The Applicability of Property Law in New Contexts: From Cells to Cyberspace

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Abstract

In recent times, it has become necessary to consider whether property law might extend to things such as human *in vitro* embryos, excised human tissue and virtual property. The difficulty in addressing such questions in the context of the Anglo-Australian legal system is the wide variety of definitions offered as to what 'property' is and how its scope might be defined. Without a proper assessment of how the scope of property might be assessed, the applicability of property law in new contexts is largely guesswork and blind assertion. In this article, I argue that these issues are best resolved by adopting a broad view of property, devising such limitations as appropriate within the concept of property.

1. Introduction

In a schema of important legal subject areas, property law is the general mechanism by which the law regulates the interactions between people and 'things'. Despite its importance, the question 'what is property?' yields a torrent of different and incompatible responses. Although the treatment of well-established 'things' can be determined from past judicial decisions, difficulties can arise in new and unfamiliar contexts. This is often seen where, as a result of technological change, there are new potentialities of separation,[1] new sources of wealth,[2] and new possibilities of exclusion.[3] In these circumstances, it is necessary to decide how some new or (newly important) 'thing' will be treated. This process usually begins by asking whether the thing can be an object of property rights.

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1 Michael J Madison, 'Law as Design: Objects, Concepts and Digital Things' (2005) 56 *Case Western Reserve Law Review* 381 at 396.

2 Roger Cotterrell, 'The Law of Property and Legal Theory' in William L Twining (ed), *Legal Theory and Common Law* (1986) 81 at 89–90.

3 For an example of the latter, see Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252 at 296. On the relationship between the law and technological change, see generally Lyria Bennett Moses, 'Recurring Dilemmas: The Law's Race to Keep Up with Technological Change' (2007) 7 *University of Illinois Journal of Law, Technology and Policy* 239.

Both courts and commentators struggle to explain limits on what constitutes a 'thing' that might be an object of property rights. This article examines three of the areas in which classification has proved troubling: human *In Vitro* embryos, human tissue stored outside a body, and land existing entirely within a virtual world such as Second Life.[4] The first two examples became controversial following advances in medicine. Human *In Vitro* embryos were first created in 1969.[5] Although it has always been possible to sever human tissue, its value has increased as a result of medical advances.[6] Whilst some judicial decisions have denied the possibility of property subsisting in either human embryos or human tissue, the law remains unclear on questions of ownership of such 'things'.

Multi-player online virtual worlds came into existence with the Internet, and their commercial importance has increased since then. At least one virtual world, Second Life, is openly commercial. In Second Life, players create virtual characters who are able to 'buy' everything from body parts and clothes to real estate and even entire islands. While 'land' is created by the program's developers, virtual chattels are generally created by the characters themselves using software tools provided by the developers. Both virtual chattels and virtual land are bought with 'Linden dollars' which can be purchased, through an online currency exchange, with real currency (for example, via credit card).[7] Characters inside the game can acquire Linden dollars by trading real currency or by creating or trading virtual items within the Second Life virtual environment. In 2006, the value of virtual goods traded inside Second Life was approximately US$60 million (United States dollars).[8] Virtual land is also valuable, with one user making over US$1 million (United States dollars) in virtual real estate transactions.[9] While digital creators who design virtual goods in Second Life own the copyright in their designs,[10] it is less clear whether a user can treat 'their' virtual goods and land as objects of property.

These three 'things' have several features in common. Controversies about whether each of them could be an object of property rights stems from technological change: virtual land exists by virtue of Internet technology, embryos were given a measure of separateness in the process of *in vitro* fertilisation, and

4 A virtual world is a computer-mediated environment in which members interact via on-line personas, known as avatars. Second Life is a virtual world created by Linden Research, Inc. It is described in more detail below.

5 R G Edwards, B D Bavister & P C Steptoe, 'Early Stages of Fertilization *In Vitro* of Human Oocytes Matured *In Vitro*' (1969) 221 *Nature* 632.

6 See John Kenyon Mason & Graeme T Laurie, *Mason and McCall Smith's Law and Medical Ethics* (7th ed, 2006) at 15.14.

7 Information about Second Life is available on its website <http://www.secondlife.com> accessed 25 February 2008.

8 'Virtual Online Worlds' *The Economist* (30 September 2006) at 98.

9 Stephen Hutchson, 'Virtual Property Queen Says Thanks a Million' *Sydney Morning Herald*, Technology (27 November 2006) <http://www.smh.com.au/news/biztech/virtual-property-queen-reaps-the-rewards/2006/11/27/1164476080388.html> accessed 10 October 2008.

10 The ownership is recognised in the licence between Linden Labs, the creators of Second Life, and members of the virtual community: 'Second Life Terms of Service' cl 3.2 <http://secondlife.com/corporate/tos.php> accessed 25 February 2008.

human tissue has gained value due to bio-medical technology. In each case, there are practical disadvantages in refusing to recognise property rights. Both uncertainty as to the contexts in which each of the three examples might be objects of property and a marked reluctance to extend property's domain have had adverse practical consequences. For each object, there is a body of literature and case law as to whether or not property rights should be recognised. Reasons offered for or against treating each thing as property are usually *ad hoc* — there is no single set of tests or considerations offered for deciding whether a thing ought to be treated as an object of property that can be applied across contexts.

My goal here is to draw on what has been said about the meaning of property in diverse contexts to propose a single process for determining whether something can be an object of property rights. This is a useful exercise because, as each of the three examples illustrates, technological change makes it likely that the question — 'is X a potential object of property?' — will continue to be posed even after existing controversies about embryos, tissue and virtual land are resolved. What is needed is a single, cohesive approach to resolving this question that can be applied to *any* potential object of property rights. After proposing such an approach, I will demonstrate how it can be applied to each of the three examples.

This article will argue that property law provides a useful starting point for developing rules to deal with human *in vitro* embryos, excised human tissue and virtual land in Second Life. Differences between how other objects of property are treated and how these things should be treated are best dealt with *within* the concept of property, rather than by seeking something entirely external. Because property law already contemplates divergence in the treatment of different types of property, this can be done. By linking new (and newly important) things to an appropriate sub-category of property, and tailoring some rules where necessary, an appropriate regulatory regime can be established.

2. The Role of Property Law and the Implications of Exclusion

Property law is the only generalisable device that operates between persons whose relationship consists solely of mutual interaction with a thing. The possibility that more than one person might interact with a thing creates a potential for conflict. From a practical perspective, it is the law of property that identifies who is subject to which legal relations with respect to a thing at any given moment and how these can be enforced.[11] In Anglo-Australian law, where certain things fall partly or entirely outside the realm of property law, only specially tailored (or *sui generis*) rules can perform a similar function. In the absence of a sufficient *sui generis* framework, a failure to apply property rules leads to wrongs without remedies and pervasive uncertainty. The choice between allowing general rules of property law to operate and imposing a *sui generis* regime must take account of the potential redundancy, incompleteness and delay involved in the latter.[12] The advantages of

11 Paul Kohler, 'The Death of Ownership and the Demise of Property' (2000) 53 *Current Legal Problems* 237 at 282. See also Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913–1914) 23 *Yale Law Journal* 16.

adopting a property framework can be observed by considering the treatment of the three examples of things described: human *in vitro* embryos, excised human tissue, and virtual land in Second Life.

A. Human Embryos

Although patients receiving infertility treatment usually have rights of control over embryos they produce,[13] treating human embryos as objects of property rights is generally perceived as inappropriate.[14] It has been held in the United States, in an oft-cited decision, that embryos are neither persons nor property, but are in an intermediate category that entitles them to special respect because of their potential for human life.[15] However, it is not clear whether this implies (1) that embryos are special property, able to be treated as objects of property rights but subject to constraints necessary to ensure respectful treatment, or (2) that embryos cannot be objects of property rights. If embryos are neither persons nor property, interactions with embryos must be regulated, if at all, through *sui generis* rules.

The difficulty of leaving embryos outside the property law regime can be observed in the outcome of an incident at the University of California at Irvine. A group of three doctors running a fertility clinic were accused of using embryos in fertilisation procedures and research *without the consent of the genetic contributors*.[16] Orange County prosecutors concluded that they could not charge the doctors involved with theft.[17] The relevant statutory offence required that the entity appropriated be property.[18] Two doctors fled the country, and the only conviction secured against the third was for Federal mail fraud in relation to errors on insurance billing forms.[19] After the scandal, the *Californian Penal Code* was amended to add a more appropriate offence should such conduct be repeated.[20]

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12 Paul Kohler & Norman Palmer, 'Information as Property' in Norman Palmer & Ewan McKendrick (eds), *Interests in Goods* (2nd ed, 1998) 3 at 17.

13 *Human Fertilisation and Embryology Act* 1990 (UK) c 37, sch 3; *Infertility Treatment Act* 1995 (Vic) ss 9,12–15, 27—30, 52–3; *Reproductive Technology (Clinical Practices) Act* 1988 (SA) s 10(3)(b); *Human Reproductive Technology Act* 1991 (WA) ss 22–4, 26; National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2007) at [8.7], [9.6] <http://www.nhmrc.gov.au/publications/synopses/_files/e78.pdf> accessed 25 February 2008. See also *Davis v Davis* 842 SW 2d 588 (Tenn, 1992) at 597 ('*Davis*').

14 This is the conclusion reached by the various committees to have considered the issue: the United Kingdom Department of Health and Social Security, *Report of the Committee of Inquiry into Human Fertilisation and Embryology*, ('The Warnock Report') Cmnd 9314 (1984) at [10.11]; Victorian Committee to Consider the Social, Ethical and Legal Issues Arising from In Vitro Fertilisation, *Report on the Disposition of Embryos Produced by In Vitro Fertilisation* (1984) at [2.8]; Senate Select Committee on the Human Embryo Experimentation Bill 1985, *Human Embryo Experimentation in Australia* (1986); Canadian Royal Commission on New Reproductive Technologies, *Proceed with Care: Final Report of the Royal Commission on New Reproductive Technologies* (1993) vol 1 at 597.

15 *Davis* 842 SW 2d 588 (Tenn, 1992) at 597.

16 Tracy Weber & Julie Marquis, 'In Quest for Miracles, Did Fertility Clinic Go Too Far?' *Los Angeles Times* (4 June 1995) at A1.

17 Ibid.

18 *California Penal Code* § 503 (2008).

The provision only addressed the conduct at issue in the scandal (requiring consent for use of embryos and gametes) and only came into effect afterwards. It did not deal with other issues, such as unauthorised destruction of embryos.[21]

In US cases where human embryos are treated as property, remedies are available to protect rights of control. In *York v Jones*,[22] a couple wishing to move embryos from one fertility clinic to another was able to rely on the tort of detinue to recover their embryos. In *Frisina v Women and Infants Hospital*,[23] a claim alleging emotional distress following loss of embryos was allowed to proceed to the extent that it was based on loss or destruction of irreplaceable property. In *Jeter v Mayo Clinic Arizona*,[24] embryos were recognised as 'things', and thus litigation based on breach of bailment and breach of an undertaking to protect 'things' was allowed to proceed. Property law and related principles thus seem capable of resolving disputes between those with rights to control embryos and those who misuse or damage them.[25] Where property rules do not apply, those whose embryos are harmed must rely on contract, which is not available in the absence of privity, or tort, where damages for emotional harm will not always be sufficient and may not always be available.[26]

B. Excised Human Tissue

A common starting point for considering the status of human tissue is the Californian case of *Moore* v *Regents of the University of California* ('*Moore*').[27] Moore's spleen had been removed for therapeutic purposes. Without telling Moore, his physician retained parts of the spleen for research, ultimately leading to the development of a valuable patented cell line. One claim made by Moore against various defendants was for conversion, on the basis that his spleen was his property. The majority of the California Supreme Court rejected this claim, but they allowed Moore to proceed against some defendants on the basis of a breach of fiduciary duty.

Where the human tissue is derived from a corpse, the common law rule that there is no property in a dead body applies in England and Australia (and to

19 John McDonald & Kim Christensen, 'No Jail: Fertility Doctor Gets Home Detention, Fine' *Orange County Register* (12 May 1998) at B2.

20 *California Penal Code* § 367g (2008).

21 On that issue, see *Del Zio v The Presbyterian Hospital in New York*, No 74 Civ 3588, 1978 US Dist LEXIS 14450 (SDNY, 1978) ('*Del Zio*') (declining to set aside a verdict awarding damages for intentional infliction of emotional distress, but not for conversion).

22 717 F Supp 421 (ED Va, 1989).

23 2002 R.I. Super. LEXIS 73. No CIV A 95–4037, No CIV A 95–4469, No CIV A 95–5827, 2002 WL 1288784 (Sup Ct RI, 30 May 2002).

24 121 P3d 1256 at 1272–5 (Ct App Ariz, 2005).

25 Disputes between different people with rights of control, such as divorcing spouses, are more complex, as standard rules of co-ownership do not apply: Lyria Bennett Moses, 'Understanding Legal Responses to Technological Change: The Example of In Vitro Fertilization' (2005) 6 *Minnesota Journal of Law, Science and Technology* 505 at 608–615.

26 In the US, damages are available in limited circumstances for intentional and negligent infliction of emotional distress: *Del Zio*, No 74 Civ 3588, 1978 US Dist LEXIS 14450 (SDNY, 1978).

27 51 Cal 3d 120 (1990).

varying degrees in the United States),[28] at least unless 'work and skill' have been applied to the remains.[29] Nevertheless, courts consistently recognise the right of certain persons to custody and possession of a body until burial.[30] It would seem, however, that the holder of this right is not entitled to property-based remedies such as conversion.[31]

Despite *Moore*'s fame and the special treatment of corpses, many cases, even in the United States, have recognised property in human tissue. In *Brotherton v. Cleveland*,[32] corneas from a corpse were held to be property for the purposes of the *United States Constitution*. *Greenberg v Miami Children's Hospital*[33] held that property rights evaporate once tissue is voluntarily given to a third party, thus suggesting that property might be held prior to the gift being made. *Washington University v Catalona*[34] involved a dispute between a university and a researcher over control of human tissue samples. Both trial and appellate courts adopted a property analysis, treating the donated material as an *inter vivos* gift from the research subjects to the university.[35] It has also been held that sperm can be property for some purposes.[36]

In Australia and England, there is authority for the view that there is property in at least some types of human tissue stored outside the body.[37] In *Roche v Douglas*,[38] a Master of the Supreme Court of Western Australia at a preliminary hearing made an order that certain stored human tissue of a deceased man be tested, an order made on the basis of a power that required the tissue to be 'property'. In *C Pecar v National Australia Trustees Ltd*,[39] Bryson J in the

28 *R v Sharpe* (1857) 169 ER 959 (no property in a corpse); *R v Kelly* [1998] 3 All ER 741 at 749 (human corpses 'not in themselves and without more capable of being property'); *Colovito v New York Organ Donor Network Inc* 860 NE 2d 713 at 717–719 (NY, 2006) (holding that the specified donee of an *incompatible* human kidney had no common law right to the organ, and not deciding whether the same result would apply had the kidney been compatible).

29 *Doodeward v Spence* (1908) 6 CLR 406 at 414 (Griffth CJ) (property in preserved body of two headed baby due to care and skill in preservation); *R v Kelly* [1998] 3 All ER 741 (property in preserved body parts for purposes of law of theft); *Re Organ Retention Group Litigation* [2005] QB 506 at 566 (work and skill exception applies to blocks and slides for histological examination in context of post-mortem). For criticism of the 'work and skill' exception, see Rohan Hardcastle, *Law and the Human Body* (2007) at 125–44.

30 *Williams v Williams* (1882) 20 Ch D 659 at 665; *Dobson v North Tyneside Health Authority* [1997] 1 WLR 596 at 600.

31 *Re Organ Retention Group Litigation* [2005] QB 506 at 544 (expressing view that action based on negligence preferable to action based on conversion).

32 923 F2d 477 (6th Cir, 1991) at 482.

33 264 F Supp 2d 1064 (Fla DC, 2003) at 1075.

34 490 F3d 667 (8th Cir, 2007).

35 *Washington University v Catalona* 490 F3d 667 (8th Cir, 2007).

36 Compare *Hecht v Superior Court (Kane)* 20 Cal Rptr 2d 275 (Cal Dist App Ct, 1993) at 283 (deceased had an interest 'in the nature of ownership' in his sperm, such interest being sufficient to constitute 'property' within the meaning of probate legislation) with *Hecht v Superior Court (Kane)* 59 Cal Rptr 2d 222 (Cal Dist App Ct, 1996) at 226 (devisee of sperm has no power to alienate, even by gift).

37 See Australian Law Reform Commission, *Human Tissue Transplants*, Report No 7 (1977) at 7.

38 [2000] WASC 146.

39 [1997] NSWSC 1.

Supreme Court of New South Wales held that human tissue fixed in paraffin was property even though it was not susceptible to full ownership (although this could be an application of the principle that human tissue becomes property when work and skill is applied). In *R v Rothery*,[40] the removal of a capsule of blood was said to constitute theft, although that charge was not directly at issue in the case. There is also authority that hair and urine are property and can thus be stolen.[41] In *R v Kelly*,[42] in obiter dicta, Rose LJ raised the possibility of body parts being recognised as property but only if 'they have a use or significance beyond their mere existence', for example if they are intended for surgery or as an exhibit in a trial.[43]

The advantages of treating human tissue as property once it is removed from a person's body is evidenced by the frequency with which the courts turn to property law to resolve disputes.[44] As in the case of embryos, theft is often the only crime applicable against someone who takes a tangible thing without authority. Trespass to goods, conversion and detinue perform a similar function in civil claims.[45] In addition, where there is more than one potential owner, as was the case in *Washington University v Catalona*,[46] property law provides mechanisms for resolving the dispute.

Property law can be useful even where tissue is donated rather than sold. If human tissue is property, a person wishing to donate their tissue for research, but retain some control over how those tissues are used (including use by third parties), can grant a conditional bailment.[47] Meanwhile, those using human tissue in research can, if they wish, only collect tissue from those willing to make an unconditional donation (which will be binding) or from those who have abandoned their tissues (for example, in the course of a medical procedure).[48]

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40 [1976] Crim LR 691.

41 *R v Welsh* [1974] RTR 478 (urine sample); *R v Herbert* [1961] JPLGR 12 (hair). See also *Venner v State of Maryland* 354 A2d 483 (1976) at 498–9 (Md Ct of Spec Apps) (human waste).

42 [1999] QB 621.

43 *R v Kelly* [1999] QB 621 at 631.

44 While inside a person's body, laws of battery, assault and privacy provide sufficient protection. For discussion of why the act of detachment is necessary for human tissue to become an object of property, see Hardcastle, above n28 at 145–50.

45 There has been some suggestion that conversion might extend to interference with intangible things: *OBG Ltd v Allan* [2008] 1 AC 1 at 69 (Lord Nicholls of Birkenhead), 88–9 (Baronness Hale of Richmond); *Telecom Vanuatu v Optus Networks Pty Ltd* [2005] NSWSC 951 at [26].

46 490 F 3d 667 (8th Cir, 2007).

47 See generally B Dickens, 'The Control of Living Body Materials' (1977) 27 *University of Toronto Law Journal* 142 at 180. Compare Roger Magnusson, 'The Use of Human Tissue Samples in Medical Research: Legal Issues for Human Research Ethics Committees' (2000) 7 *Journal of Law and Medicine* 390 at 394 (describing property law in this context as a 'blunt instrument'); Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96 (2003) at 529–30.

48 A finding of abandonment would have led to the same result in *Moore's* case without the confused denial of property rights in human tissue. See *Venner v State of Maryland* 354 A 2d 483 (Md Ct of Spec Apps, 1976) at 498–9 (involving abandoned human waste).

C. Land in Second Life

Unlike the situation regarding *in vitro* human embryos and excised human tissue, there are no decided cases in common law jurisdictions dealing with the status of land and objects existing entirely within virtual worlds. While the computer code that gives rise to virtual objects is protected as intellectual property, the status of rights that virtual characters or 'avatars' exercise over virtual land and objects is less clear. One case that might have resolved these questions was settled for a confidential sum.[49] Despite the absence of authority, academic scholarship in the area tends to urge the recognition of 'virtual property', at least in some contexts, while acknowledging the uncertainty of its current status.[50]

The status of virtual land cannot be determined by looking to the agreement between the owner of a virtual world and its users. Although users of Second Life are given intellectual property rights in their creations, the agreement stipulates that all data representing virtual land and objects are 'owned' by the world's creator and not by its users.[51] The meaning and enforceability of such clauses cannot be determined without knowing whether virtual land and virtual things can be objects of property.

Uncertainty as to whether virtual land can be property leads to several difficulties. First, there is uncertainty when such land is traded, as occurs both through mechanisms within a virtual world and through online auction sites. Because the nature of the object of trade is not clear, it is difficult to determine when such contracts are breached. Secondly, it is not clear whether 'owners' within a world have an action against hackers or a world's operators when land is destroyed or ownership is altered. Thirdly, 'neighbours' in virtual worlds can have similar disputes to those taking place in the 'real' world — there have been virtual world disputes over ownership of airspace over privately owned land and the poisoning of a neighbour's dog.[52] As the value of virtual real estate increases, so will the importance of these unresolved questions.

D. Conclusion

The question as to whether something can be an object of property has important practical implications in a variety of contexts. In some cases, *sui generis* rules or other legal doctrines can fulfil similar objectives to property law — determining what liberties, rights, powers and so forth are associated with control of a thing or providing appropriate enforcement mechanisms.[53] Where there are no such laws,

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49 Benjamin Duranske, 'Bragg v Linden Lab — Confidential Settlement Reached: "Marc Woebegone" Back in Second Life' *Virtually Blind* (4 October 2007) <http://virtuallyblind.com/2007/10/04/bragg-linden-lab-settlement/> accessed 25 February 2008. See also *Bragg v Linden Research Inc* 487 F Supp 2d 593 (2007) (interlocutory proceedings).

50 See, for example, Joshua Fairfield, 'Virtual Property' (2005) 85 *Boston University Law Review* 1047.

51 'Second Life Terms of Service' cll 3.2, 3.3 <http://secondlife.com/corporate/tos.php> accessed 25 February 2008.

52 Gregory Lastowka & Dan Hunter, 'The Laws of the Virtual World' (2004) 92 *California Law Review* 1 at 35–6.

or where they fail to cover the same breadth of circumstances as property law, remedies one might expect to be available can be denied or uncertainty can result. The point is not that property law is perfect but that, unless we are prepared to design specifically tailored rules that govern the same breadth of circumstances as property law, we are likely to end up with gaps and uncertainties.

3. The Concept of Property

Because refusal to treat something as a potential object of property has significant consequences, it is worth considering how such decisions are made. A decision to treat something as falling outside property's domain may be based on one (or both) of two beliefs: first, a belief that rights in the thing fall outside the concept of property, and second, a belief that a property label is otherwise inappropriate. The former issue will be dealt with here and the latter in the following section.

Attempts to discern the scope of 'property' have led to a glut of definitions. Both academics and judges have weighed in on what is necessary to constitute 'property' as a legal category. Attempts to define the scope of 'property' usually come in one of several forms: an insistence that rights fall into some recognised category (the 'recognised category test'); the test in *National Provincial Bank Ltd v Ainsworth* (the '*Ainsworth* test');[54] a focus on the commercial treatment of a thing (the 'commerce test'); a focus on the nature of the thing itself (for example, the 'excludability test'); an assessment of the extent to which rights operate *in rem* (the '*in rem* test'); or minimal requirements as to which rights are recognised with respect to a thing (the 'core bundle of rights test'). This section provides a brief introduction to each of these tests and points out some of the flaws. Although some elements of these tests are useful in understanding the concept of 'property', others are better confined to particular circumstances or particular types of property.

A. The Recognised Category Test

In the well-known Australian case of *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor*,[55] the majority of the High Court held that there was no property in a spectacle. A person does not own a race conducted on his or her land so as to prevent others from viewing the race from neighbouring land and commercially exploiting information as to the outcomes. In explaining his reasons for joining the majority, Dixon J stipulated that only rights in previously recognised categories could be property.[56] A reluctance to recognise property in new circumstances is also evident in the majority judgment in Californian case of *Moore*.[57]

53 See, for example, Brian Fitzgerald & Leif Gamertsfelder, 'A Conceptual Framework for Protecting the Value of Informational Products through Unjust Enrichment Law' (1997–98) 16 *Australian Bar Review* 257 at 270 (stating that unjust enrichment law, based on 'value' rather than 'property', might offer restitutionary remedies for unauthorised use of informational products falling outside property's domain).

54 [1965] AC 1175 at 1247–8.

55 (1937) 58 CLR 479.

56 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 509.

A requirement that property be limited to previously recognised categories does not help to define the scope of those categories. Courts have no difficulty concluding that rights in each new gadget are proprietary, presumably because such gadgets normally resemble other things in which property rights exist. If *in vitro* embryos are treated differently, we need to ask what makes embryos different from gadgets. Stating that new forms of property will only be recognised when similar to existing forms simply raises the question as to the criteria by which similarity is assessed. Should the requirement of similarity be assessed too stringently, then notions of property will be tied too closely to the past, a problem which has led at least one High Court judge to criticise the conclusion in *Victoria Park Racing*.[58] Ultimately, the recognised category test is a poor means for assessing whether new (or newly valuable) things might be objects of property.

B. The Ainsworth Test

In *Ainsworth*, Lord Wilberforce stated:

> Before a right or an interest can be admitted into the category of property, or of a right affecting property, it must be definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.[59]

This case has been adopted in Australia.[60] The *Ainsworth* case itself concerned whether the right of a wife to accommodation provided by her husband was proprietary and thus enforceable against a third party. There was no doubt that the underlying thing, the land itself, was capable of supporting property rights. Because most components of the test describe *property rights* rather than *objects of property*, they are not relevant to determining what things can be owned.

The third requirement from *Ainsworth* — that the property be capable in its nature of assumption by third parties — does have some relevance. As interpreted in Australia, this does not amount to a requirement that any or all of the rights in a thing be assignable.[61] Instead, the requirement is that property only contingently belong to a particular person.[62] Because the requirement falls short of alienability, the contingency is physical or conceptual rather than legal.[63] It must be possible to conceive of interactions between a second person and the thing. Virtual land in Second Life is capable of assumption by third parties in that all characters in the

57 51 Cal 3d 120 (1990) at 135.

58 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 321–2 (Callinan J).

59 *Ainsworth* [1965] AC 1175 at 1247–8.

60 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342–3 (Mason J).

61 *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 342–3 (Mason J). See also *National Trustees Executors and Agency Co of Australasia Ltd v FCT* (1954) 91 CLR 540 at 558 (Dixon CJ), 583 (Kitto J); *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297 at 311–312 (Brennan J).

62 James E Penner, *The Idea of Property in Law* (1997) at 111.

63 *ACT v Pinter* (2002) 121 FCR 509 at 528–9.

game world exist within virtual space consisting of owned and public land and there are mechanisms whereby the ownership of land can change.[64]

On the other hand, there are some things which cannot be objects of property rights because they necessarily pertain to one person only. For example, a person's self-consciousness and emotions are not property.[65] One could take this requirement further, and insist that only things physically external to a person can be property.[66] It is on this basis that many scholars draw a distinction between human tissue integrated in a human body (which is not property) and excised tissue or tissue intended to be excised (which might be).[67] Unlike the example of self-consciousness, such a statement is not necessarily true — after all, chattel slavery, where living human beings are objects of property, has been practised (with moral, rather than conceptual, difficulties) in many societies.[68] Similarly, one might imagine a society where one person could 'own' another's kidney, together with a right to remove it, in the same way a person retains ownership of goods swallowed by a thief.[69] There are no *conceptual* problems with a person owning another's intact body part. However, conceptual difficulties could arise if a person had property in their own body parts, as it is not clear what such ownership would involve.[70] Because rights to bodily integrity are protected in other ways (for example, through torts of battery, assault or privacy), property law is never used in this context.[71]

Thus the third requirement excludes from property's realm relationships between people and things with which others cannot interact, such as self-consciousness. At least some aspects of the relationship between persons and objects of property must be contingent.[72] This arguably excludes, at a conceptual level, self-ownership of one's own intact body and its parts.

C. The Commerce Test

Rather than focussing on the *Ainsworth* test, many judges prefer to ensure consistency between the legal meaning of property and its commercial meaning. An example of this approach appears in *Halwood Corporation Ltd v Chief Commissioner of Stamp Duties*,[73] a case dealing with transferable floor space,

64 Fairfield, above n49 at 1049–50.

65 Alan Brudner, 'The Unity of Property Law' (1991) 4 *Canadian Journal of Law and Jurisprudence* 3 at 20–1.

66 Penner, above n62 at 50.

67 Hardcastle, above n28 at 145–50; Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957 at 966; Penner, above n62 at 817.

68 See Jeremy Waldron, *The Right to Private Property* (1988) at 33.

69 Dickens, above n46 at 145.

70 In this regard, see *Regina v Bentham* [2005] 1 WLR 1057 at 1060 (Lord Bingham of Cornhill): 'One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. Therefore, one cannot possess it.'

71 See also Alan Ryan, 'Self-Ownership, Autonomy and Property Rights' (1994) 11 *Social Philosophy and Policy* 241; Hardcastle, above n28 at 145–50.

72 Penner, above n62 at 111; J W Harris, *Property and Justice* (1996) at 332–4.

73 (1994) 33 NSWLR 395.

where it was stated that, '[t]his is a valuable right…The reality is that commerce regards transferable floor space as a proprietary right. The courts should do likewise.'[74]

Similar statements have been made in other cases, often in the context of taxation and stamp duties.[75] The argument is that if commerce treats valuable and transferable assets as property, so should the courts.

There are strong arguments for this approach, especially in the context of revenue statutes and consumer protection law. The commerce test thus provides a strong rationale for treating land in a virtual world such as Second Life as property. There is a functioning market in such land, with virtual real estate speculation a popular, and sometimes remunerative, pastime.[76] To fail to treat virtual land as property in such circumstances may unjustifiably deny to those trading in virtual land protection similar to that provided to people trading in other types of property.

The converse is not true. In other words, the fact that a thing is not commercially valuable should not generally prevent a thing being property.[77] There are many objects (including some intangibles and junk stored in attics) in which ownership is claimed despite their lack of value. Questions of value will affect whether anyone cares that something is classified as property, but value ought not be treated as essential to the very concept of property.

D. The Excludability Test

The right (or privilege)[78] to exclude others is often described as the most fundamental of all property rights.[79] The question as to whether the set of rights in a thing can be proprietary if the right to exclude is omitted is considered below, with the discussion on the core bundle of rights test. For now, the focus is on one

74 *Halwood Corporation Ltd v Chief Commissioner of Stamp Duties* (1994) 33 NSWLR 395 at 403. A similar result was reached in an earlier case involving transferable floor space: *Uniting Church in Australia Property Trust (NSW) v Immer (No 145) Pty Ltd* (1991) 24 NSWLR 510 at 511.

75 See, for example, *A-G of Hong Kong v Nai-Keung* [1987] 1 WLR 1339 at 1342 (textile export quotas); *Pennington v McGovern* (1987) 45 SASR 27 (abalone licence); *2 Day FM Australia Pty Ltd v Commissioner of Stamp Duties (NSW)* (1989) 20 ATR 1131 (commercial radio licence); *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue* (2001) 48 ATR 498 at [28] (right to draw water from particular source); *Qld Retail Milk Vendors' Association v Deacon* [1974] Qd R 234 at 242 (lawful monopoly to sell milk in particular area). See also F H Lawson & Bernard Rudden, *The Law of Property* (3rd ed, 2002) at 21 ('The reason why [English property law] treats intangible interests as objects, as things, is because people are willing to buy them').

76 Hutchson, above n8.

77 See *Deer v Reeves* [2001] TLR 225.

78 Shyamkrishna Balganesh, 'Property Along the Tort Spectrum: Trespass to Chattels and the Anglo-American Doctrinal Divergence' (2006) 35 *Common Law World Review* 335.

79 In the US context, this corresponds to the view of the Supreme Court in *Kaiser Aetna v United States* 444 US 164 (1979) at 176. See also Felix Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357; Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730; Gray, above n3 at 294; R C Nolan, 'Equitable Property' (2006) 122 *Law Quarterly Review* 232 at 235.

aspect of the essentiality of a right to exclude, being the possibility of excluding people from a particular object. Thus the excludability test suggests that something can only be property if it is conceptually, physically or legally possible to prevent others from using that thing.[80]

The failure to satisfy such an excludability test is the basis on which things such as air are omitted from property's domain.[81] The main difficulty with excludability as a test for potential objects of property is its technological contingency. For example, technologies of weather modification have made it physically possible to exercise some control over clouds. To the extent humans can decide whose land receives rain, it is now possible to exclude some landowners from the benefit of clouds. To a limited extent, clouds have gained excludability. It might, therefore, be more accurate to say that things from which one cannot currently exclude others are not currently anyone's property, rather than assuming that such things cannot be objects of property at all.

E. Property as Involving Rights in Rem

According to the standard view proposed by Hohfeld and Honoré, it is possible to distinguish *in rem* from *in personam* rights based on the level of generality at which the right operates.[82] A right or liberty operates *in rem* if it is enforceable against a large and indefinite class of people (or operates as one of many rights, each enforceable against a large class of people). The equation between property rights and rights enforceable against a broad group of people is prominent in both case law,[83] and commentary.[84]

Although property rights are enforceable against a broad group of people, it is important to recognise that there are rights which operate against other members of society generally which are not proprietary.[85] For example, the right to bodily integrity and the right of the state to tax its citizens or demand that they serve in the military operate broadly despite the fact that they are not property rights.[86] A neater way to differentiate property rights from non-proprietary rights is to employ a different interpretation of the expression '*in rem*' and to require that the right relate to a *res* or thing.[87] The broad enforceablility of property rights can then be deduced from the fact that rights relate to a 'thing' and are enforceable against those interacting with the 'thing' rather than against specific individuals.

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80 Gray, above n3 at 299.

81 Grotius, *Mare Liberum* (1608), cited in A Mossoff, 'What is Property? Putting the Pieces Back Together' (2003) 45 *Arizona Law Review* 371 at 384–5; Lawson & Rudden, above n75 at 20.

82 Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1916–1917) 26 *Yale Law Journal* 710 at 718; A M Honoré, 'Rights of Exclusion and Immunities Against Divesting' (1959–1960) 34 *Tulane Law Review* 453.

83 For example, *Wily v St George Partnership Banking Ltd* (1999) 84 FCR 423 at 426 (Sackville J), 433 (Finkelstein J) (considering the nature of a floating charge).

84 For example, David Jackson, *Principles of Property Law* (1967) at 10, 44.

85 P Birks, *English Private Law* (2000) at xxxviii-xxxix.

86 Penner, above n62 at 25.

87 Ibid.

F. A Core Bundle of Rights

In a well-known article, Honoré described full liberal ownership of a thing 'X' as comprising various liberties, rights, powers and duties.[88] No-one has suggested that all of these legal relations must pertain to an object before the term 'property' applies. Nevertheless, it is often suggested that there is a core subset of liberties, rights and powers that are essential to the notion of property. Various combinations have been proposed, most frequently including the liberty to use, the right to possess, the right to exclude and the power to alienate.[89]

However, none of these is universally applicable to everything that has been treated as 'property'. A person can, for example, own a leasehold interest despite the lack of any legally and contractually permitted use.[90] Easements, *profits à prendre* and restrictive covenants are property despite the fact that they confer no right to possess any parcel of land nor any right to exclude others from the land. In addition, there are many examples of inalienable property, including leases that may not be assigned and certain classes of shares in some private companies.[91] The benefits of even non-assignable contracts can be held on trust or as partnership property.[92]

As is evident from the above analysis, there is no liberty, right or power that is common to all forms of property in all circumstances. This is in accord with the conclusions of a majority of the High Court in *Yanner v Eaton* ('*Yanner*').[93] That case involved the construction of the *Fauna Conservation Act* 1974 (Qld), which controlled the taking of wild animals. Section 7 of the Act provided that:

> All fauna, save fauna taken or kept otherwise than in contravention of the Act during an open season with respect to that fauna, is the *property* of the Crown and under the control of the Fauna Authority. [Emphasis added.][94]

The Court had to decide what significance to attach to the legislature's statement that certain fauna were the Crown's *property.* Most judges held that s 7 did no more than label the rights of control expressly granted in the Act itself.[95] It did not give the Crown all of the rights commonly associated with property. However, McHugh

88 A M Honoré, 'Ownership' in A G Guest (ed), *Oxford Essays in Jurisprudence* (1961) at 107.

89 For example, Mossoff, above n81; Penner, above n62 at 152; John Austin, *Lectures on Jurisprudence* (Robert Campbell ed, 4th rev ed, 2002) at [1832]; Peter Benson, 'Philosophy of Property Law' in J Coleman & S Shapiro (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) at 752, 771; *Potter v Commissioners of Inland Revenue* (1854) 156 ER 392 at 396 ('property… that which belonged to a person exclusive of others, and which could be the subject of bargain and sale to another').

90 *Hill v Harris* [1965] 2 QB 601; *Bawofi Pty Ltd v Comrealty Ltd* (1992) NSW Conv R 55–646.

91 *Barrows v Isaacs* [1891] 1 QB 417.

92 *Don King Productions Inc v Warren* [1998] 2 All ER 608 at 634; aff'd [1999] 2 All ER 218 at [24]. See also *Swift v Dairywise Farms* [2000] 1 All ER 320 at 326–7; aff'd [2001] EWCA Civ 145.

93 (1999) 201 CLR 351.

94 (1999) 201 CLR 351 at 351.

95 *Yanner* (1999) 201 CLR 351 at 370 (Gleeson CJ, Gaudron, Kirby and Hayne JJ), 389, 391–2, 394 (Gummow J).

and Callinan JJ, in separate judgments, each assumed that property had an intrinsic meaning, to which the drafters of the legislation were taken to have referred.[96] For McHugh J, property must necessarily include a right to exclude.[97] For Callinan J, the legislature was taken to have referred to 'absolute property', presumably involving Honoré's concept of full liberal ownership.[98] At one level, the differences in approach can be explained by reference to statutory interpretation. But, at a deeper level, the difference reflects differing understandings of the meaning of 'property'. For the majority, the content of 'property' can vary — if you want to know which rights are involved, you need to know more than the mere fact that 'property' is involved.[99] It follows that there are no liberties, rights, powers or immunities that always exist in the same form for all types of property. It is therefore not possible to point to the absence of a particular right in a thing as indicating that other rights in that thing are not proprietary. This indicates one flaw in the judgment of the majority of the Californian Supreme Court in *Moore*.[100] They wrongly cited statutory limitations on dealings in human tissue as preventing that tissue being a potential object of property.[101] Mosk J, who dissented, was surely right in pointing out that the absence of a particular right or power does not mean that any remaining rights cease to be proprietary.[102]

G. Conclusion

Having briefly considered several approaches to the conceptual limitations of the term 'property', only a few seem helpful: there must be a physically or conceptually definable thing with which more than one person can interact and, in some contexts, the fact that a thing is commercially valuable and tradeable strongly suggests that it is property. The fact that there are some conceptual limits on the idea of property indicate that the term is not entirely meaningless, despite statements such as '[t]hat is property which the law declares to be property',[103] and '[i]t is incorrect to say that the judiciary protected property; rather they called that property to which they accorded protection',[104] and descriptions of property as a 'vacant concept' or a 'category of illusory reference'.[105]

Employing this broad formulation of property's scope, it is clear that human *in vitro* embryos, excised human tissue and land in Second Life *could* be property. Technology has developed to the point where we can contemplate interactions

96 *Yanner* (1999) 201 CLR 351 at 375–6 (McHugh J), 407 (Callinan J).
97 *Yanner* (1999) 201 CLR 351 at 375–6.
98 *Yanner* (1999) 201 CLR 351 at 407.
99 *Yanner* (1999) 201 CLR 351 at 367.
100 51 Cal 3d 120 (1990).
101 *Moore* 51 Cal 3d 120 (1990) at 140.
102 *Moore* 51 Cal 3d 120 (1990) at 165–6.
103 Calvin Colton (ed), 8 *The Works of Henry Clay* (1904) at 152, cited in Merrill, above n79 at 737.
104 Walton Hamilton, cited in Cohen, 'Dialogue on Private Property' above n79 at 380.
105 Gray, above n3 at 252, 305. These comments have been referenced in *ACT v Pinter* (2002) 121 FCR 509 at 551–2 (Finn J); *Yanner* (1999) 201 CLR 351 at 365–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ). On categories of illusory reference, see generally Julius Stone, *The Province and Function of Law* (1950).

between more than one person and an embryo, body part or virtual 'place'. Further, the real commercial value of land in Second Life creates a strong argument for its recognition as property.

This Part has focussed primarily on elements necessary to invoke the concept of property in common law jurisdictions, with primary focus on England and Australia. There may, however, be things that *could* be property (in that there is no conceptual obstacle) that courts nevertheless decline to treat as property. For example, arguments against treating human *in vitro* embryos as objects of property are generally based on consequential rather than conceptual arguments. It is to these arguments that I now turn.

4. Limiting Property's Scope

As illustrated above, the concept of property is a broad one. Yet not everything that could conceptually be property ought to be treated as property for legal purposes.[106] There are several bases on which the label 'property' might be rejected. A few of them are sketched out in this section. First, it may be inappropriate to recognise certain rights in a thing where these cannot be philosophically justified. Secondly, treating something as an object of property rights may be morally wrong, as in the case of slavery. Thirdly, there may be concerns about commodifying a particular thing so that it can be traded freely in the market. Fourthly, it might be felt that attaching the label 'property' to certain things will itself cause harm. Finally, where categorisation as property is relevant for statutory or constitutional purposes, a proper interpretation may mean that the thing in question is excluded.

A. Lack of Rationale for Granting Power of Certain Things

If something is an object of property rights, then the owner has some control over that thing. For society to grant such control, justification is required. Philosophers have offered several justifications for society's recognition of property rights.[107] These include basing entitlements on a person's labour, on social utility, and on the basis that property enhances political liberty or self-development.

Although such theories are usually offered to explain society's recognition of property rights generally, they can also be used to justify ownership of particular things.[108] For example, much of the literature on virtual property justifies a property theory by reference to at least some of the philosophical justifications of

106 See generally Felix Cohen, 'Transcendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809; Hanoch Dagan, 'The Craft of Property' (2003) 91 *California Law Review* 1517 at 1533; Margaret A Stone, 'The Reification of Legal Concepts' (1986) 9 *University of New South Wales Law Journal* 63; Craig Rotherham, 'Property and Justice' in Matthew H Kramer (ed), *Rights, Wrongs and Responsibilities* (2001) at 152; Kohler, above n10 at 242–3.

107 For a useful description of such theories, see Lawrence Becker, *Property Rights: Philosophic Foundations* (1977) at 100–2; Jeremy Waldron, 'Property Law' in D Patterson (ed), *A Companion to Philosophy of Law and Legal Theory* (1996) at 3. Compare John W Van Doren, 'Private Property: A Study in Incoherence' (1985–1986) 63 *University of Detroit Law Review* 683 (describing such justificatory theories as incoherent).

property.[109] Generally speaking, most agree that utility and labour based theories tend to justify the recognition of virtual property, particularly in commercial virtual worlds such as Second Life. The question becomes more difficult in the case of human tissue. Rights of control over excised body parts can be justified on a number of bases, including personal development. Utilitarian arguments point both ways. The majority in *Moore* felt that treating human biological material as property would reduce the amount of such material available for research, a proposition for which they offered no empirical evidence.[110] There might also be utility in treating human tissue as property. For example, it might result in better records being kept. Weighing such factors properly would require a more extensive, and possibly empirical, analysis.

Philosophical arguments are less useful in deciding whether to treat human *in vitro* embryos as 'property'. What is at stake here is not recognition that certain people have decision-making rights over embryos,[111] but rather the nature and availability of an action against someone interfering with these rights.

B. Moral Concerns

Treating certain things as objects of property is immoral. A classic example of this is chattel slavery, where living human beings are fully owned by another. Those who believe that human *in vitro* embryos are people might be similarly concerned about classifying embryos and intact human tissue as objects of property.[112] The analogy to slavery is, however, inappropriate in the context of *in vitro* embryos. Such embryos, even if valuable as an early form of human life, have no independent will at that stage of development. Decisions as to their treatment must be made by someone else, and decision-making authority is usually allocated by statute or contract.[113] In most cases, such authority is subject to limits designed to recognise the special status of an embryo.[114] What is at stake is whether such rights of control as exist ought to be classified as proprietary. This will have an effect on the enforceability of the rights that are already recognised; it will not override statutory restrictions on what can be done to embryos.

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108 Becker, above n107; S Coval, J C Smith & Simon Coval, 'The Foundations of Property and Property Law' (1986) 45 *Cambridge Law Journal* 457.

109 For example, Fairfield, above n49 at 1094; Lastowka & Hunter, above n51 at 43–50; Erez Reuveni, 'On Virtual Worlds: Copyright and Contract Law at the Dawn of the Virtual Age' (2007) 82 *Indiana Law Journal* 261 at 280; Theodore J Westbrook, 'Owned: Finding a Place for Virtual World Property Rights' (2006) *Michigan State Law Review* 779 at 801; Steven J Horowitz, 'Competing Lockean Claims to Virtual Property' (2007) 20 *Harvard Journal of Law and Technology* 443.

110 *Moore* 51 Cal 3d 120 (1990) at 143–6. For a discussion of this aspect of the decision, see Donna M Gitter, 'Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in their Biological Material' (2004) 61 *Washington and Lee Law Review* 257 at 270–315.

111 See above n13.

112 The political debate about the status of embryos is described in Janet L Dolgin, 'Surrounding Embryos: Biology, Ideology and Politics' (2006) 16 *Health Matrix* 27.

113 See above n13.

114 See, for example, *Human Embryology and Fertilisation Act* 1990 (UK) c 37, s 3; *Research Involving Human Embryos (New South Wales) Act* 2003 (and mirror legislation in other states).

C. Undue Commodification

Arguments against treating certain things as objects of property rights are often linked with arguments against commodification.[115] The link between property and commodities assumes a connection between the classification of rights as proprietary and the alienability of those rights. If property is necessarily alienable, then concern about markets in a particular thing translates into an argument against classifying that thing as property.

Concerns about commodification are frequently expressed in the context of the proper classification of biological products such as human *in vitro* embryos and human tissue.[116] Radin is a leading proponent of the view that certain things ought to be fully or partially inalienable because to allow some things to be dealt with in a market would suggest an equivalence between personhood and money that would ultimately reduce human flourishing.[117] Even without a similar level of analysis, many feel instinctively that markets in certain things would be repulsive or an affront to human dignity.[118]

The relationship between deciding that something is property and that it is saleable is complex, as Radin herself recognises.[119] The existence of inalienable property and the fact that markets can arise in things not always considered property (such as human embryos and body parts),[120] indicate that the categories of property and commodities are not identical. Nevertheless, there is a link between these two categories.[121] The fact that property is usually alienable may turn the classification of something as property into an argument in favour of commodification.[122] Even if such pressures are resisted, classifying something as property means that a value may need to be assigned in some contexts, for example when calculating damages.[123]

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115 See, for example, Stephen R Munzer, 'Human Dignity and Property Rights in Human Body Parts' in J W Harris (ed), *Property Problems: From Genes to Pension Funds* 25 (1997); D Mortimer, 'Proprietary Rights in Body Parts: The Relevance of *Moore's* Case in Australia' (1993) 19 *Monash University Law Review* 217 at 254; Australian Law Reform Commission, above n46 at [20.21], [20.35]; K Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (1996); Judith D Fischer, 'Misappropriation of Eggs and Embryos and the Tort of Conversion: A Relational View' (1999) 32 *Loyola Los Angeles Law Review* 381.

116 For a discussion on Immanuel Kant's views on the sale of body parts, see S R Munzer, 'Kant and Property Rights in Body Parts' (1993) 6 *Canadian Journal of Law and Jurisprudence* 319.

117 Margaret Jane Radin, 'Market-Inalienability' (1987) 100 *Harvard Law Review* 1849; compare Russell Korobkin, 'Buying and Selling Human Tissues for Stem Cell Research' (2007) 49 *Arizona Law Review* 45.

118 Joan Williams, 'The Rhetoric of Property' (1997–1998) 83 *Iowa Law Review* 277 at 343, 355.

119 Radin, 'Market-Inalienability' above n117 at 1851, 1888–91.

120 Michele Goodwin, 'Altruism's Limits: Law, Capacity, and Organ Commodification' (2004) 56 *Rutgers Law Review* 305; Debora L Spar, *The Baby Business* (2006).

121 Waldron, 'The Right to Private Property' above n67 at 343; Gold, above n115 at 41–124.

122 Jennifer Nedelsky, 'Property in Potential Life? A Relational Approach to Choosing Legal Categories' (1993) 6 *Canadian Journal of Law and Jurisprudence* 343; Gold, above n115 at 174–5.

123 Mortimer, above n115 at 232–3.

Concerns about commodification can nevertheless be addressed without refusing to treat something as an object of property. Statutes can operate directly to prohibit the sale of certain things. A decision by the *Moore* court to treat human tissue as property,[124] giving Moore a right to sue in conversion, would not have affected the operation of Californian statutory law restricting sale of human body parts. There is no evidence that, despite the link between property and commodities, the outcome in *Moore* had any effect on the black market in human body parts. Arguments in favour of recognising a power of alienation over property tend to be made in a general, rather than object-specific, context; there is no reason to ignore counter-arguments in specific contexts. Laws restricting commodification, with appropriate enforcement mechanisms, are likely to be more effective in preventing inappropriate commodification than refusing to treat certain things as property because of concerns about commodification. Extending property law to non-commodities, on the other hand, will ensure appropriate civil and criminal protection against unauthorised interference.[125]

D. Concern About Labels

Part of Radin's concern about the negative impact of commodification in certain contexts relates to the likely harm arising from the use of market rhetoric where personhood is deeply implicated.[126] The language of property, including terms such as 'thing' and 'object' can carry similar connotations to the language of the market.[127] While owning property can enhance status,[128] being property may reduce it. On this view, using the term 'property' to describe human embryos or tissue denigrates and objectifies those things. For example, Arabian J, who concurred with the majority in *Moore*, expressed concern that recognising a property interest in human tissue would 'commingle the sacred with the profane'.[129]

Such an argument raises questions about perceptions of property that are best addressed empirically, although such an investigation would be admittedly difficult. Its impact depends on reactions of the broader public to the scope of property law and how this affects their self-perceptions. Certainly it is not true that people think little of all objects of property simply because of their status — the fact that pets are owned does not mean they are not loved or treated with respect. Nevertheless, if classifying human *in vitro* embryos or body parts as 'property' for legal purposes were to result in the objectification of humanity or reproduction, this would be a strong argument against such classification. Thus far, little has been offered to demonstrate that the label 'property', as opposed to the language of markets, would lead to such objectification.

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124 *Moore* 51 Cal 3d 120 (1990).

125 This accords with the recommendation in Law Reform Commission of Canada, *Procurement and Transfer of Human Tissues and Organs*, Working Paper No 66 (1992) at 187.

126 Radin, 'Market-Inalienability' above n117 at 1885–6.

127 Brendan Edgeworth, 'Post-Property? A Postmodern Conception of Private Property' (1998) 11 *University of New South Wales Law Journal* 87 at 89.

128 Hence the famous argument that welfare rights ought to be property: Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733.

129 51 Cal 3d 120 at 148.

E. Defining Property in Particular Contexts

The term 'property' can have different meanings in different contexts. Whether or not a thing can be an object of property rights can affect the applicability of s 51(xxxi) of the *Australian Constitution* and similar provisions,[130] the consequences of bankruptcy,[131] the availability of an order for execution,[132] whether something is capable of being held on trust,[133] whether stamp duty (or another tax) is payable,[134] whether a court has jurisdiction to hear a case,[135] the orders that might be made on dissolution of a marriage or relationship,[136] whether some act constitutes theft or conversion,[137] or whether some proprietary principle (including, traditionally at least, relief against forfeiture) is available.[138] Given the variety of contexts in which the question of property is raised, and the different statutory contexts in which it appears, it is inevitable that things might be objects of property for some purposes but not others.[139] In the context of the *Australian Constitution* and some statutes, property has been given a broad meaning.[140] A narrower reading may be appropriate in criminal contexts.[141] At least in statutory contexts, the meaning of 'property' is primarily a matter of interpretation.[142] Thus the status of human *in vitro* embryos, excised human tissue amd virtual land in Second Life will depend partly on the context at issue.

Despite this, it remains important to have some core idea of what it means to say something is property. Legislation and constitutional provisions that employ the term assume some basic meaning, even if that meaning is extended or contracted for particular purposes. Further, a diversity of meanings does not

130 *Smith Kline and French Laboratories (Aust) Ltd v Department of Community Services and Health* (1990) 22 FCR 73 at 120–2 (Gummow J); aff'd *Smith Kline and French Laboratories (Aust) Ltd v Department of Community Services and Health* (1991) 28 FCR 291 (whether confidential information proprietary).

131 *Jack v Smail* (1905) 2 CLR 684 (involving the question of whether a grocer's licence passed to the trustee in bankruptcy); *Condon City Corp v Bown* (1989) 60 P & CR 42 at 48 (statutory tenancy); *De Rothchild v Bell* [1999] 2 WLR 1237 at 1250 (statutory tenancy); *Re Celtic Extraction Ltd* [1999] 4 All ER 684 (waste management licence).

132 This comes up in some US cases considering whether domain names are property. See Wendy A Adams, 'Beyond Trade Mark and the Public Domain: Allocating Property Rights in Domain Names' (2003) 52 *Intellectual Property Forum* 10.

133 *Pennington v McGovern* (1987) 45 SASR 27 (involving an abalone licence); *Boardman v Phipps* [1967] 2 AC 46 at 89–91, 107–111, 115–116 (involving information).

134 *2 Day FM Australia Pty Ltd v Commissioner of Stamp Duties (NSW)* (1989) 20 ATR 1131 (commercial radio licence); *Suncoast Milk Pty Ltd v Commissioner of Stamp Duties (Queensland)* [1997] 2 Qd R 529 (right to sell milk to certain group of customers); *Australian Rice Holdings Pty Ltd v Commissioner of State Revenue (Victoria)* (2001) 48 ATR 498 (right to draw water from particular source).

135 *Banks v Transport Regulation Board (Victoria)* (1968) 119 CLR 222 at 231–2 (Barwick CJ) (taxi licence is property over certain value).

136 *Berghofer v Berghofer* [1988] Alta LR 2d 186; *Woodworth v Woodworth* 337 NW 2d 332 (Mich, 1983); *Caratun v Caratun* [1993] DLR 404; *Re Marriage of Graham* 574 P 2d 75 (Colo, 1978).

137 See, for example, *R v Stewart* (1988) 50 DLR (4th) 1 at 9–11. See also Deborah Fisch Nigri 'Theft of Information and the Concept of Property in the Computer Age' in Harris, above n115 at 48 (arguing that information should be treated as property for the purposes of the law of theft).

explain decisions such as that in *Moore* which decided that conversion was not available as a remedy *because* human tissue could not be property.[143] The Court's conclusion was not based on the special meaning of 'property' in the context of conversion suits, but rather on the premise that human tissue was not property for any purpose. Similarly, where an embryo is taken without permission, the suggestion that there is no theft relies on the fact that an embryo is not property, not on the inappropriateness of punishment. It is thus still necessary to ask what it is about a particular thing that means it cannot be an object of property, either generally or for particular purposes.

F. Conclusion

A decision to treat something as a potential object of property involves more than conceptual considerations, and requires an evaluation of consequences and context. Many of the arguments about the proper status of human *in vitro* embryos, excised body parts and virtual property take place on these terms. Provided they are focussed on the scope of 'property' and not some other category such as 'commodity', such arguments ought to be taken seriously and subjected to greater analysis than that offered here. It is possible that some of them will overpower my reasons for employing an expansive notion of 'property' in particular contexts. However, as currently formulated by their advocates, none seem to justify excluding *in vitro* embryos, excised body parts or virtual property from property's domain.

5. The Many Meanings of Property

As has been demonstrated, in order to decide whether something can be an object of property, it is necessary to consider both the concept of property *and* the implications that would follow from such classification. Property requires a

138 *Sport International Bussum v Inter-Footwear* [1984] 1 WLR 776; *Scandinavian Tanker v Flota Petrolera* [1983] 2 All ER 763. Compare *BICC v Burndy* [1985] 2 WLR 132; *Legione v Hateley* (1983) 152 CLR 406.

139 See, for example, Alice Erh-Soon Tay & Eugene Kamenka, 'Introduction: Some Theses on Property' (1988) 11 *University of New South Wales Law Journal* 1 at 10; Ronald Sackville, 'Property Rights and Social Security' (1978) 2 *University of New South Wales Law Journal* 246 at 250. See also *Wily v St George Partnership Banking Ltd* (1999) 84 FCR 423 at 426 (Sackville J).

140 *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 276 (Latham CJ), 285 (Rich J), 290 (Starke J), 295 (McTiernan J), 305 (Williams J); *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 349–50 (Dixon J) (for purposes of the *Constitution*, property includes 'innominate and anomalous interests'); *Georgiadis v Australian and Overseas Telecommunications Corp* (1994) 179 CLR 297 at 311 (Brennan J) (for purposes of the *Constitution*, property includes unassignable chose in action); *Cummings v Claremont* (1996) 137 ALR 1 (Dawson and Toohey JJ dissenting) (bankruptcy); *Suncoast Milk Pty Ltd v Commissioner Of Stamp Duties* [1997] 2 Qd R 529 at 544 (stamp duties); *Bailey v Uniting Church in Australia Property Trust (Qld)* [1984] 1 Qd R 42 at 58 (statute defining property as including all rights and interests).

141 *R v Stewart* (1988) 50 DLR (4th) 1 at 10–13. Compare *Criminal Code* (Qld) s 408C(3)(a).

142 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] 3 All ER 549 at 574; *Kirby v Thorn EMI Plc* [1988] 2 All ER 947 at 953. See also Sackville, above n139 at 250.

143 51 Cal 3d 120 (1990).

physically or conceptually definable thing with which more than one person can interact. Even where a classification of property is otherwise appropriate, there is an understandable reluctance to treat something as an object of property where to do so poses moral or practical problems.

The proper scope of property law is broad, covering a range of objects and rights. However, the fact that two things are both potentially objects of property rights does not mean that property law treats those things in the same way. The *content* of property law varies according to the type of property involved.[144] Thus there are different rules for real and personal property, choses in action and choses in possession, and for corporeal and incorporeal hereditaments.

Although it is not traditional to do so, many of these categories could be broken down further to explain varied treatment given in particular contexts. Radin, for example, has argued that chattels constitutive of an individual's identity are treated differently from mere commodities.[145] This can be illustrated through differing remedies for detinue — only where property has no monetary equivalent is specific restitution available. Another example of differing treatment within the category of chattels is the fact that animals are only property in some contexts.[146] Even where there is no real sub-category as such, property law does not mandate identical treatment. For example, zoning laws may mean that land on one street is subject to different constraints from land on a neighbouring street.

The fact that property exists in a variety of forms explains why many commentators have insisted on multiple definitions of property. For example, Harris defines property to encompass both things subject to trespassory protection and assignable assets.[147] The current edition of Meagher, Gummow & Lehane's famous text on equity defines property by reference to four criteria, based on the power to recover from a specific fund or asset, alienability, the *in rem* nature of property rights, and the operation of priority rules.[148] Each of these features can be seen as essential to at least some of the standard categories of property.

A decision that something can in principle be an object of property does not explain how it will be treated by the law of property. It is also necessary to determine whether it fits into one of the standard categories of property and whether differential treatment within that category is warranted. Addressing these issues will not always be easy — there has historically been significant debate over

144 This is reflected in statements made by the High Court, such as the fact that 'property' describes 'all or any of the very many different kinds of relationship between a person and a subject matter'. *Yanner* (1999) 201 CLR 351 at 355–6 (Gleeson CJ, Gaudron, Kirby and Hayne JJ) and 'to characterise something as a proprietary right is not to say that it has all the indicia of other things called proprietary rights' (*Tao Zhu v Treasurer of NSW* (2004) 218 CLR 530 at 577 (the Court)).

145 See Radin, 'Property and Personhood' above n67. See also Hanoch Dagan, *Unjust Enrichment* (1997) at 40–9.

146 William Blackstone, *Commentaries on the Laws of England* vol 2 (1766) at [393].

147 Harris, 'Property and Justice' above n72 at 13, 58–9.

148 Roderick Meagher, Dyson Heydon & Mark Leeming, *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (2002) at 126. See also Lawson & Rudden, above n75 at 14 (containing a similar analysis).

the proper classification of intellectual property rights,[149] and shares in a corporation.[150] Difficulties will also be encountered should human *in vitro* embryos, excised human tissue or virtual land be recognised as property. That is not, however, a reason to deny that such recognition should properly be granted.

Human *in vitro* embryos and excised human tissue are most similar to chattels but do not seem to warrant full ownership rights normally associated with that category.[151] In particular, there are strong arguments in both cases against free alienation and in favour of general laws limiting inappropriate treatment, and the law tends to reflect this.[152] There are also specific issues in each case that require special rules. For example, co-ownership of embryos is quite different to co-ownership of other chattels.[153] Property in human tissue, like property in animals, is limited by the context of the object. While wild animals are not property until captured, human tissue can only be property once brought outside the body of a human being. All of these particularities can be dealt with *within* the concept of property, rather than by excluding embryos or human tissue from property's domain altogether.

The difficulties in recognising property in virtual land in Second Life arises primarily from the difficulties of classification. There are no real conceptual obstacles to recognising property rights in such land and no moral or practical reason to decline to treat it as an object of property. Unlike the situation in some other virtual worlds, the fact that land in Second Life has a real commercial value has no negative impact on play.[154] However, virtual land seems to fall outside many standard categories. It cannot be a chattel, due to the intangibility of the subject matter. It cannot be real property, which is associated with extensive rules governing use of a fundamentally important, and limited, resource. Virtual land shares most characteristics with choses in action that can be enjoyed as soon as they are acquired, such as intellectual property and shares. This category tends to operate as a residual category, with little linking its components other than intangibility of the various objects. Accordingly, there is little difficulty in ensuring that property law treats virtual land appropriately. For example, it is possible for virtual land to operate similarly to determinable interests in land, to take account of the fact that those acquiring land in Second Life contractually agree to the world's eventual demise.[155]

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149 The debate took place over a series of articles in volumes 9, 10 and 11 of the *Law Quarterly Review*. See, for instance: Howard W Elphinstone, 'What is a Chose in Action' (1893) 9 *Law Quarterly Review* 311; Charles Sweet, 'Choses in Action' (1894) 10 *Law Quarterly Review* 303; Spencer Brodhurst, 'Is Copyright a Chose in Action' (1895) 11 *Law Quarterly Review* 64; T Cyprian Williams, 'Things in Action and Copyright' (1895) 11 *Law Quarterly Review* 223.

150 See, for example, James McConvill, 'Do Shares Constitute Property? Reconsidering a Fundamental, yet Unresolved, Question' (2005) 79 *Australian Law Journal* 251.

151 Harris, 'Property and Justice' above n72 at 187–8, 351–60.

152 See, for example, *Human Organ Transplants Act* 1989 (UK) c 31; *Human Tissue Act* 2004 (UK) c 30, s 32; *Human Tissue Act* 1983 (NSW) s 32. See also above n116.

153 See Bennett Moses, above n24 at 609–615.

154 Compare, Richard Bartle, 'Virtual Worldliness: What the Imaginary asks of the Real' (2004) 49 *New York Law School Law Review* 19.

6. Conclusion

This is not the first time in history that lawyers have struggled to apply property concepts in new contexts; but it remains an important issue. No doubt, it will continue to be an important issue as new technologies require the classification of additional things. My concern is that we need a solid understanding of our notion of property before we can understand how to approach these questions. We also need to separate concerns about classification as 'property' from other concerns, such as a distaste for commodification. By understanding the right questions to ask, it should be possible to ensure greater focus in debates as to the proper limits of property law. This is important in the context of human *in vitro* embryos, excised human tissue and virtual property. It is also necessary to have an understanding of the underlying principles in order to apply them to new contexts, perhaps as yet unimagined, as they arise.

155 'Second Life Terms of Service' cl 5.3 <http://secondlife.com/corporate/tos.php> accessed 25 February 2008.