

**WHOSE RIGHTS ARE BODY RIGHTS: A  
MODERN-DAY APPROACH EXAMINING  
THE CONSTITUTIONAL LIMIT TO  
PROPERTY RIGHTS IN HUMANS**

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## INTRODUCTION

Throughout medical history, laws have evolved concerning tissue research. Historically, when individuals sought medical treatment, any body part or biological material removed could be used for research purposes without the consent or knowledge of the individual.<sup>1</sup> During the 1950s, there were few laws in place to discern the rights of human tissue. Individuals should have legal ownership and control over their tissues and organs. Doctors should be required to inform individuals that their bodies are being used for research. Likewise, individuals should maintain sole authority when deciding whether they want their tissue and organs to be used for research regardless of their organs being excised.

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<sup>1</sup> REBECCA SKLOOT, *THE IMMORTAL LIFE OF HENRIETTA LACKS* (2010).

Best said by Radhika Rao in her article, *Informed Consent, Body Property, and Self-Sovereignty*, “[h]uman research subjects are autonomous individuals who should not only possess the power to contribute their biological materials, but also the right to help control the course of research, and to share in the resulting benefits or profits.”<sup>2</sup> Regardless of whether individuals have volunteered or consented to any form of medical treatment, patients should have control over their bodies. Not only are individuals compensating doctors for treatment, but also individuals are exemplifying trust and faith within doctors. As *quid pro quo*, individuals should be well informed of their biological materials and retain both jurisdiction over and interest in their tissues and organs.

One of the earlier cases discussing the commodification and experimentation of genetic and biological material appears in the story of Henrietta Lacks, an African American woman who was experimented on at The Johns Hopkins Hospital (“Johns Hopkins”). Written by Rebecca Skloot, *The Immortal Life of Henrietta Lacks*<sup>3</sup> narrates the experimentation Henrietta was subjected to. While visiting Johns Hopkins in 1951 to treat excessive vaginal bleeding, a large malignant tumor was found on her cervix, and she was treated with radium treatments for cervical cancer. Without her knowledge or consent, a sample of her cells was taken for study and found to be unique in their ability to replicate and survive.<sup>4</sup>

This experimentation resulted in the product cell line named “HeLa cells.”<sup>5</sup> HeLa cells became widely known and used within the medical landscape. However, despite the notoriety, scientific advantages, and fame that HeLa cells produced, Henrietta’s cells were stolen. According to Johns Hopkins, in the 1950s, when Henrietta Lacks was hospitalized,

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<sup>2</sup> Radhika Rao, *Informed Consent, Body Property, And Self-Sovereignty*, 44 J.L. MED. & ETHICS 437, 440 (2016).

<sup>3</sup> SKLOOT, *supra* note 1.

<sup>4</sup> Amanda Renee Rico, *Imagining Global Female Futures in Black Speculative and Science Fiction* 110 (2018) (Ph.D. dissertation, Texas A&M University) (on file with the Texas A&M University Libraries).

<sup>5</sup> SKLOOT, *supra* note 1, at 57.

[t]here was no established practice for informing or obtaining consent from cell or tissue donors. . . . It was common practice at Johns Hopkins to collect tissue samples from cervical cancer patients, regardless of race or socio-economic status. . . . There were no local or national regulations on the use of [patients'] cells in research.<sup>6</sup>

Prior to 2006, the Lacks family neither discovered the existence of Henrietta's cells nor were compensated through the billion-dollar industry created from HeLa cells.<sup>7</sup>

This Article considers whether there is a constitutional limit to the application of property rights when addressing whether an individual maintains a right in their excised tissues/organs. In addressing whether a right exists, this Article focuses on: (1) whether individuals have a constitutional right to bodily autonomy; (2) whether a property right claim exists over excised organs and other biological materials; and (3) whether signed or voluntary consent to undergo medical treatment strips individuals of any remaining right to their biological materials. This Article serves as an analysis of the Due Process Clause of the Fourteenth Amendment and the fundamental property rights, or lack thereof, individuals have regarding their bodies, tissues, organs, and other biological materials. This Article argues that the legal system fails to grant relief to individuals whose rights have been violated by refraining to recognize an individual's right to bodily autonomy despite the recognition of the existence of potential conversion, patent, and abandonment claims.

#### I. INDIVIDUALS SHOULD HAVE A CONSTITUTIONAL RIGHT TO BODILY AUTONOMY

The Fourteenth Amendment of the United States Constitution, in relevant part, states, “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

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<sup>6</sup> *Upholding the Highest Bioethical Standards*, JOHNS HOPKINS MEDICINE, <https://www.hopkinsmedicine.org/henriettalacks/upholding-the-highest-bioethical-standards.html> [<https://perma.cc/25L6-6F86>].

<sup>7</sup> *Id.*

of life, liberty, or property, without due process of law.”<sup>8</sup> The Fourteenth Amendment is meant to protect individuals from state government actions that infringe on a person’s constitutional right. Specifically, an individual’s constitutional right to own property and be free from deprivation of property without due process is established. By protecting individuals from arbitrary infringement, courts and states alike are required to balance the individual’s interest in their constitutional rights against the state’s interests, desired missions, and goals. By balancing the two, the Fourteenth Amendment seeks to guard against unreasonable and illegitimate state actions.

Initially, the Supreme Court of the United States, in the *Slaughter-House Cases*,<sup>9</sup> held that the Fourteenth Amendment’s Privileges or Immunities Clause applies only to those rights that owe “their existence to the Federal government, its National character, its Constitution, or its laws.”<sup>10</sup> The Court expressly stated that the federal privileges or immunities clause was not meant to protect individuals from state action.<sup>11</sup> Thus, states were allowed to grant their respective citizens certain rights, privileges, and immunities, as they saw fit. However, in *McDonald v. City of Chicago*,<sup>12</sup> the Court mentioned the incorporation doctrine.

Under selective incorporation, the Court decided that particular Bill of Rights guarantees apply to the states if the guarantees are fundamental to the nation’s scheme of ordered liberty or deeply rooted in the nation’s history and tradition.<sup>13</sup> Previously holding “most of the provisions of the Bill of Rights apply

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<sup>8</sup> U.S. CONST. amend. XIV, § 1.

<sup>9</sup> *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872). Waterways were being polluted by several of the slaughterhouses, causing health problems in New Orleans. *Id.* Louisiana created a central slaughterhouse that all butchers were required to use, and butchers then sued the state, claiming a violation of the Thirteenth Amendment and all three clauses of Fourteenth Amendment. *Id.*

<sup>10</sup> *Id.* at 79 (“[I]t should be said that no such privileges and immunities are to be found if those we have been considering are excluded, we venture to suggest some which own their existence to the Federal government, its National character, its Constitution, or its laws.”).

<sup>11</sup> *Id.* at 74.

<sup>12</sup> *See* 561 U.S. 742 (2010) (considering whether the right to keep and bear arms was protected under the Due Process Clause of the Fourteenth Amendment and whether the right was fundamental to liberty).

<sup>13</sup> *Id.* at 759-60.

with full force to both the Federal Government and the States,”<sup>14</sup> the Court in other cases established certain liberties and rights—contraception,<sup>15</sup> abortion (pre-*Dobbs v. Jackson Women’s Health Org.*),<sup>16</sup> marriage,<sup>17</sup> sexuality/sexual privacy,<sup>18</sup> and vaccines,<sup>19</sup>—which are protected under the Constitution, barring both federal and state actors from arbitrary interference. Over time, the Court has moved in the right direction to protect the rights of individuals. Despite its progression, under the aforementioned line of cases, the Court has failed to expressly recognize both the individual’s right and the individual’s liberty to their ownership and bodily autonomy. Specifically, the Court has failed to acknowledge bodily autonomy as an innate right. The Court has refrained from recognizing an individual’s right and liberty to ownership and bodily autonomy. However, under a property rights analysis, the Court may have implicitly granted individuals’ liberty to ownership.

## II. INDIVIDUALS SHOULD HAVE A PROPERTY RIGHT CLAIM IN REGARD TO THEIR BODIES, BIOLOGICAL MATERIALS, AND EXCISED ORGANS

As a matter of legal definition,

“[P]roperty” refers not to a particular material object but to the right and interest or domination rightfully obtained over such object, with the unrestricted right to its use, enjoyment and disposition. . . . [It] signifies that dominion or indefinite right of user, control, and disposition which one may lawfully exercise over particular things or objects.<sup>20</sup>

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<sup>14</sup> *Id.* at 750.

<sup>15</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>16</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), *overruled by Dobbs v. Jackson Women’s Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228 (2022).

<sup>17</sup> *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>18</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>19</sup> *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

<sup>20</sup> *Moore v. Regents of Univ. of Cal.*, 249 Cal. Rptr. 494, 504 (Cal. Ct. App. 1988), *review granted and opinion superseded*, 763 P.2d 479 (Cal. 1988), *aff’d in part, rev’d in part*, 793 P.2d 479 (Cal. 1990) (defining property).

Property rights may be categorized into four sections: the right to exclude, the right to use, the right to alienate, and the right to waste.<sup>21</sup>

Property is usually relegated to land, things, and people. In order for an individual to possess a property interest, they must acquire possession.<sup>22</sup> Possession is the controlling or holding of personal property with or without a claim of ownership subject to it.<sup>23</sup> The concept of possession of property was established in *Popov v. Hayashi*, in which the California Superior Court outlined that “[w]here an actor undertakes significant but incomplete steps to achieve possession of . . . property and [their] effort is interrupted by the unlawful acts of others, the actor has a legal[] . . . prepossessory interest in the property.”<sup>24</sup> Possession is achieved when the object is lost or abandoned, the actor intends to control the object to the exclusion of others, and the actor has actual physical control.<sup>25</sup>

To establish a property claim in oneself, individuals must show that they (i) intend to control themselves, (ii) to the exclusion of others, and (iii) that they have actual and physical control.<sup>26</sup>

[W]hen the human body is fragmented from the person and it becomes possible to disaggregate rights in the body and assign them to different parties, we should employ the property paradigm because it alone possesses the conceptual framework and the vocabulary for allocating rights and responsibilities among all of those who share an interest in a precious resource.<sup>27</sup>

Thus, the first question is not *if* property rights exist within the human body but rather whether courts will recognize a property right claim in people. The second question is under a property

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<sup>21</sup> Glen Anderson, *Towards an Essentialist Legal Definition of Property*, 68 DEPAUL L. REV. 481 (2019).

<sup>22</sup> See generally *Popov v. Hayashi*, No. 400545, 2002 WL 31833731 (Cal. App. Dep’t Super. Ct. Dec. 18, 2002) (establishing what is required in order to achieve possession).

<sup>23</sup> *Id.* at \*3-5.

<sup>24</sup> *Id.* at \*6.

<sup>25</sup> *Id.* at \*4, \*6.

<sup>26</sup> *Id.*

<sup>27</sup> Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 364 (2000).

analysis, should the law distinguish the human body, whether alive or deceased, from an individual's isolated body parts?<sup>28</sup>

A. *The Thirteenth Amendment Prohibits the Ownership of Humans*

In the 1800s, the United States Supreme Court legally recognized the ownership of Black people. However, the right to own humans was later prohibited by the Thirteenth Amendment. The Thirteenth Amendment of the United States Constitution, in relevant part, states, “[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”<sup>29</sup> In 1857, the United States Supreme Court held otherwise. In *Dred Scott v. Sandford*, Dred Scott, an enslaved person, brought an action in a Louisiana state court seeking his freedom.<sup>30</sup> Scott sued under 28 U.S.C.A. Section 1332, the federal diversity statute, claiming he was a citizen of Minnesota—a different state than Sandford, his white owner.<sup>31</sup> After a verdict and judgment in Scott's favor, the state court's decision was reversed, and Scott's case was heard before the United States Supreme Court. The Supreme Court declared that Black enslaved people in the United States, as well as their descendants, were not considered citizens of the United States and were not entitled to the protections and rights of the Constitution.<sup>32</sup> The effect of this decision relegated all Black enslaved persons as property. Through *Dred Scott*, white Americans' property right claims, in regard to Black enslaved bodies, biological materials, and excised organs, were established. As a direct result of owning Black bodies, white Americans also owned their accompanying genetic

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<sup>28</sup> *Id.* at 445-46 (considering whether the law should view the human body, alive or dead, as a singular object, separate and distinct from human body parts which are many objects once removed from the live being and whether the law should treat them differently).

<sup>29</sup> U.S. CONST. amend. XIII, § 1.

<sup>30</sup> 60 U.S. (19 How.) 393 (1857) (enslaved party), *superseded by constitutional amendment, U.S. CONST. amend. XIV.*

<sup>31</sup> *Id.* at 400.

<sup>32</sup> *Id.* at 633.



information and biological materials.<sup>33</sup> Specifically overruling *Dred Scott*, section 1 of the Fourteenth Amendment invalidated these instances.<sup>34</sup>

*B. The Supreme Court Should Recognize Individuals' Right to Own Themselves*

Although the United States Supreme Court unequivocally recognized property rights claims regarding ownership of another person, it was silent when discussing whether individuals should retain ownership of their own bodies. “While property ownership [in things] is a fundamental constitutional right,”<sup>35</sup> the United States Supreme Court in *Cleveland Board of Education v. Loudermill* held “[p]roperty interests are not created by the Constitution, ‘they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’”<sup>36</sup> “Property rights and the use of property are fundamental rights on which the country was established.”<sup>37</sup> “[T]he bundle of venerable rights associated with property is strongly protected and must be trod upon lightly, no matter how great the weight of other forces.”<sup>38</sup>

By refraining from establishing property rights and interests regarding the ownership of an individual’s body in the Constitution and assigning this task to states, the United States Supreme Court turns a blind eye to the reality that states may, or may not, protect its citizens’ bodily autonomy interests as compared to the interests of the state. States “create[] and define[] property rights or interests.”<sup>39</sup> For example, California defines property as “the thing

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<sup>33</sup> See generally Brynn Holland, *The “Father of Modern Gynecology” Performed Shocking Experiments on Enslaved Women*, A&E TELEVISION NETWORKS (Aug. 29, 2017), <https://www.history.com/news/the-father-of-modern-gynecology-performed-shocking-experiments-on-slaves> [<https://perma.cc/CZ43-3N2D>] (Because white people owned Black enslaved people, they owned the right to their body parts—specifically, the right to experiment on and subject the Black body to pain, torture, and treatment as they saw fit.).

<sup>34</sup> U.S. CONST. amend. XIV, § 1.

<sup>35</sup> 63C AM. JUR. 2D *Property* § 4, Westlaw (database updated Nov. 2022).

<sup>36</sup> 470 U.S. 532, 538 (1985) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)).

<sup>37</sup> 63C AM. JUR. 2D, *supra* note 35, § 4.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* (footnotes omitted).

of which there may be ownership.”<sup>40</sup> Further, “[t]he words ‘personal property’ include money, goods, chattels, things in action, and evidences of debt.”<sup>41</sup> Property is “every species of right and interest capable of being enjoyed as such upon which it is practicable to place a money value.”<sup>42</sup>

*C. Scholars Weighing Individuals’ Interests in Owning  
Themselves Against Researchers Interests in Advancing the  
Medical Field*

Authors Lori Andress and Dorothy Nelkin, in their article, *Whose Body Is It Anyway? Disputes Over Body Tissue in a Biotechnology Age*, directly examine the interest researchers possess in acquiring individuals’ tissues and cells against individuals’ interest in determining what happens to their body parts and tissues once they are excised.<sup>43</sup> At the crux of their analysis, they discuss how all scientists and researchers alike dehumanize patients and refer to the human body as a “project” or “subject.”<sup>44</sup> They claim, in doing so, this allows researchers to remove the human from their body and break patients down to their molecular level.<sup>45</sup> From a medical point of view, scientists objectify the body. Rather than focusing on the human being, scientists look at the tissues, cells, and organs, stripping away the concept of a person.<sup>46</sup> The scientific view of the body is defined as “reified, isolated, decontextualized, and abstracted from real time, actual location and social space.”<sup>47</sup>

By dehumanizing patients, scientists and researchers are allowed, without remorse, to continue experimenting and “dissect[ing] down [patients] to the molecular level.”<sup>48</sup> “Objectifying

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<sup>40</sup> CAL. CIV. CODE § 654 (West 2023).

<sup>41</sup> CAL. CIV. CODE § 14(b)(3) (West 2022).

<sup>42</sup> *Yuba River Power Co. v. Nev. Irrigation Dist.*, 279 P. 128, 129 (Cal. 1929) (quoting 22 R.C.L., p. 43, § 10).

<sup>43</sup> Lori Andress & Dorothy Nelkin, *Whose Body Is It Anyway? Disputes over Body Tissue in a Biotechnology Age*, 351 THE LANCET 53, 53 (1998).

<sup>44</sup> *Id.* at 54.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 53 (quoting MARGARET M. LOCK, ENCOUNTERS WITH AGING: MYTHOLOGIES OF MENOPAUSE IN JAPAN AND NORTH AMERICA 370-71 (1993)).

<sup>48</sup> *Id.* at 54.

the body enables scientists to extract, use, and patent body tissue without reference to the person involved.”<sup>49</sup> Andress and Nelkin argue that “[t]he clinical detachment that defines the patient less as a person than as an anatomical object with certain diseased parts helps the physician adjust to this unsettling role.”<sup>50</sup> The call of the article interrogates whether “individuals [are] entitled to know about, and have a say in, the uses that are made of their body tissue,”<sup>51</sup> often coupled with commercial incentive on part of the medical team.

Analyzing the “growing divide between scientific and social views of the body in the commercial context of the biotechnology age,”<sup>52</sup> Andress and Nelkin acknowledge the importance of the body through a cultural and religious lens. Throughout different cultures and religions, “personal and social views of the body serve certain functions for individuals and their communities.”<sup>53</sup> As a sense of self identity, “body parts [are] important to nations as well as individuals.”<sup>54</sup> Through science, the body is referred to as “an abstract object, a project, a resource to be mined.”<sup>55</sup> However, someone’s body may be their sense of self. To take away the identity of a person and to donate it to science is to exterminate the human race for the sake of medical advances.<sup>56</sup>

On the other hand, scientists and medical researchers argue that “restraints on their ability to gain access to, manipulate, and commercialise tissue will impede the progress of research and deprive society of useful medical benefits.”<sup>57</sup> Despite advancements in the medical field being an integral aspect of growth and expansion, researchers and physicians dismiss public concerns regarding the lack of consent “as misunderstanding scientific research, as anti-science, or as simply naïve.”<sup>58</sup> Andress and Nelkin criticized this claim on the basis that the benefit and reward

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 53.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 54.

<sup>54</sup> *Id.* at 55.

<sup>55</sup> *Id.* at 54.

<sup>56</sup> *Id.* at 55.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

researchers speak to has been exaggerated and when compared to the inherent rights people should possess in themselves as property, the interests of the researchers pale in comparison.

D.C. Taylor, in *Treating Children and Adults: Whose Body Is It Anyway?*, suggests an individual's body belongs to the State.<sup>59</sup> Taylor asserts "it is the State that clearly owns the body which is first managed for it by the parents and later by the self. . . . Professionals are put in judgment over it by the State."<sup>60</sup> Although specifically focusing on treatment in epileptic patients, Taylor analyzes to what extent individuals have a possessory interest<sup>61</sup> in their bodies as compared to actual ownership.<sup>62</sup> She exclaims, "[t]he body we appear to own is not allowed by law to be deprived of care and education; not allowed to ingest certain substances, not allowed to neglect itself too publicly; kill itself deliberately; or be killed off at its own request."<sup>63</sup> In their respective articles, Address, Nelkin, and Taylor each express a shared concern regarding experimentation on patients. Specifically, Taylor focuses on how a lack of informed consent could result in abuse and may adversely affect the patient.<sup>64</sup> Despite their claims that patients should either own themselves, including their biological materials, the law simply does recognize this right. Specifically, the United States Constitution does not afford citizens property rights over themselves.

The Supreme Court erred when they failed to recognize an individual's right in body autonomy. In *Washington University v. Catalona*, although the United States District Court for the Eastern District of Missouri believed "the research participant to be a 'donor' who had parted with any semblance of ownership rights once [his] biological materials had been excised for medical

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<sup>59</sup> D.C. Taylor, *Treating Children and Adults: Whose Body Is It Anyway?*, 8 EUROPEAN CHILD & ADOLESCENT PSYCHIATRY 315, 316 (1999).

<sup>60</sup> *Id.* at 316.

<sup>61</sup> 5 ENCYCLOPEDIA OF MISS. L. *Trespass to Land* § 41:45 (2022). Generally, individuals have an interest in the *actual* possession of someone or something. *Id.*

<sup>62</sup> *Id.* (defining ownership as the lawfulness of the possession by showing ownership under color of title, written title, adverse possession, or by some other right, such as a lease).

<sup>63</sup> Taylor, *supra* note 59, at 315.

<sup>64</sup> *Id.* at 317.

research”<sup>65</sup> and was unable to establish a property right in his biological materials, the Missouri District Court indirectly acknowledged such claims may subsist.<sup>66</sup> At a point in time, white Americans had a constitutionally protected property right claim regarding the ownership of people. However, there is no right in the ownership of oneself. Despite the Thirteenth Amendment prohibiting an individual’s right to own *other* humans, scholars continue to engage in discourse discerning whether individuals own a right to themselves while the law as a whole questions whether such a right exists. Although not expressly granted, a property right claim may exist through conversion claims, patent claims, or property abandonment claims.

#### *D. Federal Acts Should Also Apply to Living Beings*

The National Organ Transplant Act (“NOTA”) makes it “unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce.”<sup>67</sup> Prescribing criminal fines of as much as \$50,000 or imprisonment for up to five years for any violation, this federal law prohibits the purchase or sale for transplant of human organs.<sup>68</sup> Pursuant to the NOTA, “human organs” are broadly defined as “the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof.”<sup>69</sup> After reviewing the NOTA, Radhika Rao, in *Property, Privacy, and the Human Body* claims “the very existence of a law forbidding commercial alienation of organs paradoxically portrays the human body as an ‘article of commerce’ that lies within the purview of congressional power and would otherwise be subject to sale on the market.”<sup>70</sup> She asserts, since the NOTA expressly prohibits the sale of biological materials, it inherently conveys human organs as property, regulated by commerce.<sup>71</sup> While courts are reluctant to

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<sup>65</sup> 437 F. Supp. 2d 985, 997 (E.D. Mo. 2006).

<sup>66</sup> See generally *id.* at 995.

<sup>67</sup> 42 U.S.C. § 274e(a) (2007).

<sup>68</sup> *Id.* at § 274e(a)-(b).

<sup>69</sup> *Id.* at § 274e(c)(1).

<sup>70</sup> Rao, *supra* note 27, at 376.

<sup>71</sup> *Id.*

recognize an individual's existence in property rights, federal statutes move towards outlining and prescribing limits to biological ownerships, requiring states to follow suit. The Uniform Anatomical Gift Act ("UAGA"), adopted by all fifty states in some form or fashion, asserts that "individuals possess the right to donate their bodies and body parts after death for the purposes of transplantation, therapy, research, or education."<sup>72</sup> Because the United States Supreme Court has already decided property interests are not afforded by the constitution, but rather, are determined by states,<sup>73</sup> the two aforementioned federal statutes, create the starting point of analysis for state courts regarding individuals' biological materials.

#### 1. States That Do Not Recognize Individuals' Property Rights or Interests

Reaching as early as 1997 in *Jacobsen v. Marin General Hospital*, the United States District Court for the Northern District of California held that under the California Gift Act,

The Gift Act authorizes a coroner, medical examiner, hospital, or local public health official to release and permit removal of a body part where that institution has custody of a body and after a 'reasonable effort' has been made to locate and inform' next of kin of their option to make, or object to, an anatomical gift.<sup>74</sup>

In *Jacobsen*, Danish citizen Martin Jacobsen was visiting the United States when he suffered a head trauma.<sup>75</sup> Within four days, and after forty plus hours of hospital and police officials attempting to locate his next of kin, the coroner consented to the extraction of Martin's organs, including his kidney, liver, pancreas, and heart.<sup>76</sup> After comparing individuals' interest in retaining his or her organs versus that of the hospital, California adopted "a twelve hour search period . . . stating that a reasonable search 'shall be deemed

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<sup>72</sup> *Id.* at 377-78 (footnote omitted).

<sup>73</sup> *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985).

<sup>74</sup> 963 F. Supp. 866, 871 (N.D. Cal. 1997), (emphasis added) (quoting CAL. HEALTH & SAFETY CODE §§ 7151.5(a)-(c)), *aff'd*, 192 F.3d 881 (9th Cir. 1999).

<sup>75</sup> *Id.* at 868.

<sup>76</sup> *Id.* at 868-69.

to have been made' once this amount of time has passed."<sup>77</sup> The California Federal Court in this case concluded that because over forty hours elapsed, the defendant hospital acted in compliance with the state Gift Act, and the plaintiffs retained no property interest.<sup>78</sup>

Similarly, the Georgia Supreme Court in *Georgia Lions Eye Bank, Inc. v. Lavant* held that "[h]ealth regulations are of the utmost consequence to the general welfare; and if they are reasonable, impartial, and not against the general policy of the State, they must be submitted to by individuals for the good of the public, irrespective of pecuniary loss."<sup>79</sup> In *Lavant*, a deceased infant's corneal tissue was removed unbeknownst to the parents.<sup>80</sup> Despite the trial court finding in favor of the parents, the state supreme court later reversed the trial court's decision, determining the interest of the state was more important than a parent's interest<sup>81</sup> in the decedent's child's body.<sup>82</sup> The court found that there is no *constitutionally* protected right in a decedent's body.<sup>83</sup> Despite lower courts "evolv[ing] the concept of quasi property" by recognizing "the interests of surviving relatives in the possession and control of decedents' bodies," Georgia does "not find this common law concept to be of constitutional dimension" and determined the removal of the corneal tissue was valid.<sup>84</sup>

## 2. States That Recognize Individuals' Quasi-Property Rights

While some jurisdictions prioritize the state's interest in advancing science over the individual's interest in the retention of their bodies, other courts are in constant limbo when determining whether to recognize individuals' property interests. For example,

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<sup>77</sup> *Id.* at 872 (quoting CAL. HEALTH & SAFETY CODE § 7151.5(a)(2)).

<sup>78</sup> *Id.* at 873.

<sup>79</sup> 335 S.E.2d 127, 129 (Ga. 1985) (quoting *Abel v. State*, 13 S.E.2d 507, 511 (1941)).

<sup>80</sup> *Id.* at 128.

<sup>81</sup> Legally, this interest refers to anyone who has standing under the respective jurisdiction to bring forth this claim. Generally, outside of researchers and institutions, family members or close friends are the ones who are claiming an interest in a deceased person's body. Note that all of the cases in this section are defining (or not defining) rights and interests in someone else—not oneself.

<sup>82</sup> *Lavant*, 335 S.E.2d at 129.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 128.

the Maryland Court of Appeals in *Snyder v. Holy Christ Hospital* recognized deceased persons as quasi-property, giving a right to the next of kin for burial purposes only.<sup>85</sup> In *Snyder*, a father brought suit to enjoin the coroner from performing an autopsy on his 18-year-old son who passed under unknown conditions.<sup>86</sup> Balancing the state's interest in ascertaining the cause of death against the father's interest to prohibit molestation of the body according to their Jewish Orthodox faith, the court stated:

[T]he right to possession of a dead body for purposes of burial has been described as a "quasi-property" right in the nature of a "sacred trust" that a court will uphold as a result of natural sentiment, affection, and reverence. . . . [T]he law recognizes property in a corpse but property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise.<sup>87</sup>

When balancing competing interests, the Maryland Court of Appeals referred back to the state's established laws.

[T]he surviving husband or wife or next of kin have a quasi property right in the body in the absence of testamentary disposition. The right is not a property right in the general meaning of property right, but is extended for the purpose of determining who shall have the custody of the body in preparing it for burial.<sup>88</sup>

Concerning burial arrangements, Maryland has consistently granted the next of kin a quasi-property right, distinguishing this right from true property rights by limiting this right specifically to burial.<sup>89</sup> However, because the son was presumed to be of normal health and the coroner, without more, was unable to determine the true cause of death, the court determined that the state's interest outweighed the father's would be quasi-property right.<sup>90</sup>

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<sup>85</sup> 352 A.2d 334, 340-41 (Md. Ct. Spec. App. 1976).

<sup>86</sup> *Id.* at 334-35.

<sup>87</sup> *Id.* at 340-41.

<sup>88</sup> *Id.* at 341 (quoting *Painter v. U.S. Fid. & Guar. Co.*, 91 A. 158, 160 (1914)).

<sup>89</sup> *Id.* at 340-41.

<sup>90</sup> *Id.* at 341-42.



Likewise, the Pennsylvania Supreme Court in *Pettigrew v. Pettigrew* found that individuals possess property rights in the deceased.<sup>91</sup> Despite this, the court chose to disengage in the nuance of whether the innate right is deemed a *property* right.<sup>92</sup> Based on Pennsylvania state law, the court concluded “[w]hether, however, the rights be called ‘property’ or not is manifestly a question of words, rather than of substance.”<sup>93</sup> However, the court *did* exclaim that the appropriate approach when attributing ownership to deceased persons is to recognize “right of custody, control, and disposition, the essential attribute of ownership.”<sup>94</sup>

### 3. States That Recognize Individuals’ Property Rights and Interests

On the opposite end of the spectrum, there are jurisdictions that recognize property rights over deceased persons. The Sixth Circuit concluded that under Ohio law, the relative of a deceased person has enough sticks in the bundle of rights, whether the sticks are called property rights or not, to “rise[] to the level of a ‘legitimate claim of entitlement’ protected by the due process clause” of the constitution.<sup>95</sup> In *Brotherton v. Cleveland*, a widow brought suit against the state for “permitting [the] removal of [her husband’s] corneas, [classifying] their use as anatomical gifts without [her] or [their] children’s consent.”<sup>96</sup> Weighing the two interests and without distinguishing whether the right would be a property or quasi-property right, the Sixth Circuit determined that under Ohio’s Anatomical Gift Act, the plaintiff had a right to possess the body for burial, a right to control the disposal of the body, and a right to maintain a claim for disturbance of the body.<sup>97</sup> Because the act itself expressly granted the right to control the disposal of the body, the Court held “the aggregate of rights granted by the state of Ohio to Deborah Brotherton [rose] to the level of a

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<sup>91</sup> *Pettigrew v. Pettigrew*, 56 A. 878, 880 (Pa. 1904).

<sup>92</sup> *Id.* at 879.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> 923 F.2d 477, 480 (6th Cir. 1991) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).

<sup>96</sup> *Id.* at 477.

<sup>97</sup> *Id.* at 482.

'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment."<sup>98</sup>

Because researchers are claiming they too possess an interest in a patient's biological materials, some courts have decided to differentiate whether different biological materials are subject in individual property interests. "[T]he lack of coherence in our concept of the body promotes an inconsistent and haphazard approach that enables different treatment of the body under essentially similar circumstances."<sup>99</sup> Courts distinguish property rights based on the specific biological material.<sup>100</sup> As property, "the body can be detached from its 'owner' and fragmented into discrete components, allowing it to be manipulated, transformed, alienated on the market, or even seized by the state upon payment of just compensation."<sup>101</sup>

For example, the Court of Appeals of California determined sperm in a deceased person was property and that "the value of sperm lies in its potential to create a child after fertilization, growth, and birth."<sup>102</sup> In *Hecht v. Superior Court*, the decedent's girlfriend brought a claim against the probate court claiming it lacked jurisdiction to order the destruction of the decedent's sperm located in a sperm bank.<sup>103</sup> "The power of the probate court extends only to the property of the decedent."<sup>104</sup> Here, the court found that since sperm contains gametic material which is used for reproduction, unlike human tissue, at the time of his death, the decedent had an interest in the "nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction." "Such interest is sufficient to constitute 'property' within the meaning of [the] Probate Code . . . ."<sup>105</sup> Because established law grants decision making authority in gamete providers, and since the sperm had the ability to reproduce, it was

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<sup>98</sup> *Id.*

<sup>99</sup> Rao, *supra* note 27, at 364.

<sup>100</sup> *Id.* at 371.

<sup>101</sup> *Id.* at 428-29.

<sup>102</sup> 20 Cal. Rptr. 2d 275, 283 (Cal. Ct. App. 1993).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 280 (quoting *In re Estate of Lee*, 177 Cal. Rptr. 229, 232 (Cal. Ct. App. 1981)).

<sup>105</sup> *Id.* at 283.

deemed property of the decedent and fell under the jurisdiction of the probate court.<sup>106</sup>

Likewise, under Virginia law, to create a bailor-bailee relationship,<sup>107</sup> all that is needed “is the element of lawful possession . . . and duty to account for the thing as the property of another that creates the bailment.”<sup>108</sup> In *York v. Jones*, a couple who had trouble becoming pregnant began the *in vitro*<sup>109</sup> fertilization process.<sup>110</sup> Placing their pre-zygotes at the Institute for Reproductive Research, the couple later sought to have the embryo transported to another hospital.<sup>111</sup> After reviewing the cryopreservation agreement between the two parties, the court noted a bailor-bailee relationship was created.<sup>112</sup>

The essential nature of a bailment relationship imposes on the bailee, when the purpose of the bailment has terminated, an absolute obligation to return the subject matter of the bailment to the bailor. The obligation to return the property is implied from the fact of lawful possession of the personal property of another.<sup>113</sup>

Turning to the scope of the agreement, the court found the requisite elements of a bailment relationship were present.<sup>114</sup> Because the defendants recognized their “duty to account for the pre-zygote . . .purporting to disclaim liability for any injury to the pre-zygote, . . .[and] consistently referred[] to the pre-zygote as the ‘property,’” the Virginia District Court found the defendants retained ownership of their pre-zygote.<sup>115</sup>

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<sup>106</sup> *Id.*

<sup>107</sup> 8A AM. JUR. 2D *Bailments* § 2, Westlaw (database updated Jan. 2023). Generally, “[a] bailor is a person who delivers personal property to another to be held in a bailment; . . . a bailee is the party to whom personal property is delivered under a contract of bailment. *Id.*

<sup>108</sup> *York v. Jones*, 717 F. Supp. 421, 425 (E.D. Va. 1989) (quoting *Crandall v. Woodard*, 143 S.E.2d 923, 927 (1965)).

<sup>109</sup> *Id.* at 423 (meaning “outside the womb”).

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 424.

<sup>112</sup> *Id.* at 425.

<sup>113</sup> *Id.* (citing 8 AM. JUR. 2D *Bailments* § 178 (1980)).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

The NOTA recognizes property rights in certain biological materials and bars them from sale in commerce.<sup>116</sup> Whereas the UAGA defines the property interest in deceased persons granting the right to the next of kin as defined by the specific state statute.<sup>117</sup> Likewise, various states determine whether a property claim exists depending on the type of material—blood, sperm, tissue, cells, etc. The common denominator in these cases is whether the biological material in question derives from non-living individuals. Throughout all these analyses, courts have examined, defined, and limited property rights within the deceased. While these analyses are beneficial, the question remains whether *live* individuals possess property right claims in their own biological materials.

*E. Conversion of Property Claims Implicitly Grant Individuals Ownership Rights to Their Bodies, Biological Materials, and Excised Organs*

Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the full value of the chattel.<sup>118</sup> First appearing in tort law, conversion is substantial interference that disposes the original intent; conversion interferes with the owner's use, ownership, and enjoyment of the chattel.<sup>119</sup> The theory of conversion is that an individual, by converting the chattel to their own use appropriated another's property for which they are now required to make compensation at the time and place of conversion.<sup>120</sup>

Addressing one of the first conversion claims regarding the ownership of one's biological materials, the California Supreme Court in *Moore v. Regents of University of California* held that to establish conversion “[a] plaintiff must establish an actual interference with his ownership or right of possession . . . Where [the] plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for

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<sup>116</sup> 42 U.S.C. § 274e(a) (2007).

<sup>117</sup> Rao, *supra* note 27, at 379.

<sup>118</sup> 5 ENCYCLOPEDIA OF MISS. LAW 2D *Conversion* § 41:80, Westlaw (database updated Oct. 2022).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

conversion.”<sup>121</sup> In *Moore*, the plaintiff, John Moore, sued several defendants for lack of informed consent, breach of fiduciary duty, and conversion of property.<sup>122</sup> Moore, who suffered from leukemia, sought medical treatment and later consented to the removal of his spleen.<sup>123</sup> However, unbeknownst to Moore, when the doctors extracted his spleen, they arranged for portions of his spleen to be sent to a separate research facility.<sup>124</sup> At subsequent visits, and all without Moore’s consent, doctors withdrew additional samples of “blood, blood serum, skin, bone marrow aspirate, and sperm.”<sup>125</sup> The court defined conversion as “a distinct act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his title or rights therein, . . . without the owner’s consent and without lawful justification.”<sup>126</sup> Differentiating between having property rights in one’s own body and being the property of another, the court held that since there was no existing law establishing a person’s individual property rights in their body, there was “nothing which negates, and much which supports, the conclusion that plaintiff had a property interest in his genetic material.”<sup>127</sup> In Moore’s case, the court reasoned that since Moore consented to medical treatment, the medical doctors’ act of researching and testing Moore’s biological materials was not inconsistent with Moore’s rights. Despite its finding, the Court determined:

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<sup>121</sup> 793 P.2d 479, 488 (Cal. 1990).

<sup>122</sup> *Id.* at 483, 487.

<sup>123</sup> *Id.* at 481.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Moore v. Regents of Univ. of Cal.*, 249 Cal. Rptr. 494, 503 (Cal. Ct. App. 1988), review granted and opinion superseded, 763 P.2d 479 (Cal. 1988), *aff’d in part, rev’d in part*, 793 P.2d 479 (Cal. 1990) (quoting 18 AM. JUR. 2D *Conversion* § 1).

<sup>127</sup> *Id.* at 504.

The rights of dominion over one's own body, and the interests one has therein, are recognized in many cases. These rights and interests are so akin to property interests that it would be a subterfuge to call them something else. . . . [S]imple consent to surgery does not imply a consent to medical research on the patient's tissues unrelated to treatment nor to commercial exploitation of the patient's tissues.<sup>128</sup>

Because Moore did not expect to retain possession of his cells following their removal, the court dismissed his conversion claim. The court reasoned that in order to sue for their conversion, Moore had to have retained an ownership interest in his biological materials.<sup>129</sup>

After the California Supreme Court's *Moore* analysis, lower courts quickly followed suit—all hesitating to recognize an individual's interest in their biological materials. The Second District Court of Appeals of California, in *Baldwin v. Marina City Properties, Inc.*, found that for conversion claims, a plaintiff need only allege: "(1) plaintiffs' ownership or right to possession of the property at the time of the conversion; (2) defendants' conversion by a wrongful act or disposition of plaintiffs' property rights; and (3) damages."<sup>130</sup> The tort of conversion protects an individual not only against improper interference with the right of possession of his property, but also against unauthorized use of his property or improper interference with his right to control the use of his property.<sup>131</sup> In *Cobbs v. Grant*, the California Supreme Court held that "a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment."<sup>132</sup>

Along this analysis, the California Supreme Court, in *Corey v. Struve*, acknowledged the important limitations individuals may be subjected to because of the superseding public health concerns.<sup>133</sup> Despite this, the California Court of Appeals later declared, "the absence of unlimited or unrestricted dominion and control does not

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<sup>128</sup> *Id.* at 505, 510.

<sup>129</sup> *Moore*, 793 P.2d at 488-89.

<sup>130</sup> 145 Cal. Rptr. 406, 410 (Cal. Ct. App. 1978).

<sup>131</sup> 18 AM. JUR. 2D *Conversion* § 1, Westlaw (database updated Nov. 2022).

<sup>132</sup> 502 P.2d 1, 9 (Cal. 1972).

<sup>133</sup> 149 P. 48, 48-49 (Cal. 1915).

negate the existence of a property right for the purpose of a conversion action.”<sup>134</sup> Similar to the United States Supreme Court, although some lower courts recognize conversion claims in property analysis, the California court refrained from explicitly finding conversion claims existing within individuals’ rights under a property analysis.<sup>135</sup> Despite not finding the existence of a conversion claim in *Struve*, the California court recognized the possibility of conversion claims existing under the right circumstances.<sup>136</sup> Pursuant to the *Baldwin* test, individuals who file suit alleging conversion are typically unable to satisfy the second prong.<sup>137</sup> The second prong requires the wrongful disposition of property.<sup>138</sup> Most jurisdictions, when weighing the state and individuals’ interest, pick the state’s continued efforts towards medical advancements, and lower courts rarely find the individual *actually* retained a property interest in their excised biological materials. Thus, even if a person’s biological materials are deemed their property, conversion claims are possible but not probable and will likely be overturned.

*F. Excised Organs Should Not Be Considered Abandoned  
Property on the Sole Basis That They Are No Longer Physically  
Attached to an Individual*

The California Supreme Court in *Moore v. Regents of University of California* further explained:

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<sup>134</sup> *Moore v. Regents of Univ. of Cal.*, 249 Cal. Rptr. 494, 506-07 (Cal. Ct. App. 1988) (footnote omitted) (citing *Struve*, 149 P. 48), *review granted and opinion superseded*, 763 P.2d 479 (Cal. 1988), *aff’d in part, rev’d in part*, 793 P.2d 479 (Cal. 1990).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

The essence of a property interest—the ultimate right of control—therefore exists with regard to one’s own human body. . . . A patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress. . . . A consent to removal of a diseased organ, or the taking of blood or other bodily tissues, does not necessarily imply an intent to abandon such organ, blood or tissue.<sup>139</sup>

When the owner of property forms an intent to relinquish all rights in the property, it is deemed abandoned.<sup>140</sup> Property rights are implied rights. Courts acknowledge the possibility of abandoning biological material.<sup>141</sup> By acknowledging a person can abandon their biological materials this implies ownership of said biological material.<sup>142</sup> In turn, by having ownership, a person possesses the *right* to exclude others.<sup>143</sup>

Under the legal fiction of [informed] consent,<sup>144</sup> the coroner or medical examiner in these states is typically authorized to harvest corneas or pituitary glands from the bodies of those within their custody for transplant to others, so long as the official lacks knowledge of any objections by the decedent or his family.<sup>145</sup>

Although abandonment claims are rarely, if ever, brought and upheld regarding individuals’ abandoning their biological materials, it has been acknowledged that under the right set of facts, a researcher may rebut conversion claims with abandonment arguments.<sup>146</sup> Accordingly, the Supreme Court of California correctly held the mere consent to remove one’s biological materials

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<sup>139</sup> Moore, 249 Cal.Rptr. at 506, 508, 509.

<sup>140</sup> Robert Michael Ey, *Cause of Action Against Owner to Establish Abandonment of Personal Property*, in 21 CAUSES OF ACTION 655 (1990).

<sup>141</sup> See Rao, *supra* note 27, at 375 n.49.

<sup>142</sup> See *id.*

<sup>143</sup> *Id.* at 369.

<sup>144</sup> See discussion *infra* Part III.

<sup>145</sup> Rao, *supra* note 27, at 380.

<sup>146</sup> Ey, *supra* note 140.



does not automatically, without more, give rise to an abandonment analysis.<sup>147</sup>

### III. INDIVIDUALS WHO EITHER SIGN OR VOLUNTARILY CONSENT TO UNDERGO MEDICAL TREATMENT SHOULD NOT BE STRIPPED OF ANY REMAINING RIGHT TO THEIR BIOLOGICAL MATERIALS

#### A. *Standard of Informed Consent*

When first established, informed consent was used as a scapegoat to counter any legal trouble hospitals might find themselves in. Scholar Radhika Rao, in her article, *Informed Consent, Body Property, and Self-Sovereignty*, explains how “the entire enterprise of informed consent is fraught with the potential for miscommunication and cultural misunderstanding, and undermined by its inability to protect those who lack knowledge and power.”<sup>148</sup> For example, if a doctor tells an uneducated patient that they have stage five carcinoma cells spreading throughout their body, the patient may only understand that they have cancer. However, if the doctor further explains that they have a limited amount of time to live, unless the necessary medicines and treatments are taken, the patient will understand not only that they have cancer, but also the severity of it. This is an example of miscommunication and cultural misunderstanding. In cases similar to that of Henrietta Lacks, this constitutes a cultural misunderstanding because the assumption is that the patient has a requisite level of education which may not always be the case. Unless physicians explain to the patient their medical condition in detail, there is a breach in understanding.

Patients may argue that informed consent is different from the perspective of the patient than through the eyes of scientists and doctors. Despite being told the status of their health, a patient may not understand the medical terminology used. This may result in a type of language barrier which is the start of a much bigger problem. Because of this, patients with no medical training should

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<sup>147</sup> Moore v. Regents of Univ. of Cal., 249 Cal. Rptr. 494, 503 (Cal. Ct. App. 1988), *review granted and opinion superseded*, 763 P.2d 479 (Cal. 1988), *aff'd in part, rev'd in part*, 793 P.2d 479 (Cal. 1990).

<sup>148</sup> Rao, *supra* note 2, at 439.

not be expected to comprehend and make life altering decisions without an in-depth synopsis of the treatment that they are receiving. The Supreme Court of California in *Cobbs v. Grant* held that “the patient’s consent to treatment, to be effective, must be an informed consent.”<sup>149</sup>

The Restatement (Second) of Torts § 892A(2)(b) requires informed consent to be “‘to the particular conduct, or substantially the same conduct’ in order to be effective.”<sup>150</sup> Additionally, the rule states in § 892B, that:

[A] consent to a contact the particular character of which the other is fully aware, is not made ineffective by reason of the fraudulent misrepresentations which induce the other to give the consent, is of peculiar importance in determining the existence of liability for a merely offensive contact. . . . [T]he consent, though fraudulently procured, prevents the infliction of the contact from being itself a wrong and as such actionable.<sup>151</sup>

In *Tilousi v. Arizona State University*, the Havasupai Indian Tribe brought suit against Arizona State University professors. Among other things, the Havasupai Tribe claimed the defendants obtained “blood samples and hand print samples from plaintiff tribe members ostensibly to be used to study diabetes within the tribe.”<sup>152</sup> “However, plaintiffs claim the samples were also used for research on unrelated topics such as schizophrenia, inbreeding, and ancient human population migrations.”<sup>153</sup> The District Court for the District of Arizona dismissed the plaintiffs’ lack of informed consent claim holding that “their consent is not made ineffective even if defendants did make fraudulent representations to induce that consent.”<sup>154</sup> The court reasoned that since the plaintiffs gave their consent for their blood to be drawn, it is irrelevant that the

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<sup>149</sup> 502 P.2d 1, 9 (Cal. 1972).

<sup>150</sup> *Tilousi v. Ariz. State Univ.*, No. 04-CV-1290-PCT-FJM, 2005 U.S. Dist. LEXIS 49830, at \*6 (D. Ariz. Mar. 2, 2005) (internal quotations omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 892A(2)(b) (AM. L. INST. 1965)).

<sup>151</sup> *Id.* at \*7 (quoting RESTATEMENT (SECOND) OF TORTS § 18 cmt. f (AM. L. INST. 1965)).

<sup>152</sup> *Id.* at \*5.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at \*7.

defendants fraudulently induced them by claiming their blood would be used for a different reason.<sup>155</sup>

Currently, relevant laws and regulations—including the Health Insurance Portability and Accountability Act (“HIPAA”) Privacy Rule, the Genetic Information Nondiscrimination Act (“GINA”), and the Common Rule<sup>156</sup>—govern aspects of these components, including the informed consent process for human research subjects, prohibited uses of the data, and access to the data (and in what form).<sup>157</sup> While physicians are required to “safeguard the public and itself against the physicians deficient in moral character or professional competence,” as well as:

[O]bserve all laws, uphold the dignity and honor of the profession and accept its self-imposed disciplines, [t]hey should expose, without hesitation, illegal or unethical conduct of fellow members of the profession, . . . respect the rights of patients, colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law.<sup>158</sup>

In practice, once physicians exercise control over said materials, they convert it and are allowed to profit off patients.<sup>159</sup>

Currently, Johns Hopkins and other research-based medical centers maintain strict patient consent processes that are at the core of all medical research conducted.<sup>160</sup> Across the country and at Johns Hopkins, it is now standard practice to have an Institutionalized Review Board (“IRB”) “examine every research study involving human participants before it is approved”,<sup>161</sup> in part thanks to learning from the experiences of people like Henrietta Lacks, “IRBs uphold strict standards of informed consent

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<sup>155</sup> *Id.*

<sup>156</sup> See OFF. FOR HUM. RSCH. PROTS., FEDERAL POLICY FOR THE PROTECTION OF HUMAN SUBJECTS (“COMMON RULE”) (2022) (The “Common Rule” is the Federal Policy for the Protection of Human Subjects.).

<sup>157</sup> AMANDA K. SARATA ET AL., CONG. RSCH. SERV., R44026, GENOMIC DATA AND PRIVACY: BACKGROUND AND RELEVANT LAW (2015).

<sup>158</sup> Frank A. Riddick, Jr., *The Code of Medical Ethics of the American Medical Association*, 5 OCHSNER J. 8, 9 (2003).

<sup>159</sup> See discussion *infra* Section II.F.

<sup>160</sup> *Upholding the Highest Bioethical Standards*, *supra* note 6.

<sup>161</sup> *Id.*

for all potential participants in human research involving cell or tissue donation.”<sup>162</sup>

*B. Individuals Should Retain an Interest in Their Bodies, Biological Materials, and Excised Organs Unless, After Being Properly Informed, They Agree Otherwise*

In *Greenberg v. Miami Children’s Hospital Research Institute*, the Southern District Court of Florida held “property right[s] in blood and tissue samples . . . evaporate[] once the sample is voluntarily given to a third party.”<sup>163</sup> Carlo Petrini states “the donor loses the rights to ownership and control of the use of biological material as soon as the material is donated for research purposes,”<sup>164</sup> and “donors of biological material have a right to be informed of its possible uses and, in particular, of potential commercial spin-offs.”<sup>165</sup> Thus, “the recipient has the right to commercial exploitation of any products developed from the processing of biological material received, in accordance with current legislation,”<sup>166</sup> and “the right to control the biological material taken from a donor ceases at the moment of donation.”<sup>167</sup> The Second District Court of Appeals of California, in *Bouvia v. Superior Court*, stated, “[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body.”<sup>168</sup> In *Washington v. Catalona*, the court held that when the research patients, pursuant to receiving informed consent, “made voluntary donations of biological materials for medical research...,”<sup>169</sup> they no longer retained ownership rights in their excised biological materials.<sup>170</sup> It is well-settled that exclusive possession and control of personal property is prima facie evidence

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<sup>162</sup> *Id.*

<sup>163</sup> 264 F. Supp. 2d 1064, 1075 (S.D. Fla. 2003).

<sup>164</sup> Carlo Petrini, *Ethical and Legal Considerations Regarding the Ownership and Commercial Use of Human Biological Materials and Their Derivatives*, 3 J. BLOOD MED. 87, 92 (2012).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> 225 Cal. Rptr. 297, 302 (Cal. Ct. App. 1986) (quoting *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914)).

<sup>169</sup> 437 F. Supp. 2d 985, 994 (E.D. Mo. 2006).

<sup>170</sup> *Id.*

of ownership, and anyone claiming such property bears the burden of proof.<sup>171</sup> Because Washington University presented evidence expressing its intent to maintain ownership over all intellectual property created with the University's resources, the court found the research patients donated their material.<sup>172</sup>

*C. Researchers Should Be Able to Patent Certain Biological Materials, Conditioned That Individuals' Have Been Given Proper Informed Consent*

Pursuant to § 101 of Patentability and Inventions, “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”<sup>173</sup> Recently, the United States Supreme Court addressed whether deoxyribonucleic acid (“DNA”) is patent eligible and whether synthetically created DNA known as complementary DNA (“cDNA”) is patent eligible.<sup>174</sup> In *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, researchers and medical organizations alike brought suit challenging the respondent’s patents for DNA associated with cancer.<sup>175</sup>

Respondent Myriad discovered “the precise location and genetic sequence of the BRCA1 and BRCA2 genes within chromosomes 17 and 13.”<sup>176</sup> Despite this finding being a groundbreaking discovery, “[i]t is undisputed that Myriad did not create or alter any of the genetic information encoded in the BRCA1 and BRCA2 genes.”<sup>177</sup> “The location and order of the nucleotides existed in nature before Myriad found them.”<sup>178</sup> Although the Court previously held both DNA and cDNA were patent eligible, the *Myriad* Court determined mere isolation was not enough to satisfy the patent eligibility requirement under § 101.<sup>179</sup> The Court held that “genes and the information they encode are not patent eligible

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> 35 U.S.C. § 101 (2023).

<sup>174</sup> *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013).

<sup>175</sup> *Id.* at 586.

<sup>176</sup> *Id.* at 590.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 591.

under § 101 simply because they have been isolated from the surrounding genetic material,” and that “cDNA is not a ‘product of nature’ and is patent eligible under § 101. . . .”<sup>180</sup> As a result, the Court found the respondents satisfied the requirement of § 101 pertaining to cDNA and failed regarding their DNA patent.<sup>181</sup>

While researchers do spend significant time studying and experimenting on individuals’ biological materials, whether they are DNA, tissue, cells, or organs, researchers should be able to patent work they have changed or altered significantly, conditioned that the patient whose biological materials they possess are adequately informed<sup>182</sup> of the research and potential economic interest.

If individuals are thoroughly informed of the procedure, risk, research, monetary value, and financial interest, and they consent to the procedure, then the patient should not retain interest in their body. However, if they are not thoroughly informed, consent should be negated. In theory, this is a property right claim for excised body materials and DNA. At large, the Arizona court erred when they held that fraudulently induced consent would not negate consent. Additionally, courts erred when they concluded that parties must retain interest in their biological materials before a property right may be recognized.

## CONCLUSION

Ultimately, courts err when they fail to expressly recognize property rights in body rights. Property rights claims should exist over body rights. While the United States recognizes rights in individuals’ body rights, aside from contraception and privacy rights, there are federal statutes along with state statutes that provide alternative routes for individuals to retain their property interests in bodily autonomy. The closest constitutional right to bodily autonomy that is afforded to individuals are potential

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<sup>180</sup> *Id.* at 595-6.

<sup>181</sup> *Id.*

<sup>182</sup> See generally Michael McKee, *Consent to Injury: Modern Medicine’s Unconscionable Shield from Liability for Medical Practitioners Through the Doctrine of Informed Consent*, 19 FLA. COASTAL L. REV. 299 (2019) (proposing that adequately informed consent includes, but is not limited to, risks, benefits, alternative courses of action, commercial benefits, and potential financial gain).

property claims through the Due Process Clause of the Fifth and Fourteenth Amendments. Under property analyses, courts have correctly recognized the existence of potential conversion, patent, and abandonment claims while incorrectly failing to grant relief to those whose rights have been violated.

Although informed consent has evolved over time, researchers and medical professionals should be subject to discipline and barred for collecting and retaining their interest in a subject's biological materials if said individual is unaware of any material experimentation or profit possibly gained. However, upon receiving informed consent, if an individual consents to, or donates their biological materials to research, they should no longer possess an interest in their bodies, tissues, organs, and other biological materials unless their consent provides otherwise.

