

Book Review: Being and Owning: The Body, Bodily Material, and the Law by Jesse Wall

Alicja Puchta
alicia.puchta@gmail.com

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Book Review



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Book Review: Being and Owing: The Body, Bodily Material, and the Law by Jesse Wall

Abstract

This is a book review of *Being and Owing: The Body, Bodily Material, and the Law* by Jesse Wall .

Book Review

***Being and Owning: The Body, Bodily Material, and the Law*, by Jesse Wall¹**ALICJA PUCHTA²

FOR CENTURIES, THE STARTING POINT of the common law regarding ownership of the human body has been the no property rule—that is, the presumption that human bodies cannot be owned.³ The rule goes back at least as far as Sir Edward Coke’s *Institutes of Laws of England* of 1644, where he wrote that cadavers are *nullius in bonis*: the property of no one.⁴ 1882 marks the first recorded judgement in English law regarding ownership of the human body. In *Williams v Williams*,⁵ the Court of Chancery held that there was no property in the dead body of a human being. As such, one could not bequeath one’s body to another after death.

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1. (Oxford: Oxford University Press, 2015) [Wall].
 2. JD Candidate 2017, Osgoode Hall Law School. Many thanks to Boris Majkic for acting as my sounding board, and Richard Haigh for his invaluable comments.
 3. Dianne Nicol et al, “Impressions on the Body, Property and Research” in Imogen Goold et al, eds, *Persons, Parts and Property* (Oxford: Hart Publishing, 2014) 9 at 13. The existence of slavery is a notable exception to the common law rule of “no property in the human body.” At the same time courts were enforcing the idea that one could not own his or her body parts, they were oddly quiet with regard to ownership of living beings. This tension can be explained through the historical treatment of slaves as chattel. Because slaves were considered things rather than legal persons, they were characterized as objects of rights rather than subjects of them. English law eventually abolished the notion that living persons could be property. See Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Oxford: Hart Publishing, 2007) at 64.
 4. E Coke, *The Third Part of the Institutes of the Law of England: Concerning High Treason, and Order Pleas of the Crown, and Criminal Classes* (London: 1644) at 203; Wall, *supra* note 1 at 1.
 5. [1882] 20 Ch D 659, [1881-5] All ER Rep 840 [Williams].

Exceptions have since been carved out of the no property rule. In the case of *Doodeward v Spence*, the Australian High Court declared there was property in the corpse of a two-headed baby the plaintiff had stored in a jar and exhibited.⁶ The Court made its ruling on the basis that the corpse was no longer an ordinary corpse, having been transformed through a combination of “work and skill” into a specimen.⁷ The English case of *R v Kelly* similarly applied the work and skill exception to avoid the no property rule.⁸ In *Kelly*, the Royal College of Surgeons stored body parts in jars. The defendant stole the body parts, but claimed that, due to the no property rule, he could not be charged with theft. The court in *Kelly* held that the body parts—by virtue of having been transformed through work and skill—were property of the college, thus thwarting the defendant’s attempts to evade criminal liability.

In *Yearworth v North Bristol NHS Trust*, the plaintiffs’ property rights to their own sperm were recognized on the general basis that the plaintiffs had produced the sperm and separated it from their bodies with the intention of later using it for reproductive purposes.⁹ The Court of Appeal for England and Wales concluded that a departure from the limited work and skill exception was necessary because developments in medical science prompted “a re-analysis of the common law’s treatment of and approach to the ownership of parts or products of a living body.”¹⁰

These cases demonstrate courts’ increasing willingness to expand common law principles to respond to a modern reality in which technological advancements have made it possible to treat human-derived materials in ways that were previously unimaginable. As technology has evolved, so too has the law, resulting in a “postmodern rewriting (and re-righting) of the body.”¹¹

In *Being and Owning*, Jesse Wall takes the reader through the above precedents and many others. Wall does not, as one might expect, lay the cases out in chronological order. Rather, he engages with them organically, whenever they become thematically relevant. Each chapter opens with a compelling account from a case dealing with legal issues around bodily material. After Wall introduces each case, he then relies on it to bolster his claims or to demonstrate concepts in practice. Cases are thus woven in as a seamless element of the narrative of *Being*

6. [1908] 6 CLR 406, [1908] HCA 45 [*Doodeward*].

7. *Ibid* at 414.

8. [1998] EWCA Crim 1578, [1998] 3 All ER 741 [*Kelly*].

9. [2009] EWCA Civ 37, [2009] 2 All ER 986 [*Yearworth*].

10. *Ibid* at para 45.

11. Peter Halewood, “On Commodification and Self-Ownership” 20:2 (2013) Yale JL & Human 131 at 139.

and Owning. And although Wall purports to focus on jurisprudence from the United Kingdom, he does not do himself justice: the book is exhaustive in its coverage of common law jurisprudence dealing with ownership in the human body and human tissue.

The overarching purpose of *Being and Owning* is to determine what the legal status of bodily material is, and what it should be.¹² Wall shapes his analysis using three main inquiries. First, he sets out to identify under what circumstances a person ought to be able to own bodily material, and which legal frameworks we should utilize to assert ownership. Second, Wall points out that ownership in the human body may be an uncomfortable notion because the body can be both a subject (an individual who attracts moral attention), and an object. Using this framework, he examines where on the subject-object spectrum human bodily material should fall.¹³ The third inquiry proceeds on the basis that we may attribute value to bodily material in two ways.¹⁴ Bodily material may be valued as an object in and of itself, in which case we attribute value to it based on our individual preferences as we do for all possessions. Alternatively, bodily material may have value because of its unique status as a physical extension of our subjective selves. Wall argues that we must first discern which type of valuation is being applied to bodily material in a given instance if we intend to treat it as property.

Wall opens his book with an overview of pertinent property law concepts by reviewing and rejecting different theories of ownership. In Chapter 1, he explains that ownership and property are not interchangeable concepts. Ownership is a functional concept that is often described as being made up of accrued “incidents of ownership.”¹⁵ First popularized by Tony Honoré, incidents of ownership are a way of subdividing the bundle of rights that attaches to any given object.¹⁶ Incidents of ownership include the right to possess an object, to sell it, to transfer it, to manage it, and so on. Bodily material fits well within the ownership paradigm precisely because of how easily incidents of ownership extend to bodily material. Subjects can have functional relationships with bodily material that reflect enumerated incidents of ownership: we can possess, control, or even sell sperm cells in much the same manner we can possess, control, or sell

12. Wall, *supra* note 1 at 3.

13. *Ibid* at 3–4.

14. *Ibid* at 4.

15. *Ibid* at 12.

16. Tony Honoré, “Ownership” in Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (Oxford: Clarendon Press, 1987) 161 at 161–92.

a car. However, unlike cars, sperm cells—or any other bodily material for that matter—often demand moral considerations that reflect their human origins.

Wall asserts that it is important to consider different incidents of ownership when inquiring into the moral implications of classifying bodily materials as property. This is because different incidents of ownership may require different types or levels of justification.¹⁷ For example, justifying why someone should be able to possess their sperm cells engages different considerations than justifying why they should be able to sell their sperm cells. In Chapter 2, Wall uses the inquiry into how we can relate the outer object of separated bodily material to the inner subjectivity of its human source to explore justifications explaining why incidents of ownership in bodily material should be recognized. Wall rejects the Lockean “work and skill” justification from *Doodeward*, characterizing it as incomplete.¹⁸ He argues that, although the transformation of a human subject to an object through work and skill bridges the gap between object and subject somewhat, it does so imperfectly, for the justification can only be made in certain narrowly formulated circumstances. Wall contends that a Hegelian conception can more fully bridge the gap between object and subject.¹⁹ A Hegelian basis for ownership in human tissue is rooted in the idea that people can wilfully create a state of affairs that results in the generation of bodily material, and that the individual can then use that bodily material to achieve specific ends. While this concept is difficult to follow in the abstract, Wall helpfully clarifies the nature of a Hegelian justification by using *Yearworth* as an example. In *Yearworth*, the plaintiffs’ property rights in their sperm were recognized because they alone had generated the sperm so they could later use it for their own benefits.²⁰

Ultimately, however, Wall rejects both the Lockean and Hegelian justifications in favour of one first proposed by Maurice Merleau-Ponty: Rather than treating the subject and the bodily tissue object as two separate things between which we must bridge the gap, we should recognize them as overlapping, intertwined entities.²¹ Objects derived from human bodies will always engage a person’s subjectivity. The values that are attached to the object depend on whether the

17. Wall, *supra* note 1 at 31.

18. *Ibid* at 47-50.

19. *Ibid* at 50-56.

20. A Hegelian justification seems limited to regenerative bodily material. The concept of an individual wilfully producing regenerative bodily material (*i.e.*, sperm, ova, or blood) for a specific purpose such as *in vitro* reproduction or blood donation is intuitive. But the notion of generating tissue to achieve one’s ends cannot possibly apply to non-regenerative tissues, making the justification unavailable in contexts like organ donation.

21. Wall, *supra* note 1 at 57-58.

subject sees the object as one that is either *in-itself* or *for-itself*. An object that is in-itself is essentially treated as a mere object, and has only a causal connection to an individual subject.²² The subject may use the object in a mechanical manner, and may ascribe value to it that is similar to the value one may ascribe to a precious ring or a favourite shirt, but no more. In contrast, human bodily material as an object for-itself represents a direct extension of the individual's subjectivity, for it is the individual's tie to the external world through which he or she expresses himself or herself.²³ For example, we can view the sperm in *Yearworth* as either mere objects, or objects for-themselves—synonymous with the patients' bodies and necessarily associated with them. Ultimately, Wall contends that any inquiry into property rights in bodily material must distinguish between whether the bodily material in question is treated as mere object or as an object for-itself.

Having established that bodily material may be considered a mere object in some circumstances, Wall turns in Chapter 3 to the corollary of this conceptualization: commodification. Commodification is often the central concern raised around ownership of human bodily material. Recognizing the proprietary nature of human tissue runs the danger of treating objects derived from humans as desirable commodities, severable from their progenitors, and with a value independent of said progenitors. When human body parts are dealt with as things that can be “severed, moved around, controlled, bought and sold, sued over and profited from,” they lose their inherent dignity as objects derived from subjects.²⁴ The concern with commodification is that it leads to objectification that extends beyond the body part to its human source. In turn, objectifying an individual undermines his or her inherent value and dignity.²⁵ As Wall puts it, it “denigrates” the individual, vitiating the value we see in humans in their own right.²⁶

The Kantian notion of value equivalence posits that objects that can be substituted for another have an equivalent value, while those that have no

22. *Ibid* at 59-60.

23. *Ibid* at 58-59.

24. Kate Greasley, “Property Rights in the Human Body: Commodification and Objectification” in Imogen Goold et al, eds, *Persons, Parts and Property* (Oxford: Hart Publishing, 2014) 67 at 70.

25. See e.g. Margaret Jane Radin, *Contested Commodities* (Cambridge, Mass: Harvard University Press, 2001); Margaret Jane Radin, “Market-Inalienability” (1987) 100:8 Harv L Rev 1849; Carolyn McLeod, “For Dignity or Money: Feminists and the Commodification of Women's Reproductive Labour” in Bonnie Steinbock, ed, *Oxford Handbook of Bioethics* (Oxford: Oxford University Press, 2007) 258 at 258-81.

26. Wall, *supra* note 1 at 80.

equivalent have an inner worth, a dignity on which one cannot put a price.²⁷ Some scholars in the field have argued that commodification of human-derived objects necessarily leads to objectification of an individual, leading to a world where society regards human bodies as resources, not as objects entitled to Kantian dignity.²⁸ However, Wall points out that one cannot presume that what is “true of the whole must be true of its parts.”²⁹ Whether human body parts possess Kantian dignity depends on the values ascribed to them by their progenitor. Do we view the item as in-itself? Or do we view it as for-itself? Commodifying an item that is in-itself does not invite value degeneration. Rather, denigration occurs when one commodifies an item that is for-itself. An item that is for-itself has a non-equivalent value; if we ascribe a monetary, equivalent value to it, we corrupt its inherent value.³⁰ On this basis, Wall argues that decisions with regard to the sale of bodily material should depend on whether the progenitor of the material views it as inherently valuable or as a mere object.³¹ However, the decision as to whether an object is for- or in-itself should be insulated from financial and social pressure. External social or financial pressure can crowd out intrinsic reasons for not wishing to sell a part of our bodies, thus forcing value equivalence on an object that the subject in fact intrinsically views as for-itself.³²

In Chapter 4, Wall moves away from the morality-laden discussion around commodification, and considers the practical difficulties underpinning the ownership of human bodily materials. Specifically, he orients his discussion towards both the structure and functionality of property law frameworks, and whether such frameworks can be applied to human bodies.

Property law describes legal relationships between rights-holders and objects. The use of said objects is governed in a legally distinct manner centred on the exclusion of others from the object.³³ However, the protection of bodily material differs on a conceptual level from that of other objects, and the two should not be conflated. Wall characterizes the rights to control and use our own bodies and their derivatives as “non-contingent,” in that they always “protect a particular set of preferences and choices that can only be exercised by the particular

27. *Ibid* at 99.

28. Stephen R Munzer, “Uneasy Case against Property Rights in Body Parts” (1994) 11 Soc Phil & Pol’y 259 at 286; Ruth F Chadwick, “The Market for Body Parts: Kant and Duties to Oneself” (1989) 6:2 J Appl Philos 129 at 137.

29. Wall, *supra* note 1 at 100.

30. *Ibid* at 100-101.

31. *Ibid* at 101-108.

32. *Ibid* at 106-107.

33. *Ibid* at 113.

rights-holder.”³⁴ In other words, non-contingent rights are necessarily associated with the identity of the rights-holder. In contrast, property rights around an object enable contingent rights that do not depend on the identity of the rights-holder. This attribute is reflected in the structural features of property law. For example, under property law frameworks, it is permissible for one rights-bearer to transfer property rights to another. Furthermore, property rights are negative rights. They exclude others from using an object. This is in contrast to the positive duties of care for an object that we might expect to attach to human bodies.

The distinction between non-contingent and contingent rights is an important one because non-contingent rights protect a relationship between a subject and a thing that has inherent value. Contingent property rights, on the other hand, concern relationships between objects and subjects wherein the object has value equivalence, and may be replaced with another. Therefore, Wall argues, there is a conceptual and structural inconsistency between property rights and rights to bodily material, which provides the “main impetus for resisting the wholesale application of property law” to our legal treatment of bodily material.³⁵

Chapter 5 expands upon the conclusions of Chapter 4. Wall recognizes that the increasing tendency of the common law to recognize property rights in bodily material stems from the pressure to exclude others from intervening with our bodies.³⁶ The exclusionary boundary defined by property law allows rights-holders to prevent an open set of persons from, for example, using, possessing, and controlling an object.³⁷ To interfere with the owner and the object by acting in a manner inconsistent with the owner’s instructions is impermissible. Because such interferences are actionable wrongs, property law provides robust protection against interferences with our bodily material. Thus, it is an attractive framework within which to consider our rights to our bodies.

Wall concludes that the limitations of property law thus invite the formulation of a novel legal framework to govern rights regarding bodily material. Property law is premised on an object that is independent of the rights-holder, whereas the relationship between human bodily material and the rights-holder may be necessarily linked. Wall therefore argues for a dichotomous approach that “benefit[s] from the legal structure of the exclusion strategy without having to also apply a legal structure that presumes the entitlements in the object or

34. *Ibid.*

35. *Ibid* at 139.

36. *Ibid* at 142.

37. *Ibid* at 144.

resource represent preferences and choices that can exist independently of the rights-holder.”³⁸

In the final chapter, the concepts and concerns Wall has discussed coalesce into his conclusions as to how we should approach the use and storage of bodily material. The way forward, he suggests, is to analogize rights in bodily material to privacy rights.³⁹ Wall posits that bodily material and privacy information are parallel in that they both have values that are self-ascribed and thus ambiguous.⁴⁰ Recall that bodily material may be in-itself—a mere object—or for-itself, serving as an expression or extension of a person’s subjective self into the external world. The classification of an item as in- or for-itself depends on which values the progenitor ascribes to it. The value of an object of bodily material is therefore ambiguous vis-à-vis third parties; they do not know whether an item of bodily material is a mere object or if it has intrinsic value unless the progenitor explicitly tells them. Personal information—information that attaches to an identifiable person—has similar properties. Individuals often choose to tailor the information they wish to share about themselves. An individual’s public persona thus differs from his or her private person. In this manner, what personal information warrants privacy protection depends on the individual that it concerns. Moreover, the right to privacy is an exclusionary right that has been famously articulated as “the right to be let alone.”⁴¹ It is also a non-contingent right: nothing can replace privacy once lost. Just as the right to use, control, or store bodily material should depend on whether said material has been self-ascribed as for-itself (rather than in-itself), the information that is subject to the right of privacy depends on the individual’s self-ascription.

Ultimately, Wall suggests that two distinct legal categories should be created, allowing different entitlements in objects that are in-themselves or for-themselves. An in-itself object would be subject to property rights actionable against an open set of persons. In contrast, a for-itself object would be governed by a new regime akin to duties of confidentiality with regard to personal information, and would only be actionable against those who knew, or ought to have known, of the rights-holder’s relationship with the bodily tissue in question.⁴² This dualist approach would provide a basis for differentiating between the possible objective and subjective dimensions of human bodily material. Furthermore, it would

38. *Ibid* at 143.

39. *Ibid* at 177.

40. *Ibid* at 190-91.

41. Samuel Warren & Louis Brandeis, “The Right to Privacy” 1890 4:5 Harv L Rev 193 at 196.

42. *Ibid* at 207. [check *ibid* – is this still referring to Warren & Brandeis, or is it back to Wall?]

account for the ambiguous nature of bodily material vis-à-vis third parties, for whom it may not be clear whether an item is for-itself or in-itself.

Being and Owning presents a novel approach to considering ownership of the human body and its derivatives. The book does a commendable job of analyzing and explaining why some individuals view their own tissues as mere objects, and why others view the same types of tissues as intrinsically valuable. It also captures why we, as a society, are entirely comfortable with the notion of treating certain bodily tissues in certain circumstances as objects, but why we feel a line must be drawn with regard to others. Wall elucidates the basis on which this line should be drawn. Paying attention to how an item of bodily material is self-ascribed guides our behaviour with regard to that item, dictating whether it should be treated as an object for-itself or in-itself.

Being and Owning is conceptually challenging. It demands a lot of its reader. This is for two reasons. First, the book is just as multi-disciplinary as it is multi-jurisdictional. Legal notions are explained through a heavy reliance on abstract philosophical models. The entire undercurrent of the book addresses the moral and societal issues surrounding the objectification of the human body. Thus, the technical, concrete aspects of the book mix frequently with the abstract. To maintain engagement, the reader must be open to a variety of theoretical perspectives.

Second, the book must be considered in the aggregate. Individual chapters discuss discrete topics, but Wall introduces concepts that subtly build on one another. Thus, the book must be read in an active manner. Each concept should be parsed as it is presented, and then placed mentally into the overarching scheme of the book. To this end, Wall provides useful overviews at the beginning of each chapter that presage more detailed discussion with a brief grounding in the topics to come. Even more helpful are the conclusions at the end of each chapter, which Wall uses to succinctly guide the reader through the main points of the preceding text. This assists the reader in seeing the book as a whole, and understanding where it has been, and where it is going next.

The main shortcoming of *Being and Owning* is that the book is, at times, overly concerned with conceptual justifications, and does not give as much thought to issues of practical application. For this reason the book proceeds in a way that is detached from reality. For example, Wall analyzes the decision to apply property rights to bodily material as one that occurs because of the attraction of the exclusionary principle upon which property law is based. However, in reality, property law has been the emergent framework through which the law has dealt with claims in human tissue for many other reasons.

For one, the language of property helps us describe the extent to which we have rights (such as management, possession, transferability, and control) over our body parts to the exclusion of others.⁴³ Additionally, the common law has been forced to respond to claims dealing with bodily tissue because of a technological reality that has made such claims far more common than they were in the past. Extant property law frameworks recognize the functional parallels between items of bodily material and conventional property objects in that they are tangible things that can be moved, used, stored, et cetera.⁴⁴ Thus, there is an “intuitive attraction of treating items of bodily material as items of property.”⁴⁵

Furthermore, classifying an object as property is an essential element in a number of legal claims. Certain statutory legal rights are triggered only if an item is defined as property. Similarly, a number of common law concepts (*inter vivos* gifts, constructive trusts, and the tort of conversion, to name a few) hinge on the thing at issue being classified as property. Therefore claimants must formulate claims in a certain way to gain access to legal remedies. Recognizing bodily material as property has the very practical benefit of providing claimants with access to effective legal recourse. The alternative route is less desirable, as it forecloses all property-based remedies, thereby forcing a claimant into a position where they may have to resort to ill-suited or incomplete legal remedies.⁴⁶ Given this reality, Wall’s suggestions to reformulate our approach to the legal treatment of bodily material are of little help to claimants in the here and now. Nonetheless, *Being and Owning* is a significant contribution to the field, because it has its eyes fixed on improving the future, and it does so in an innovative manner.

Wall’s book is also particularly timely for Canadian readers. Four Canadian courts have considered the question of whether tissue derived from the human body can be considered property. In chronological order, the cases are: *CC v AW*,⁴⁷ *JCM v ANA*,⁴⁸ *Lam v University of British Columbia*,⁴⁹ and *Piljak Estate v Abraham*.⁵⁰ Collectively, the four cases converge on one common conclusion: in Canada, bodily materials attract property rights.

43. *Ibid* at 12. [check *ibid*]

44. *Ibid* at 13.

45. *Ibid*.

46. Imogen Goold & Muireann Quigley, “The Case for a Property Approach” in Imogen Goold et al, eds, *Persons, Parts and Property* (Oxford: Hart Publishing, 2014) 231 at 244.

47. 2005 ABQB 290, [2005] AJ No 428.

48. 2012 BCSC 584, [2012] BCJ No 802.

49. 2013 BCSC 2094, [2013] BCJ No, aff’d 2015 BCCA 2, [2015] BCJ No 4 [*Lam*].

50. 2014 ONSC 2893, [2014] OJ No 2665 [*Piljak Estate*].

Three of the cases, *Lam*, *CC v AW*, and *JCM v ANA*, dealt with sperm intended for use in assisted reproduction. However, the contexts of the three cases were vastly different: *Lam* was a negligence claim arising out of a commercial contract. The claim turned on an issue of statutory interpretation. *CC v AW* and *JCM v ANA* arose as family law cases; *CC v AW* dealt with the sperm as an *inter vivos* gift, while *JCM v ANA* dealt with sperm as property for the purposes of a spousal relationship dissolution agreement. The factual scenario of *Piljak Estate* is even further removed from the preceding three cases. *Piljak Estate* dealt with civil procedure rules, and asked whether a deceased patient's stored tissue samples are property that can be used for evidentiary purposes.

The different contexts in these four Canadian cases hint at why the inquiry into legal rights regarding bodily material must be contextual. Different contexts require different considerations. Certain contexts—and certain tissues—require a heightened effort to avoid objectification of an object that is, as Wall would put it, in-itself. For example, consider two situations: living blood donation versus organ donation from a deceased relative. Although these two situations both involve questions of bodily material ownership, they engage different considerations. The former example deals with a material that is more easily classified as a mere object (blood cells), because it is renewable and easily parted with. The latter situation, in contrast, deals with an object that is more likely to be ascribed intrinsic value. Describing the organ of a deceased individual as in-itself reflects the special nature of the relationship between the object (the organ) and the subjects dealing with it (family members and loved ones of the deceased). Ultimately, I believe readers will benefit from Wall's book because it proposes how the law should approach the distinction between bodily material that is a mere object and bodily material that has intrinsic value.

