ownership based on an institutional view of property that can begin to make sense of the parallels between powers of disposal over one's person and property rights over different kinds of object, without ignoring the points of differentiation between the two.





## CONCLUSION

This thesis started with a puzzle about our conflicting intuitions regarding treating the body as property. The puzzle arose from cases where we intuitively affirm rights of disposal over some aspects of the person that are similar to or indistinguishable from rights of disposal over property, while simultaneously rejecting the characterization of those very same parts of oneself as mere property. The central case I used to illustrate this tension arose from our attitudes to different uses of a person's hair. The thought was that we do not take it to be problematic that I can cut off my hair and sell it if I want to. There are plenty of websites which would allow me to set a price and agree to the sale of my hair before I have it cut off. To that extent, we do not take it to be problematic that I treat my hair as though it is my property, much like a crop to be cultivated and sold at market. But if a stranger were to ambush me on the street and cut the hair from my head without my permission (albeit without harming me), we consider that to be an assault, an attack against the person, not mere theft of some property of mine. Having dispatched approaches which either take property to be foundational or insist on a sharp distinction between persons and property as lacking the tools to solve this puzzle, the challenge of the thesis was to construct an approach to property which could adequately account for these seemingly conflicting convictions.

One aspect of the thesis was a negative argument to the effect that two existing approaches prove inadequate to tackling this puzzle. Theories of self-ownership which insist that property is foundational are unable to explain why aspects of the human body should be treated as special relative to any other owned object. Moreover, such a view plays on two conflicting intuitions in the way that it transposes ordinary property rights onto the person. As Ryan suggests: it's only because we think that ordinary property is trivial and disposable that we're drawn to the claim that having ownership of my lungs entails being able to sell them. Conversely, it's only because we don't think persons are trivial or disposable that Nozick can suggest that taxation amounts to slavery. The force of this criticism derives from the fact that, while self-ownership has been used in debates on social justice to justify various distributive frameworks, it lacks the tools to explain *why* self-ownership matters and how. As an alternative, one might insist on a sharp distinction between the spheres of the person and objects, such that no part of the person can be considered property (as exemplified by the Kantian approach to property). Property is then justified by grounding it in some other fundamental natural right to agency. However, this kind of view is unable to explain the continuity of the form of a person's rights of disposal over her hair before and after she decides to cut it off. Moreover, the way in which the Kantian approach links property to purposiveness ends up drawing the link between the person and ordinary property implausibly closely, by holding any interferences in property to constitute a direct interference to a person's agency. In light of this negative argument, we

were left with no principled reason to distinguish between some categories of object which are properly 'property' and another category which are not.

The main aspects of the negative argument were provided in chapters 1 to 3. Chapter 1 provided an analysis of the foundations of self-ownership. In order to understand what basis there might be for positing property as a foundational principle of rights, this chapter provided an analysis of Locke's concept of property in the person. It argued that Locke's concept is grounded in theological assumptions, and it is these which provide the grounds for expressing the natural rights an individual holds over herself in terms of property rights. The chapter also raised preliminary concerns about the Kantian approach as a possible alternative to Locke. In light of the inadequacy of Locke's grounding for the concept of property in the person, chapter 2 sought to explain the appeal of the concept of self-ownership to contemporary liberals, and to challenge whether a principle of self-ownership can function as a basic axiom of liberal political philosophy. The chapter highlighted key points of tension in the view of self-ownership proposed by Nozick and Cohen. I argued that a view which takes self-ownership as axiomatic plays on conflicting intuitions in order to make the case for invoking property rights as morally fundamental. Nevertheless, I suggested that there was a common theme to be found in both the Lockean and Kantian accounts of property which may give reason to think it appealing to theorise rights over the person as similar in form to property. This was the suggestion that property provides the tangible subject which gives content to an abstract notion of autonomy. However, if this could explain the appeal of using property to express a fundamental principle of autonomy, it would not be sufficient to give rise to a 'full' principle of self-ownership of the Nozickian sort. Chapter 2 concluded that in order to understand why or in what way we ought to think of people as self-owners, we need to understand the reasons we have to apply ownership rights over different objects in different ways, and what implications this would have for thinking of people as owners of themselves and their bodies.

In response to this, Chapter 3 returned to the Kantian insistence of distinguishing sharply between persons and objects, and examined the potential problems with treating aspects of the body as property through a discussion of the wrong of objectification. I argued that rather than condemning objectification as a distinctive category of moral wrong, we ought to recognise that as embodied beings we often have reason to make use of one another's bodies in their capacity as an object. It is useful, however, to retain from Kant the insight that institutions have a role to play in shaping the moral context within which individuals interact.

This was the point at which the positive contribution of the thesis began to emerge. The discussion of consent in Chapter 4 provided the starting point for distinguishing between the underlying moral structure of our interactions and the transactional operation of claims at the conventional or institutional level. Section 4.1 argued that the way in which we track the transaction of claims through consent does not map perfectly onto the moral features of our

interactions which mark them as consensual. Section 4.2 made the case that the transactional claims of consent we attribute to an individual over her body are similar in form to property rights held over objects. Having established this similarity of form while recognising that the transactional level of claims does not map perfectly onto the underlying moral structure of interactions, this paved the way to clarify the points of analogy and disanalogy between ownership of the body and ownership of objects. This was done using Scanlon's test of reasonable rejection to explain the seriousness of trespass on a person's body relative to trespass on some external property of hers. This provided an initial basis for considering ownership powers over the body to be similar in form to property rights, while providing some reason for thinking of the body as a special kind of property.

The main framework of the institutional approach to property was constructed in chapter 5. While chapter 4 mainly explored ownership in terms of a power to exclude, chapter 5 addressed to what extent various aspects of the body ought to be alienable as property. It framed concerns about treating some aspects of the body as property as a concern about giving consent to certain uses of one's body in a way that is problematically irrevocable. This motivated the move, in section 5.1, to draw on Hume's account of property. Two aspects of it were highlighted as particularly salient: that it provides an explanation of property as an artificial conventional structure without grounding it in some further natural right; and that it explains the convention of property as dependent on a practice of promising to enable the alienation of property relations. This account provided a basis for moving forward with an institutional approach to property, though did not provide the tools for determining what shape any given framework of property should take. In order to answer that question, it would be necessary to supplement a purely conventional approach with some moral theory. If alienation is dependent on something like promising, I suggested that a fruitful way of figuring out how to set the limits on what is alienable would be to analyse a contractualist account of promising. The contractualist account was salient because it provides insight into how purely conventional aspects of promising combine with the generation of foundational moral obligations. The discussion in section 5.3 argued that promising involves alienating transactional claims over oneself in an irrevocable way, but allows for a get-out clause where fulfilling the promise will be overly burdensome for the individual. I suggested that this provided a moral standard by which we can begin to assess the extent to which certain transactional agreements ought to be enforced at the institutional level. Further to this, I suggested that the significance of different kinds of object and the way we relate to them on a scale from 'personal' to 'fungible' would inform this approach.

Having sketched out the institutional approach in chapter 5, it was necessary to return to the suggestion from chapter 2 that property gives concrete expression to the abstract notion of autonomy. Given this link between property and autonomy, a question remained as to whether

the way in which the institutional approach places constraints on what a person may do with certain aspects of her own body amounted to imposing problematic constraints on her autonomy, relative to the maximum conceivable powers of ownership that could be attributed to her. In response to this, chapter 6 argued against a univocal understanding of property rights measures the ‘fullness’ of a property right by comparison to the maximum conceivable list of Hohfeldian incidents which could make up a cluster of property rights. Drawing on recent work by Scanlon, I argued instead that there are limits internal to a theory of property which arise from analysing what the basic reasons are for valuing something like property, and to see where those very reasons support or go against implementing that framework in various specific ways. This allowed us to make the case that there is room within the standard Hoheldian structure of property rights to posit a heterogeneous concept of property which can explain the extent of property rights over different objects as limited differentially depending on the nature of a given object and the way in which we relate to it.

Summing up the institutional approach, I argued that a proper understanding of property has to take into account three distinct layers of analysis: (1) The institutional structures which enforce rules for how we behave towards one another, (2) the social conventions which provide non-institutional regulation of our behaviours and influence cultural attitudes to certain objects and activities, and (3) the basic moral structure of our interactions with one another. I suggested that Scanlon’s test of reasonable rejection provides a good account of when someone is wronged by the actions of another. I also argued that the institutional and conventional levels do not map perfectly onto the moral structures of our interactions. As a result, the justification that we give for applying institutional structures such as property in different contexts must involve assessing the extent to which those structures serve our interests while providing protection to individuals from being wronged in serious ways. A complication in making this assessment is that it is not possible to evaluate this based on a pre-social assessment of the interests of rational beings in the state of nature. Rather, we must recognise that existing institutional structures and conventional practices play a role in shaping our interests. They also have bearing on the assessment of which actions are those it is reasonable for an individual to reject with respect to various objects or body parts. Answering concrete questions as to whether one ought to be able to sell one’s hair, one’s kidney, or any other aspect of one’s body thus requires taking a view from the perspective of the existing institutions and conventional practices which regulate transactions and interactions between people, in order to assess the generic reasons in favour of any particular application of property rights.

This provides us with a pragmatic approach which allows us to assess where to place the limits on treating a certain object as property on a case by case basis, depending on the context in which the object is being used or acted upon. As such, it allows us to explain the central puzzle illustrated by the hair case as follows. When it comes to the idea of a person selling her

own hair, we can begin with an assessment of the conventional practices and cultural significance we attach to that part of ourselves. For most people in the UK, the value of hair is considered to be mainly aesthetic and disposable. It is commonly viewed as a fungible part of oneself, to the extent that once cut off, it will be replaced by new hair growth. There is no general stigma attached to people cutting their hair or selling it. To that extent, culturally, hair is a good candidate to be treated as property, it being seen as a fungible, disposable part of the body. Moreover, there is a high demand for high-quality wigs made from real hair to cater to those who have become bald through illness or who simply want a quick change of style.

We can concede that this practice may place burdens on those who feel compelled to sell their hair for pressing economic reasons or on those who change their minds having agreed to the contract. However, the business of selling hair is neither particularly lucrative nor regular (because one would have to wait for the hair to grow back to a considerable length before selling it again), and the worst that a person who has regretted her decision will suffer is a bad haircut until it grows longer. These considerations contribute to the assessment that it would not be reasonable to reject the recognition of sales in hair as legitimate property transactions, because it would not place people at risk of being wronged in a serious way. Once the hair has been cut off, as an item of fungible property, any interference with it can straightforwardly be treated as an institutional violation of interfering with object-property, rather than as a wronging of the person. However, we needn't commit to the conclusion (as the Kantian does) that an individual can only claim a new set of property rights in the hair after it has been cut off. Rather, we can say that the form of the transactional rights which are attributed to an individual over her hair include the power to alienate and sell it if she so wishes. Once an individual has alienated her ownership power of her hair, the hair is treated as an object like any other under the institutional framework of property.

While the hair is still attached to the person, however, although she may regard it as fungible in the sense described above, it is still a constitutive part of her. This recognition leads to the conviction that it is not adequate to characterise the wrong of an assault against someone's hair as a violation of property. Part of the question set by the puzzle was whether it follows from conceding that a person may sell her own hair as property that any taking of it from her head must simply be a case of theft. The institutional approach allows us to resist that conclusion. It makes it possible to explain why this wrong is one of assault, and not theft, in the following way. Again, it is important to proceed with an analysis of existing institutional and conventional structures, as well as the underlying moral structure of the interaction. At the conventional level, although hair is generally considered to be a fungible part of oneself which has largely decorative significance, we nevertheless place great importance on the integrity of our bodily boundaries, of which our hair forms a part. Recall that on the institutional approach,

frameworks of property were explained as arising from an interest in protecting secure spheres of exclusive use over external objects, modelled on the privileged relation of control each individual has over her own physical and mental powers. The question of building in mechanisms for the alienation of claims was explained as dependent on securing that initial interest. Despite the fact that we treat our hair as fungible in many ways, the unexpected cutting of a person's hair by a stranger on the street is likely to make her feel threatened with respect to the general and basic power of control she has over her own body. From this perspective, the cutting of the hair is an interaction which one would reasonably reject as a deeply felt threat to this basic power. This gives us reason to suggest that our institutional structures ought to treat this as the more serious crime of assault against the person, rather than a mere taking of property, even if the object in question is the same quantity of hair which she would anyway have cut off to sell. For our institutional structures to treat these crimes as a mere taking of property (which may not rise beyond the level of petty theft, depending on the market value of the hair), would provide inadequate protection to individuals from being wronged in this serious way.

This approach leaves open the possibility, however, that in some circumstances it would be appropriate to regulate such crimes as theft as well as the more serious crime of assault. This might be the case in a society in which hair selling was so widespread as to be a common form of income, with some people able to charge large amounts for their particular hair-type. In this society where hair was more commonly treated like a cash-crop, it may better protect the interests of individuals to prosecute this kind of violation both as assault on the person and a theft of some valuable property of the victim's. The crime would be analogous to theft through trespass on the body, rather than mere theft or mere trespass.

I suggested that the institutional approach can allow us to have our cake and eat it too. It does so by allowing us to explain why with respect to the very same object, a difference in context changes our convictions as to whether that object is attributed the status of mere, disposable property, or whether it is treated as an inviolable part of a person, or perhaps even both. In this way, the approach provides a complex yet pragmatic way of explaining why certain parts of the body may be alienable as property, without thereby being committed to exhaustively characterising that same part as property. This approach does not only apply to specific parts of a person's body, but could also help to explain the reasons for imposing varying restrictions on ownership of different kinds of external objects. This would depend on the significance of an individual's relation to that object with respect to the individual's sense of control over her basic powers over herself.

In light of the importance to this approach of examining existing institutional and conventional structures and how they bear on the moral features which underpin the account, a more thorough exploration of the applications of this approach would require much more

engagement with a range of sociological and anthropological perspectives on the ways in which people relate to and value the body and other objects. There is also an entire section of property which this thesis has not touched on, and which would be of great interest in developing the institutional approach, which is the area of intellectual property. Although there has not been space to pursue those avenues here, they present rich opportunities for further research.





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