

The Liability Rule, Proprietary Remedies and Body Parts

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Abstract Sometimes courts and commentators disavow a proprietary approach to excised body parts in the belief that non-proprietary remedies are adequate to the task. A belief of this sort, this type of conceptual resistance to the application of property law to body parts, is allegedly captured in the compendious expression known as the liability rule. *Moore v Regents of the University of California* clearly illustrates this type of opposition. Some recent scholarship has also tried to ground this sort of exclusive non-proprietary approach to body parts in the liability rule component of the analytical framework developed by Calabresi and Melamed. This piece interrogates the idea that nonproprietary causes of action should exclusively furnish the applicable theory of liability in relation to body parts; it suggests an understanding of the theoretical framework of Calabresi and Melamed which facilitates a proprietary approach to body parts along with current non-proprietary approaches. I argue that property, liability and inalienability rules basically serve the same purpose (protection of an entitlement in the nature of a property interest) and that the difference amongst them is one of degree rather than nature; also, none of the triad applies separately and independently of one another. Thus, I suggest that the liability rule is not essentially non-proprietary and could be used to protect a proprietary entitlement. I tested my understanding of Calabresi and Melamed's framework against a case that involved damaged kidney in order to show the difference the framework, as conceived by me, could make to the remedial fortunes of a claimant in body parts' litigation.

Keywords Liability rule · Property rule · Inalienability rule · Body parts · Property in body parts · Calabresi & Melamed

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Introduction

Sometimes courts and commentators disavow a proprietary approach to excised body parts in the belief that non-proprietary remedies are adequate to the task. A belief of this sort, this type of conceptual resistance to the application of property law to body parts, is allegedly captured in the compendious expression known as the *liability rule*. *Moore v Regents of the University of California* clearly illustrates this type of opposition.¹ Moore suffered from leukaemia and needed to undergo a splenectomy procedure in order to remain alive. Although the procedure itself was successful, Moore's doctors misappropriated his excised (diseased) spleen, and other bodily tissues surreptitiously obtained from him in the name of post-operative treatment. Moore's doctors, who were also medical researchers, used his non-consensually obtained body parts to develop and patent a lucrative cell-line. When Moore became aware of the full facts, he claimed a share of the profits made from his body parts. Consequently, he brought several causes of action against his doctors, including a proprietary claim in conversion. The majority of the Supreme Court of California dismissed Moore's conversion claim, although they held that Moore could pursue an action for breach of informed consent and fiduciary duty²; this essay is more interested in the majority's reason for declining Moore's claim in conversion. In part, *Moore's* majority observed that 'there is no pressing need to impose a judicially created rule of strict liability [conversion] since enforcement of physicians' disclosure obligations will protect patients against the very type of harm with which Moore was threatened'.³ In the same vein, Arabian J's concurring judgment observed that Moore was 'not without a remedy; he remains free to pursue defendants on a breach-of-fiduciary-duty theory, as well as, perhaps, other tort claims not before us'.⁴ Thus, the majority thought that non-proprietary remedies were sufficient for Moore, even though he was most unlikely to succeed in a negligence action against his doctors because of the difficulties he would have had in proving the elements of causation and damage.⁵ *Moore's* minority, using examples drawn from outside the doctor-patient relationship, challenged the majority's claim on the adequacy of a cause of action for lack of informed consent⁶; the minority's pessimism was vindicated by the failure of a claim for lack of

¹ *Moore v Regents of the University of California*, 793 P.2d 479 (Cal. Sup. Ct. 1990).

² It should be noted that, in England and Wales, there are no freestanding or independent causes of action in tort known as 'breach of fiduciary duty' and 'lack of informed consent'; interests protected by the latter are vindicated through an action in negligence; for instance, see *Chester v Ashfar* [2005] 1 AC 134 46 (HL). Differences between American law and the law of England and Wales in the categorisation of the tort action based on lack of informed consent were explored elsewhere in more detail by the author: RN Nwabueze, *Cadavers, Body Parts and the Remedial Problem*' in I Goold, et al. *Persons, Parts and Property: How Should We Regulate Human Tissue in the twenty first Century?* (Oxford: Hart Publishing, 2014), at 160–164. Thus, any reference in this piece to a tort action based on lack of informed consent should be understood as an action in negligence. Many thanks to one of the journal's anonymous reviewers for bringing my attention to the need for this clarification.

³ *Ibid.*, at 497.

⁴ *Ibid.*, at 498.

⁵ No trial materialised as the case was settled out of court.

⁶ *Moore* (n1), Broussard J at 504, and Mosk J at 521.

informed consent in the latter case of *Greenberg v Miami Children's Hospital Research Institute*.⁷ In *Greenberg*, the claim for lack of informed consent failed partly because there was no doctor-patient relationship between the claimant-tissue donors and defendant-genetic researchers.

I suggest that the view of the minority in *Moore* was right; therefore, this essay interrogates the sufficiency of non-proprietary remedies in litigations involving body parts. Particularly, I hope to challenge the claim that non-proprietary frameworks should provide the exclusive remedies in actions involving body parts. Recently, there have been fascinating attempts to anchor such claims on the liability rule component of the seminal analytic framework developed by Calabresi and Melamed (the *Cathedral*).⁸ Essentially, this linkage suggests that the liability rule is a non-proprietary framework.⁹ While this sort of perspective is extremely interesting, innovative and refreshing, I attempt a different excogitation of the Cathedral in order to present a view that promotes the consideration of both proprietary and non-proprietary frameworks in disputes involving the separated parts of a human body. Thus, I suggest that the *Cathedral* establishes a framework for the protection of an entitlement in the nature of a proprietary interest through varying degrees of remedies which are distinguished from one another on the basis of whether a transfer of the entitlement requires prior consent of the entitlement holder (the property rule), or does not require such consent subject to the compensation of the entitlement holder with an amount of damages determined by a public agency (the liability rule), or whether such a transfer is prohibited, absolutely or partially (the inalienability rule). Hence, I argue that property, liability and inalienability rules basically serve the same purpose (protection of an entitlement in the nature of a property interest), and that the difference amongst them is one of degree rather than nature. Equally, I take the view that no component of the triad applies separately and independently of one another. In essence, I suggest that the liability rule embraces, rather than rejects, the notion of property; and that the Cathedral facilitates, rather than impairs, the deployment of proprietary frameworks over claims involving body parts.

Thus, I start with a brief review of important non-proprietary approaches to body parts suggested by some reputable scholars, and their call for the use of legislation to regulate body parts. Next, I examine the interesting and innovative attempts to anchor non-proprietary approaches to body parts on the theoretical framework of the Cathedral. Following this, I try to outline and expound the Cathedral in order to show that an interpretation that permits a proprietary approach is possible. In the last section, I try to test the Cathedral framework as conceived in this essay on a real claim involving a damaged kidney. I conclude that while non-proprietary approaches to body parts remain important, the Cathedral's flexible analytic

⁷ *Greenberg v Miami Children's Hospital Research Institute*, 263 S Supp 2d 1064 (US DC Florida 2003).

⁸ G Calabresi and AD Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' (1972) 85 Harvard L. Rev. 1089–1128. [*The Cathedral*].

⁹ LI Palmer, 'Should Liability Play a Role in Social Control of Biobanks?' (2005) 33 J.L Med & Ethics 70.

framework facilitates the incorporation of proprietary remedies into the remedial armamentarium available to the courts in litigations involving body parts.

Non-Proprietary Approaches to Body Parts: General Outlook and Proposal for Legislative Underpinning

The suggestion that any legal redress for unauthorised interference with a separated part of the body should be based on non-proprietary frameworks has its doctrinal underpinning in the historic no-property rule applied to cadavers.¹⁰ Though not reliant on the anachronistic no-property rule for dead bodies, some reputable commentators have offered refreshing and persuasive arguments in support of non-proprietary approaches to body parts; they have even suggested that such approaches should be covered by legislation. Gold, for instance, argued that the concept of property is judicially deployed in favour of those whose valuation of a resource is economic and, as such, a proprietary framework is not apt for the analysis of conflicts over body parts because it tends to recognise the economic interests of biotech companies and tissue innovators at the expense of tissues sources whose valuations of tissues are rather moral, cultural or religious.¹¹ Therefore, Gold suggested a parliamentary approach, the development of a comprehensive, non-property-based, statutory scheme to regulate the exploitation of separated body parts in ways that recognise all modes of bodily valuations.¹² Similarly, Herring argued that a proprietary approach to body parts focuses on individualistic values, the protection of an owner's rights of exclusion and control over a thing, in a way that neglects not only the owner's personal interests, such as interests in dignity, identity and personhood, but also undermines significant social, communal and relational interests which exist in a human body.¹³ According to Herring, the wide-ranging interests in human bodies and excised body parts are better weighed, balanced and calibrated under a statute.¹⁴

Gold and Herring's innovative non-proprietary approach to body parts based on statutory regulation resonates with Michelman's Legal Process Approach to legal scholarship, under which efficiency and cost-savings in adjudication and administration of justice are thought to be best achieved by leaving certain issues to the exclusive jurisdiction and determination of an expert administrative body or tribunal.¹⁵ In a seminal piece, Michelman demonstrated the utility of that approach in solving legal problems¹⁶; he suggested that administrative agencies, rather than

¹⁰ Examined and criticised by P Matthews, 'Whose Body? People as Property' (1983) 36 CLP 193.

¹¹ ER Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington D.C: Georgetown University Press, 1996).

¹² *Ibid.*, at 177.

¹³ J Herring, 'Why We Need a Statute Regime to Regulate Bodily Material' in Goold (n2) at 215–222.

¹⁴ *Ibid.*, at 223–228.

¹⁵ FI Michelman, 'Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law' (1967) 80 Harvard L. Rev. 1165 at 1245–1257 [Just Compensation].

¹⁶ *Ibid.*

the courts, would better implement certain criteria of fairness which should ground the idea of compensability in eminent domain cases.¹⁷ Essentially, therefore, the legal process method is an approach based on comparative institutional analysis.¹⁸ Thus, Gold and Herring's non-proprietary approach to body parts grounded in statutory regulation has the advantage of institutional efficiency, in addition to avoiding the deficiencies which they identified in a property-based approach. Instead of legislation, however, some other commentators have sought to ground their non-proprietary approaches to body parts in the theoretical framework of the Cathedral. Below, I examine some of these interesting efforts.

Non-Proprietary Approaches to Body Parts: Theoretical Grounding in the Liability Rule Component of the Cathedral

First, I consider Palmer's fascinating attempt to link his non-proprietary approach to body parts' litigation to the liability rule framework of the Cathedral.¹⁹ Writing within the context of biobanks, Palmer's interesting article analysed the relevance of the liability rule of the Cathedral to litigations involving body parts.²⁰ He argued that the liability rule, as a non-proprietary framework, was preferable to property rules in dealing with the myriad legal and ethical issues that arise from biobanks; for Palmer, this is because the application of rules of property and contract to body parts produce outcomes that are prospectively determined, and could lead to award of an injunction that trenches on a winner-takes-all attitude. Put differently, proprietary and contractual rules are not sufficiently flexible and context-dependent, in contrast to the liability rule which is flexible enough to engage the question of social control over the use of body parts. The liability rule approach, therefore, considers the question of conflict of interests between tissue-sources and tissue-innovators-users, and usually attempts to balance the contending interests and competing values before making a decision. Consequently, Palmer praised the rejection of the conversion claim in *Moore* and the use of insufficient consent as the appropriate theory of liability. He equally praised the non-proprietary (the liability rule) approach in *Greenberg* which,²¹ according to him, enabled the *Greenberg* court to consider the social contexts of the case and the parties; such as the fact that the claimant-research participants, although victims of Canavan disease, had initiated the research collaboration themselves and were very organised, educated and belonged to the same ethnic group. Palmer thought that these sorts of considerations underpinned the failure of the claim for lack of informed consent in *Greenberg*, and

¹⁷ *Ibid.* Although not the focus of this article, note that the modern American approach to eminent domain has significantly moved away from Michelman's formula.

¹⁸ G Calabresi, 'An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts' (2003) 55 *Stan. L. Rev.* 2113 at 2123 [Four Approaches].

¹⁹ Palmer, n9.

²⁰ *Ibid.*

²¹ *Greenberg*, n7.

he contrasted it with *Grimes v Kennedy Krieger Institute Inc.*,²² where a claim for lack of informed consent succeeded presumably because the children-research-participant claimants in the lead abatement study were from poor families, lived in poor neighbourhoods and, therefore, critically needed access to the court. Thus, Palmer called for more ‘attention to the role of liability rules in arriving at the appropriate institutional balance between research goals and promises versus individual and group desires to have some degree of social control over the research enterprise’.²³ He concluded that the liability rule approach ‘will highlight rather than obscure the ethical issues and provide appropriate focus on the context’.²⁴ Put simply, Palmer opined that, unlike the liability rule, a property rule approach is inflexible, gives little room for judicial discretion and fails to weigh and balance competing interests and values.²⁵

Palmer’s absolute rendition of the proprietary approach often finds support in cases such as *Foskett v McKeown*,²⁶ where a rogue trustee had purchased and paid for some of the premiums of a whole-life policy with money stolen from a trust fund. A dispute arose, as to entitlement to the proceeds of the policy, between the trustee’s children, who were the beneficiaries under a trust of the policy, and beneficiaries of the trust. Pointedly, Lord Browne-Wilkinson observed that the ‘crucial factor in this case is to appreciate that the purchasers [beneficiaries of the trust] are claiming a proprietary interest in the policy moneys and that such proprietary interest is not dependent on any discretion vested in the court’.²⁷ He observed that it was rather ‘a case of hard-nosed property rights’²⁸ that left ‘no room for any consideration whether, in the circumstances of this particular case, it is in a moral sense “equitable” for the purchasers to be so entitled’.²⁹ However, Rotherham observed that this sort of classical and absolutist declaration of property obscures the redistribution and creation of new property rights actually effected by courts through well-established doctrines such as tracing, subrogation, conversion, and enrichment by wrongs; although ‘in each, a departure from the conventional paradigm of property, suggesting a shift from the province of the judiciary into that of the legislature, is obscured. Rhetoric is employed to provide the illusion that these doctrines involve the observance of existing entitlements, rather than a redistribution of parties’ rights and obligations’.³⁰ While this suggests that a property right might not be as inflexible as Palmer claimed, the point is that Palmer identified the liability rule component of the Cathedral as establishing a non-proprietary framework whose flexibility is useful in resolving disputes over body

²² *Grimes v Kennedy Krieger Institute Inc.*, 782 A. 2d 807 (Md. 2001).

²³ Palmer, n9, at 72.

²⁴ *Ibid.*, at 76.

²⁵ The liability rule raises same difficulties: E Sherwin, ‘Introduction: Property Rules as Remedies’ (1997) 106 Yale L.J. 2083.

²⁶ *Foskett v McKeown* [2001] 1 AC 102 (HL).

²⁷ *Ibid.*, at 108.

²⁸ *Ibid.*, at 109.

²⁹ *Ibid.* at 127 (Lord Millett).

³⁰ C Rotherham, *Proprietary Remedies In Context* (Oxford: Hart Publishing, 2002) at 46.

parts. Essentially, Palmer suggested that this sort of flexibility eludes the property rule component of the Cathedral, hence his preference for the liability rule.

Second is Harrison's equally interesting application of the Cathedral's liability rule to disputes over body parts.³¹ Essentially, Harrison's objective was to promote a non-proprietary approach to the intractable problem of control over body parts. Hoping for an intermediate framework between the extremes of non-compensable gifting and market in body parts, Harrison developed a hybrid system under which body parts obtained with the informed consent of the tissue source would be freely available to scientists, researchers and biotech entrepreneurs, more or less on the basis of a gift; however if, and only if, a tissue-based product is profitably commercialised, the tissue source would then be entitled to compensation determined by a statutorily established administrative agency or tribunal.³² According to Harrison, this framework 'would constitute a "liability rule"',³³ so that if '*people chose* to contribute their tissue, researchers could use it without up-front cost, but commercial users would be required to compensate the sample source after the fact if the commercial utility of the tissue met statutory eligibility criteria. A statutorily established compensation tribunal would interpret and apply these criteria'.³⁴ Harrison provided interesting and detailed analysis of the proposed tribunal and dynamics of compensability which need not detain us here. Notice, however, that her 'liability rule' framework is subject to prior consensual acquisition of body parts³⁵; it is a system erected on the informed consent of tissue sources.³⁶ This is a refreshing extension of the Cathedral because, under the liability rule of the Cathedral, a transfer of entitlement is non-consensual. The point, nevertheless, is that Harrison promoted the liability rule framework as a non-proprietary remedy that is suitable for dealing with disputes over body parts.

Third is Wall's fascinating and refreshing rendition of the Cathedral's liability rule in relation to body parts.³⁷ Simply put, Wall considered the liability rule of the Cathedral as a non-proprietary framework, and that it is the best framework for dealing with issues over body parts. Thus, Wall suggested that the liability rule is any cocktail of remedies prescribed by an *existing* and relevant statute: 'liability rules use an internal remedial metric for determining the cost of acquiring...interests (such as a statutorily determined penalty). One, or a combination, of many different remedial aims, may guide this internal remedial metric'.³⁸ Wall's idea that the

³¹ CH Harrison, 'Neither *Moore* nor the Market: Alternative Models for Compensating Contributors of Human Tissue' (2002) 28 Am. J. L. and Med. 77.

³² Similar to the Legal Process Approach—Michelman, n15.

³³ Harrison, n31, at 88.

³⁴ *Ibid.*, at 96–97.

³⁵ Highlighted in D M Gitter, 'Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in their Biological Material' (2004) 61 Wsh. & Lee. L. Rev. 257 at 342.

³⁶ Harrison, n31, at 95–96. Normatively, liability rule based on consent is arguably indistinguishable from property rule which trenches on consent. JL Coleman & J Kraus, 'Rethinking the Theory of Legal Rights' (1986) 95 Yale L. J. 1335 at 1359.

³⁷ J Wall, 'The Legal Status of Body Parts: A Framework' (2011) 31 OJLS 783.

³⁸ *Ibid.*, at 800.

liability rule resonates with statutorily determined remedies underpinned his distinction between *Evans*³⁹ and *Yearworth*.⁴⁰ In *Evans*, a heterosexual couple consented to the use of their gametes to form embryos, but their relationship fell apart before the embryos could be implanted into the lady. Relying on the Human Fertilisation and Embryology Act 1990 (as amended), the Court of Appeal held that the lady's partner was entitled to withhold his consent to the implantation of the embryos. Because the Court of Appeal focused on HFEA for its remedial guidance, Wall concluded that 'the ownership entitlements of the Respondent (Mr Johnston) were protected by liability rules under the HFEA 1990'.⁴¹ Contrasting with *Yearworth*, where a property right was affirmed over similar rights of management and use in relation to negligently destroyed sperm samples, Wall observed that the difference is

that in *Evans* the interference with an individual's entitlements triggers statutory liability under the HFEA 1990 so that the ownership entitlements of Ms Evans, Mr Johnson (sic) and Amicus Care were protected by liability rules...Whereas, in *Yearworth*, remedies were sought through property rules...most likely because the HFEA 1990 did not have liability provisions concerning the type of misuse of the semen.⁴²

As I understand it, Wall is saying that a property rule was applied in *Yearworth* because the liability structure of HFEA, though sufficient for *Evans*, was not comprehensive enough to cover the facts of *Yearworth*; in the circumstances, the court was justified to travel outside the regulatory system of HFEA to a find a proprietary rule in *Yearworth*.⁴³ Thus, the liability rule in Wall's analysis not only recognises non-proprietary entitlements; but also, it is inextricably linked to statutorily prescribed remedies and its application is, therefore, dependent on the comprehensiveness of a particular regulatory regime. Accordingly, Wall eulogised the Human Tissue Act 2004 as a quintessential liability rule framework, suggesting that such a statutory framework was preferable to property-based approaches to body parts.

Fourth, sometimes some commentators' support for non-proprietary approaches to body parts manifests in a claim that only monetary damages, rather than proprietary remedies, should be available in litigation involving body parts; they consider this the liability rule approach.⁴⁴ In other words, the liability rule sounds in compensatory monetary awards rather than proprietary remedies, such as the grant of an injunction, an order for repossession or return of property to the owner. On this

³⁹ *Evans v Amicus Healthcare Ltd.* [2004] EWCA (Civ) 727.

⁴⁰ *Yearworth v North Bristol NHS Trust* [2010] QB 1 (CA).

⁴¹ Wall, n37, at 798.

⁴² *Ibid.*, 798–799.

⁴³ As a general point, the contrast between *Evans* and *Yearworth* might be justified on the basis that an embryo's potential for life implies that its *propertisation* is likely to raise more serious objections compared to the *propertisation* of sperm samples which generally lack such potential for life. Many thanks to one of the journal's anonymous reviewers for this insight.

⁴⁴ S E Sterk, 'Property Rules, Liability Rules, and Uncertainty about Property Rights' (2008) 106 Mich. L. Rev. 1285 at 1287.

view, some aspects of tort would be a quintessential liability rule.⁴⁵ But if this were true, a case like *Yearworth* should have been regarded as grounded in the liability rule since the claimants received damages in bailment and negligence for the destruction of their stored sperm samples; yet, as Wall rightly suggested, *Yearworth* is grounded in the property rule. Moreover, although conversion is a tort its remedy can be proprietary; an order for the return of claimant's good, for instance.⁴⁶ More importantly, a very high amount of damages intended to deter non-consensual taking basically amounts to property rule protection.⁴⁷ For this reason, Smith observed that not much difference exists between the property and liability rules except that they occupy different points on a spectrum of damages.⁴⁸

While the perspectives above on the liability rule are all very interesting and engaging, I suggest (below) that a different analysis of the liability rule, one that supports a proprietary approach to body parts, is possible. In the next section, therefore, I begin by reviewing the Cathedral's theoretical framework which gave birth to the neologism of 'the liability rule'; then I highlight my conception of the Cathedral's specific rules, their consequences and potential impact on disputes involving body parts.

The Cathedral

Allocation of Entitlement

Calabresi and Melamed suggested that a conflictual interaction, such as a dispute between two or more parties in a case, would require a two-stage process of state intervention or decision-making; that is, the allocation of an entitlement and the enforcement of that choice by the application of a relevant rule of protection.⁴⁹ At the first stage of state intervention the court must decide whom, as between the parties in a case, an *entitlement* must be allocated to, that is, the party who should be vested with the right in issue. While the choice of allocation might be driven by a given set of factors or goals relevant to a legal system, Calabresi and Melamed suggested efficiency, distributional goals and other justice factors. Detailed analysis of these factors need not detain us here.

⁴⁵ But not when injunction is used as a remedy in tort.

⁴⁶ Section 3 Torts (Interference with Goods) Act 1977; WVH Rogers, *Winfield & Jolowicz on Torts*, 17th ed. (London; Sweet & Maxwell, 2006) at 780–781; RA Epstein, 'A Clear View of the Cathedral: The Dominance of Property Rules' (1997) 106 Yale L.J. 2091 at 2099 [Clear View].

⁴⁷ L Kaplow & S Shavell, 'Property Rules Versus Liability Rules: An Economic Analysis' (1996) 109 Harvard L. Rev. 713 at 724; I Ayres & E Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade' (1995) 104 Yale L.J. 1027 at 1048.

⁴⁸ HE Smith, 'Property and Property Rules' (2004) 79 N.Y.U. L. Rev. 1719 at 1742 (PPR).

⁴⁹ Cathedral, n8, at 1090–1091.

Rules of Protection

Without protection for the entitlement potentially allocated as above, that critical first stage choice or allocative decision would be rendered nugatory by the losing party through the use of force. Accordingly, a second stage intervention is required, which should focus on the protection and enforcement of the allocative decision made at the first stage.⁵⁰ Thus, an entitlement might be protected and enforced via *property rule, liability rule or inalienability rules*.⁵¹ An entitlement is protected by the property rule where only a voluntary transfer thereof is allowed, and at a price agreed to by both the buyer and seller; for this reason the property rule is said to be based on market considerations, entailing market decentralisation. The liability rule, on the other hand, applies where an entitlement could be destroyed or transferred from its owner without the owner's permission or authority, subject to the payment of compensation whose value is determined collectively by an organ of the state, rather than the parties themselves. Calabresi and Melamed suggested that when transaction costs are high, with the potential to block a socially beneficial exchange, the state might wish to overcome that impediment by protecting the relevant entitlement with the liability rule, instead of the property rule; that sort of situation is best illustrated with eminent domain, the state's compulsory acquisition of private property for public purposes.⁵² The transaction costs rationale for preferring the liability rule to the property rule is so entrenched in the legal literature that Krier and Schwab called it a 'virtual dogma'.⁵³ Conversely, the property rule is usually regarded as a protection rule of choice when transaction costs are negligible.⁵⁴ So far, notice that deployment of the liability rule is simply based on the exigencies of high transaction costs, rather than its non-proprietary quality; that fact arguably warrants the destruction or involuntary transfer of another's entitlement, subject to the payment of collectively determined compensation. On my understanding, therefore, the critical point of the liability rule is not its alleged non-proprietary nature. In this connection, consider Calabresi & Melamed's third rule of protection—the inalienability rules⁵⁵; although inalienability rules, just like the liability rule, appear to underscore a non-proprietary right, inalienability rules are actually proprietary in nature. Not much attention has been paid to inalienability rules after the Cathedral.⁵⁶ Such rules relate to partial or complete restrictions on the transfer of entitlements.⁵⁷

⁵⁰ Ibid., at 1090–1091.

⁵¹ Ibid., at 1092–1093.

⁵² Ibid., at 1106.

⁵³ JE Krier & J Schwab, 'Property Rules and Liability Rules: The Cathedral in Another Light' (1995) 70 N.Y.U.L. Rev. 440 at 452.

⁵⁴ RA Posner, *Economic Analysis of Law*, 9th ed. (New York: Wolters Kluwer, 2014) at 57, 70. Liability rule might be preferable even in low transaction costs situations: Ayres & Talley (n45) at 1048.

⁵⁵ Cathedral, at 1092–1093.

⁵⁶ M J Radin, 'Market Inalienability' (1987) 100 Harvard L.J. 1849; Susan Rose-Ackerman, 'Inalienability and the Theory of Property Rights' (1985) 85 Colum. L. Rev. 931.

⁵⁷ RA Epstein, 'Why Restrain Alienation?' (1985) 85 Colum. L. Rev. 970 (Alienation).

Rose-Ackerman has noted three dimensions of inalienability rules, consisting of restrictions on *ownership*, *use* or *transfer*⁵⁸; and thus inalienability rules are extensive and pervasive,⁵⁹ something that Radin equally emphasised in her similar piece where she identified, as species of inalienability rules, rights that are non-transferable, nonsalable, non-relinquishable and incapable of being lost.⁶⁰ In the Cathedral, however, Calabresi and Melamed focused largely on transfer restrictions.⁶¹ Inalienability rules may promote efficiency through the elimination or reduction of negative externalities. A good example is a transfer that amounts to an affront on the sensitivities of a third party; selling oneself into slavery is a quintessential example. This sort of externality sounds in moralism.⁶² Typically, moralisms are non-monetizable⁶³; when we prohibit a transfer that potentially generates moralisms, we are actually promoting efficiency by accounting for the externality.⁶⁴ Similarly, paternalism plays a significant role in the deployment of inalienability rules; an example would be the prohibition of a range of activities involving minors⁶⁵; or the prohibition of a sale by an incompetent owner, such as a sale concluded while the owner was intoxicated. Apart from the considerations above, Rose-Ackerman has observed that inalienability rules could be justified on ‘certain specialized distributive goals’, as well as public policy which ensures that market processes do not impede the ‘responsible functioning of a democratic state’.⁶⁶ Radin, however, rationalised market-inalienability on the basis of personhood and the promotion of human flourishing.⁶⁷

As indicated above, the effect of inalienability rules is to undermine a claim that no entitlement should be recognised as proprietary in nature unless it is protected under the property rule. Consider, for example, restrictions on historical (*listed*) buildings. Rose-Ackerman observed that restrictions on historical buildings usually relate to *use*, as a result of which certain actions might be *required* of the owner, such as making specified repairs to the building, or the owner might need to obtain permission for any planned alteration to the building.⁶⁸ The restriction might also relate to the transfer of such buildings. Thus, restrictions operate to protect an owner’s rights to such buildings under rules of inalienability rather than the property rule. Has the building, therefore, ceased to be property? Unquestionably, the answer is no. Restrictions are not incompatible with ownership claims over historical buildings.⁶⁹ Rose-Ackerman has observed that such restrictions might even serve

⁵⁸ Rose-Ackerman, n56, at 933–937.

⁵⁹ *Ibid.*, at 931.

⁶⁰ Radin, n56, at 1852–1855.

⁶¹ Cathedral, n8, at 1092.

⁶² *Ibid.*, at 1112.

⁶³ M Morris, ‘The Structure of Entitlements’ (1993) 78 Cornell L. Rev. 822 at 882.

⁶⁴ *Ibid.*, at 882.

⁶⁵ Cathedral, n8, at 1113.

⁶⁶ Rose-Ackerman, n56, at 933.

⁶⁷ Radin, n56, at 1903–1909.

⁶⁸ Rose-Ackerman, n56, at 954.

⁶⁹ Exemplified by *Penn Central Transportation Co. v New York City*, 483 US 104 (1978).

‘as a condition for retaining ownership’.⁷⁰ In the same vein, Penner suggests that the listing of a building might be seen as a *diminution* of property rights; he proffered two options. First, the property in the listed building might be considered to have been ‘replaced with a kind of duty of stewardship’. Second, the listing could be ‘interpreted as the law’s replacing (of) one object of property with another, like the proposal to replace fees simple with ninety-nine year lease’.⁷¹ Penner suggests that this latter interpretation is sensible, with the effect that rights protected in the building should properly be regarded as proprietary. Thus, property rights might be derived from non-property rule protections, such as the liability and inalienability rules.

Also, consider the matter from a Hohfeldian perspective.⁷² According to Hohfeld, a property right entails a *jural relation* with another person, and thus entitles the holder to a *claim-right*, *liberty-privilege*, *power* or *immunity* against that other person. Respectively, these jural elements correlate to *duties*, *no-right*, *liability* and *disability*. Against these correlatives are jural opposites (respectively, *no-right*, *duty*, *disability* and *liability*) which typically define a non-holder of property right. A *claim-right* enables the holder to control the conduct of others, because those others are under a duty to abstain from interference with the actions or enjoyment of the holder. *Liberty-privilege* entitles the holder to freedom of action; that is, others have no right to compel or restrain the holder from doing something. *Power* gives the holder an ability to alter the holder’s legal relation; for instance, by transferring or alienating his or her property to another person. The transfer equally alters the transferee’s legal relation from being a non-owner to owner. Lastly, *immunity* protects the holder against having his or her legal relation altered; an example is the legal protection against the confiscation or appropriation of an owner’s property. What the *listing* of a building or restriction on transfer does is to extinguish the element of *power*, so that while the owner becomes incapable of alienating it, he or she nevertheless retains the remainder of Hohfeldian incidents.⁷³ Significantly, these remaining incidents include the *control* functions of claim-right and liberty. Interestingly, Nozick observed that the right of control forms the ‘central core of the notion of a property right’⁷⁴; and that it is ‘the right to determine what shall be done with X; the right to choose which of the constrained set of options concerning X shall be realised or attempted’.⁷⁵ Thus, the protection of entitlements through inalienability rules can produce a proprietary status just as protection through a property rule. Most discussions of the Cathedral delineate a property-liability rule binary compartmentalisation because they fail to incorporate inalienability rules into the equation for entitlement protection. Yet Calabresi and Melamed disavowed that sort of inflexibility, observing that ‘most entitlements to

⁷⁰ Rose-Ackerman, n56, at 953.

⁷¹ JE Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 101.

⁷² WH Hohfeld, *Fundamental Conceptions as Applied in Judicial Reasoning* (W Cook, ed., New Haven: Yale University Press, 1919).

⁷³ Exemplified by *Andrus v Allard*, 444 US 51 (1979).

⁷⁴ R Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974) at 171.

⁷⁵ *Ibid.*

most goods are mixed. Taney's house may be protected by a property rule in situations where Marshall wishes to purchase it, by a liability rule where the government decides to take it by eminent domain, and by a rule of inalienability in situations where Taney is drunk or incompetent'.⁷⁶ This interface is further demonstrated by Rose's suggestion that property and liability rules are bilaterally symmetric,⁷⁷ although that claim is vigorously challenged by Smith.⁷⁸

Bilateral Symmetry: Four Rules

Before Calabresi and Melamed developed the categories of property and liability rules in 1972, described by Rose as 'the article's most famous legacy',⁷⁹ the astute Michelman⁸⁰ had already identified the first three of the four rules below, which represent the permutations of Calabresi and Melamed's property and liability rules.⁸¹ The four rules can be applied to any given legal problem.⁸² Although the rules have rarely been used to analyse body parts, they are potentially applicable to a *Moore*-type situation where, without informed consent, a physician develops a profitable therapeutic product from a patient's separated body parts. In that context, a court considering the imposition of liability can choose from any of the four rules below.

Rule 1

Under this rule, the patient's entitlement to his or her excised body parts cannot be transferred without the patient's consent. An injunction is available to prohibit attempts to transfer the patient's entitlement to their body parts non-consensually. Thus Rule 1 is a typical property rule. Where, as in *Moore*, the physician's surreptitious use of a body part made its return or the grant of injunction impossible, then damages should be assessed on a market basis to reflect the value obtainable by the patient in a voluntary transaction (this assumes the existence of a market in body parts). Thus, the property rule is consistent with the principle of informed consent. Although Rule 1 option was theoretically available to the court in *Moore*, the majority of the Supreme Court of California refused to seize that opportunity on the ground of high transaction costs, including the costs of obtaining the consent of tissue sources, the problem of holdout and the existence of negative externality—impeding the progress of biotechnology industry. However, a Rule 1 sort of

⁷⁶ Cathedral, n8, at 1093.

⁷⁷ CM Rose, 'The Shadow of the Cathedral' (1997) 106 Yale L.J. 2171 at 2177–2178 [Shadow].

⁷⁸ H Smith, 'Exclusion and Property Rules in the Law of Nuisance' (2004) 90 Virginia L. Rev. 966, at 1011–1016 (EPR).

⁷⁹ Rose, Shadow, n77, at 2175.

⁸⁰ Calabresi and Melamed's own description of Michelman: Cathedral, n8, at 1116.

⁸¹ FI Michelman, 'Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs' (1971) 80 Yale L.J. 647 at 670–672 (Pollution).

⁸² Most writers focus on pollution.

approach was adopted in *McFall v Shimp*. There, the claimant needed a bone marrow transplant to survive. The claimant's cousin, who was the only good match for the transplant, refused to donate his bone marrow; the court held that since the cousin's consent was absolutely necessary his donation could not be compelled.⁸³ By prohibiting non-consensual transfer of the cousin's bone marrow in *McFall*, the court essentially protected his entitlement under a property rule (Rule 1).⁸⁴

Rule 2

Under Rule 2, the patient's entitlement to their separated body parts is given a different type of protection. Unlike in Rule 1, Rule 2 enables the physician to obtain non-consensual transfer of the patient's body parts subject to the payment of compensation assessed by the court. Thus, Rule 2 applies the liability rule, the approach adopted by the majority in *Moore* which sanctioned the non-consensual transfer of Moore's body parts to his physicians subject to the payment of damages to Moore in an action based on lack of informed consent. Notice that the remedy of damages under Rule 2 has often been suggested to mean that the liability rule is essentially non-proprietary, but this overlooks the underlying proprietary entitlement protected by the award of damages; also, if the damages are high enough, they might sound in property rule. Contrary to the perception that Rule 2 (the liability rule) is non-proprietary, Epstein suggests that Rule 2 protects an underlying property right since it permits any individual willing to pay damages to compulsorily acquire another's private property, although that might undermine the stability of possession and property.⁸⁵ Thus, he observes that 'the rule (Rule 2) that the outsider can force the reassignment of the entitlements removes the stability normally afforded possession. It is difficult to conceive of a system that is attended by greater inconvenience'.⁸⁶ To obviate this, Epstein suggests that Rule 2 should be severely limited to cases of bilateral monopoly and necessity.⁸⁷ Equally, Rose recognises the underlying proprietary nature of Rule 2 which, she says, involves a rhetorical puzzle, professing the *protection* of an entitlement but actually undermining that protection: 'liability rule simply divides the entitlement differently and... yields a different and diminished entitlement for the owner.'⁸⁸

Rule 3

Under Rule 3, the patient's body parts can be used freely by the physician without the payment of compensation; nor is the patient entitled to the grant of an injunction against the physician. Thus, Rule 3 is a property rule in favour of the physician-defendant, unlike Rule 1 which states a property rule for a source-claimant. Rule 3

⁸³ *McFall v Shimp*, 10 Pa. D. & C. 3d 90 (1978).

⁸⁴ G Calabresi, 'Do We Own Our Bodies?' (1991) 1 Health Matrix 5.

⁸⁵ Epstein, Clear View, n46, at 2097.

⁸⁶ *Ibid.*, at 2099.

⁸⁷ *Vincent v Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910); *Ploof v Putnam*, 71 A. 188 (Vt. 1908).

⁸⁸ Rose, Shadow, n77, at 2178.

might be implied by the total rejection of a patient's case. Such would have been the case had the claimant in *Moore* failed in all his claims. Interestingly, Rule 3 could be used to operationalise a confiscatory organ procurement framework developed by Fabre.⁸⁹ She argues that provided the principle of sufficiency is satisfied, a sick person is entitled in justice to obtain from a healthy person the organ they desperately need to survive. This could be justified on rationales similar to coercive taxation. Under Fabre's framework, the sick is even more entitled to the useable organs of the dead. Rule 3 potentially enables the translation of Fabre's thesis to practice through some judicial ruling entitling the sick to a forced transfer of a healthy person's organ, for instance, by an order of injunction mandating surgical removal of the organ.⁹⁰ In a case like *McFall* above, it means that the court should have held the claimant entitled to an injunction to 'harvest' his cousin-defendant's bone marrow.

Rule 4

Under Rule 4, the patient could stop the physician from using the patient's excised body parts, but the patient must pay some (judicially determined) compensation to the physician.⁹¹ Unlike the property rule in Rule 3, Rule 4 protects the physician's entitlement to the patient's body parts via liability rule. Thus, the patient can destroy or obtain a non-consensual transfer of his or her own body parts only on the payment of compensation to the physician. Obviously, Rule 4 sounds strange and counterintuitive because it requires an owner to pay compensation to a non-owner for the owner's use of his or her property⁹²; for this reason, Epstein observed that Rule 4 'utterly subverts the nature of property rights',⁹³ because 'it seems very hard to think that someone can be said to own land if he is required to buy a second time the quiet possession associated with ownership'.⁹⁴ Accordingly, Rule 4 is essentially a *reverse damages rule* in which 'nominal plaintiffs end up liable to nominal defendants'.⁹⁵ However, Rose has suggested that the way out of Rule 4's difficulties is to see it as an example of eminent domain in which the interest of the claimant is represented by the state.⁹⁶

Finally, it should be noted that, in addition to the four rules above, Levmore has developed a series of intermediate rules which evince a mix of the remedies derived from the main four-rule structure above.⁹⁷ As Levmore's intermediate rules do not

⁸⁹ C Fabre, *Whose Body is it Anyway? Justice and the Integrity of the Person* (Oxford: Oxford University Press, 2006).

⁹⁰ This is just a thought experiment; not likely to be translated into practice.

⁹¹ Cathedral, n8, at 1116.

⁹² Rule 4 was applied in *Spur Industries v Del E. Webb Development Co.*, 494 P.2d 700 (Ariz. 1972).

⁹³ Epstein, Clear View, n46, at 2104.

⁹⁴ *Ibid.*, at 2117.

⁹⁵ Krier & Schwab, n53, at 470.

⁹⁶ Rose, Shadow, n77, at 2180.

⁹⁷ S Levmore, 'Unifying Remedies: Property Rules, Liability Rules, and Startling Rules' (1997) 106 Yale L.J. 106 at 2153–2157.

significantly alter the analysis above, they need not detain us. Unlike Levmore, Krier and Schwab have added a more substantial *Rule 5* to the structure above.⁹⁸ *Rule 5* allows a nominal defendant (a polluter, for instance) to abandon an impugnable activity *ex ante* and then demand compensation from the nominal claimant. The amount of compensation is assessed at the level of damages which the nominal claimant would have claimed had he or she brought an action against the nominal defendant. Thus, *Rule 5* is a double reverse twist of *Rule 4*. Levmore has warned against the moral hazards inherent in *Rule 5*, under which ‘A will engage in an activity in order to induce a complaint and then profit from stopping and collecting’.⁹⁹ I do not pursue *Rule 5* further.

Consequences of the Rules

It is apparent that the main four-rule framework above delineates a property-liability rule alternating matrix in favour of a claimant, on the one hand, and a defendant, on the other hand. Thus, while *Rules 1* and *2* protect a claimant, *Rules 3* and *4* protect a defendant, in a way that is bilaterally symmetric.¹⁰⁰ The bilaterally symmetric nature of the rules also attests to Coasean insights on the reciprocity of any given problem.¹⁰¹ For instance, a problem, such as pollution, is not only *caused* by the defendant; it is also caused by the claimant (such as the claimant coming to the nuisance); this explains why each party is endowed with an entitlement protected in an alternating fashion with the property and liability rules. Let me highlight three important points that flow from the analysis above.

First, in determining which of the rules above should apply to any given problem, the Cathedral suggests that liability should be imposed on the party or person who can most cheaply avoid the costs of harm¹⁰²; the rationale is that this person has the incentive to engage in harm reduction or costs containment measures. For instance, he or she would adopt such measures if the cost of harm prevention is less than damages that could be awarded against them by the court. Otherwise, it might be more efficient for him or her to continue with the harmful activity and then pay damages.¹⁰³ Second, and more importantly, the rules above are not individuated; nor considered and applied separately and independently of the others. Rather, they are all equally applicable options open to a judge adjudicating a given dispute.¹⁰⁴ Levmore emphasised this point, observing that ‘this four-rule framework revealed the ability of courts to choose among endowments, whether in the form of property

⁹⁸ Krier & Schwab, n53, at 470–477.

⁹⁹ Levmore, n97, at 2167–2168.

¹⁰⁰ Rose, Shadow, n77, at 2178; contrast, Smith, *EPR*, n78.

¹⁰¹ RH Coase, ‘The Problem of Social Cost’ (1960) 3 *J.L. & Econ.* 1 at 2.

¹⁰² Cathedral, n8, at 1119. RA Posner, ‘Killing or Wounding to Protect a Property Interest’ (1971) 14 *J.L. & Econ.* 201 at 216 (Killing).

¹⁰³ L Kaplow & S Shavell, ‘Do Liability Rules Facilitate Bargaining? A Reply to Ayres and Talley’ (1996) 105 *Yale L.J.* 221 at 222.

¹⁰⁴ Accident law dramatizes this, often utilising a ‘specific deterrence (liability rule) approach...with a substantial degree of market control of accidents’: G Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale University Press, 1970) at 113 (Book).

rights (as in Rules 1 and 3) or liability rules (as in Rules 2 and 4), in order to balance considerations of fairness and efficiency'.¹⁰⁵ Similarly, Coleman and Kraus remarked that in 'encouraging the efficient distribution of resources, a court actually has four options'.¹⁰⁶ Although Michelman's insightful analysis considered only a three-rule structure, he equally opined that 'in any given situation of this sort (pollution), three liability decisions are possible, and we should try to grasp the tertiary costs for each of them'.¹⁰⁷ Calabresi also frowned at the dichotomous delineation of property and liability rules, observing that analysis of the rules is more 'helpful when it takes place in a context when it asks in a given situation why one rule is better than another'.¹⁰⁸

Third, and following from the above, the difference between property and liability rules is one of degree and not of kind; both potentially protect the same *proprietary interest* or *entitlement*, albeit using different remedial metrics for that protection. Thus Kaplow and Shavell observed that a state 'has...two fundamental ways of protecting *property rights*. On one hand, it may adopt *property rules*...On the other hand, the state may employ *liability rules*'¹⁰⁹; tellingly, the authors further observed that property and liability rules 'lie on a continuum'.¹¹⁰ The issue of the difference, if any, between property and liability rules invites two critical questions. First, are the Cathedral rules largely remedial in nature (not substantive)? If the answer is yes, then they should be amenable to flexible application as suggested above. Second, is an *entitlement* a property right? If an entitlement could be considered a property right in certain circumstances, as I argue below, then it would suggest that the liability rule equally protects a proprietary interest.

Nature of the Cathedral Rules: Remedial or Substantive Rights?

Some substantive rights are superstructural in nature, in the sense that they define and explain wrongs that violate those rights.¹¹¹ Thus, rights antedate *remedies*, which are the courts' legal response to the violation of a right (that is, the wrong) or injustice.¹¹² Barker's analysis, delineating a distinction between primary and secondary rights, is both apposite and instructive.¹¹³ According to Barker, *primary rights* are initial legal entitlements and, as such, they precede a wrong or injustice,

¹⁰⁵ Levmore, n97, at 2152.

¹⁰⁶ Coleman & Kraus, n36, at 1337.

¹⁰⁷ Michelman, Pollution, n81, at 670.

¹⁰⁸ G Calabresi, 'Remarks: The Simple Virtues of the Cathedral' (1997) 106 Yale L.J. 2201 at 2205 (Remarks).

¹⁰⁹ Kaplow & Shavell, n47, at 715.

¹¹⁰ *Ibid.*, at 757.

¹¹¹ P Birks 'Rights, Wrongs, and Remedies' (2000) 20 OJLS 1at 5.

¹¹² D Friedmann, 'The Protection of Entitlement via the Law of Restitution—Expectancies and Privacy' (2005). 121 LQR 400 at 402.

¹¹³ K Barker, 'Rescuing Remedialism in Unjust Enrichment Law: Why Remedies are Right' (1998) CLJ 301.

as well as the remedy thereof.¹¹⁴ *Secondary rights*, on the other hand, are *remedies*; the law's legal response to the violation of primary rights.¹¹⁵ Although there are many senses in which a *remedy* might be understood, including the five categories identified by Birks,¹¹⁶ the four-rule structure above qualifies as a remedy in the sense of a redress provided by a court. Hence Sherwin locates the Cathedral's four rules in the context of a court order, observing that 'judicial practice strongly favors case-by-case decisionmaking under loosely defined standards'.¹¹⁷ Most of other authors also accept the remedial nature of the four rules above.¹¹⁸ Jaffey also throws some light on the issue, although he focuses on the redress of unjust enrichment, alleging that the grant of a remedy for unjust enrichment wrongly implies that a substantive right exists which correlates to that remedy; in other words, a remedy for unjust enrichment assumes an underlying categorical principle.¹¹⁹ Thus, and more pertinent for this article, Jaffey warned against an approach in which 'a remedy is taken to define a justificatory category',¹²⁰ and he described this approach as a "remedy-as-justification" fallacy'.¹²¹

Furthermore, the remedial character of the four-rule structure above underpinned all the papers presented at a symposium to mark the 25th anniversary of the Cathedral; some of these papers have already been analysed.¹²² It is not coincidental that the symposium papers were presented at the *Remedies Section* of the annual meeting of the Association of American Law Schools. In her paper, Sherwin underscores the 'remedial character of property rules and liability rules', observing that the 'literature on property rules and liability rules proposes various criteria for choosing among remedies'.¹²³ As such, she criticises the four-rule structure for operating in an all-or-nothing manner,¹²⁴ in the sense that it lacks the flexibility and discretion, the indistinct normative standards, which actually characterise judicial choice of remedies.¹²⁵ I don't need to agree with Sherwin on the inflexibility of the four-rule structure in order to accept her thesis that the rules are mainly remedial in nature. More confusingly, Calabresi's paper at the symposium observes: 'of course, the so-called remedy defines the *nature* of the right', suggesting that the rules may

¹¹⁴ *Ibid.*, at 319.

¹¹⁵ Remedies might be construed as rights: Birks, n111, at 19–25.

¹¹⁶ *Ibid.*

¹¹⁷ Sherwin, n25, at 2085.

¹¹⁸ Coleman & Kraus, n36, at 1346–1347.

¹¹⁹ P Jaffey, *Private Law and Property Claims* (Oxford: Hart Publishing, 2007) at 69–71.

¹²⁰ *Ibid.*, at 17.

¹²¹ *Ibid.*

¹²² Association of American Law Schools (Section on Remedies), 'Symposium: Property Rules, Liability Rules, and Inalienability: A Twenty-Five Year Retrospective' (1997) 106 Yale L.J. 2081.

¹²³ Sherwin, n25, at 2084.

¹²⁴ R M Dworkin, 'Is Law a System of Rules?' in R M Dworkin, ed. *The Philosophy of Law* (Oxford: Oxford University Press, 1977) at 47.

¹²⁵ Sherwin, n25, at 2086–2088. S Evans, 'Defending Discretionary Remedialism' (2001) 23 Sydney L. Rev. 463.

have a substantive dimension.¹²⁶ It should be stressed that Calabresi was simply trying to cite and capture Rose’s insight although something appeared to have been lost in translation, because what Rose actually said was that ‘the choice of rules affects the *content* of entitlements’.¹²⁷ *Nature* and *content* of a right are quite different things. Rose did not suggest that the four-rule structure determines the substantive character of an entitlement; however, she observed that the rules could affect the *content* of an entitlement. For example, the liability rule practically divides an entitlement between a claimant and a defendant. In that context, according to Rose, the claimant would now have only one part of the entitlement, which she described as a “property right subject to an option or easement”, and the defendant gets the remainder of the entitlement, which is the easement or option.¹²⁸ So, while the liability rule has effected a division of the claimant’s original substantive right, it has not changed its proprietary quality. Lastly, I should mention Smith’s salient observation that the four-rule structure establishes a ‘framework for understanding the variety of remedies for protecting entitlements’.¹²⁹ Therefore, since the rules are remedial in nature they apply flexibly and interdependently to protect an underlying entitlement.

Notion of Entitlement

As hypothesised above, if *entitlement* means a *property right* in some (but by no means all) circumstances, then in those circumstances it might not be said that its protection under the liability rule would cause the entitlement to lose its proprietary quality.

Although the locution of *entitlement* formed the conceptual bedrock of Calabresi and Melamed’s analytical framework, the authors however failed to define that term. Nevertheless, the overall context of their analysis implies that they understood the term in a proprietary sense. This became clearer thirty-one years later when, in a separate piece, Calabresi examined the law and economics’ approach to allocation of entitlements in transplantable organs.¹³⁰ He argued that the problems of bilateral monopoly and transaction costs would complicate efforts to allocate organs, and thus he observed that the appropriate question to ask was whether it: ‘is...more efficient to start with *entitlements* in those who have more than they need, or in those who need what they don’t have?’.¹³¹ Explaining this further in a footnote which suggests that *entitlement* is synonymous with *ownership*, Calabresi observed: ‘Almost as important as deciding who will have the entitlement is the question of how that entitlement will be enforced. If I have “ownership” of one of your kidneys (because, say, I need it more than you), I might be entitled to an injunction to have it

¹²⁶ Calabresi, Remarks, n108, at 2205.

¹²⁷ Rose, Shadow, n77, at 2179.

¹²⁸ Ibid.

¹²⁹ Smith, PPR, n48, at 1720.

¹³⁰ Calabresi, Four Approaches, n18, at 2138.

¹³¹ Ibid., at 2137–2138.

surgically removed from you (a property rule) or I might merely have the right to receive damages if you refuse to consent to a transplant (a liability rule)'.¹³² Although this completely answers the question above in the positive, let me inquire farther.

Nozick's *Entitlement Theory*, deployed in rebuttal of redistributive justice-based arguments for a state more extensive than a minimal state, comes in handy.¹³³ He noted that from 'the point of view of an entitlement theory, redistribution is a serious matter indeed, involving, as it does, the violation of people's rights'.¹³⁴ Apparently, Nozick used *entitlement* in the sense of 'people's holding',¹³⁵ and thus identified two sources of this *holding*, which suggests that he deployed *entitlement* as a surrogate for *property*. The first source relates to *the original acquisition of holdings*; this concerns the appropriation of previously un-owned things, and the *justness* of such appropriation is determined by reference to the 'principle of justice in acquisition'.¹³⁶ The second source relates to the *transfer of holdings* via voluntary exchange and gift; the *justness* of the transfer is determined by reference to the 'principle of justice in transfer'.¹³⁷ Nozick identified a critical version of the Lockean labour theory and deployed it to illustrate the principle of justice in acquisition.¹³⁸ This means that, at least in the Nozickean libertarian philosophy, an entitlement is a property right in holdings (valuable resources) whose acquisition or receipt is consistent with the principles of justice in acquisition or justice in transfer.

Furthermore, lawyers have increasingly used *entitlement* as a referent for property right.¹³⁹ Singer's salient book title is a paradigmatic example.¹⁴⁰ Singer argues that the classical notion of ownership as an absolute control over an identifiable property by a single owner often obscures the tensions and conflicts that are inherent in the concept and institution of property; he notes that the resolution of these conflicts involve value-laden judgements that tend to destabilize the classical paradigm of ownership, because such judgements highlight the mutuality of property obligations and the social relationships that are structured by property law. Thus, Singer observes that although entitlement is a legally protected right or interest its meaning embeds a useful ambiguity; so that it can support strong claims to a right, on the one hand, but also is able to make that right easily defeasible, on the other hand. Thus, Singer suggests that the locution of entitlement describes

¹³² *Ibid.*, at footnote 106.

¹³³ Nozick, n72, at 150–174.

¹³⁴ *Ibid.*, at 168.

¹³⁵ *Ibid.*, at 150.

¹³⁶ *Ibid.*

¹³⁷ *Ibid.*, at 150–151.

¹³⁸ *Ibid.*, at 174–182.

¹³⁹ Merrill & Smith observed: 'as C&M (Calabresi and Melamed) make explicit "entitlement" means the collectively imposed assignment of use rights as between rival claimants': TW Merrill & HE Smith, 'What Happened to Property in Law and Economics?' (2002) 111 Yale L. J. 357 at 380; K Gray and SF Gray, *Elements of Land Law*, 5th ed. (Oxford: Oxford University Press, 2009) at 107–108. Bernard Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem' in J Eekelaar & J Bell (eds.) *Oxford Essays in Jurisprudence, Third Series* (Oxford: Clarendon Press, 1987) at 239.

¹⁴⁰ JW Singer, *Entitlement: The Paradoxes of Property* (New Haven: Yale University Press, 2000).

property rights better, because it captures the contingency of property rights, the limitation of such rights by obligations inherent in ownership and the balance usually made between an owner's rights and the rights of others.¹⁴¹ He suggests that entitlement 'is a conceptual structure designed to replace both the ownership model and the bundle-of-rights model in order to better describe the meaning of property and the choices posed by private property regime'¹⁴²; and that the practical resolution of ownership conflicts often 'reveal[s] facts about property as an entitlement'.¹⁴³ Furthermore, Merrill and Smith observed that 'most modern economic accounts endow property with no distinctive character at all. *Property rights are simply "entitlements"*'.¹⁴⁴ Of course, as I indicated above, this does not mean that an entitlement means a property right in all circumstances.¹⁴⁵ I only aim to suggest that in some philosophical and legal literature, entitlement has been understood to indicate a property right. More particularly, I suggest that entitlement as used in the Cathedral refers to a property right, which could be protected under the liability rule.

Body Parts, Proprietary and Non-proprietary Remedies: Applying the Cathedral

The analysis above suggests that rather than exclude proprietary approaches to disputes over body parts, the Cathedral establishes a flexible framework that facilitates the consideration of proprietary and non-proprietary remedies in a given case. In a body part's case, therefore, a court committed to the Cathedral's framework would not *ex ante* exclude proprietary approaches as the governing theory of liability; instead, the court would consider all potentially applicable remedies in the round and, particularly, would compare the options of the liability rule, property rule and rules of inalienability in order to determine which would meet the justice of the case. The current system, in contrast, tends to exclude proprietary frameworks *ex ante*; in a body part's litigation, this could potentially inflict injustice on a claimant/tissue source or potential organ recipient. Take the Danish Kidney case: *Veedfald v Amtskommune*, for instance.¹⁴⁶

In *Veedfald*, the claimant had been prepared for a transplant procedure with a kidney donated by his brother (living donation). As part of the routine for such a procedure, the kidney was flushed with a perfusion fluid manufactured by the defendant-hospital solely for that purpose. Unfortunately, the perfusion fluid blocked the excised kidney's artery and made it unusable for transplantation. Unsurprisingly, the claimant brought a product liability action for damages, which was referred to the European Court of Justice (ECJ) by the Danish Supreme Court.

¹⁴¹ *Ibid.*, at 91–94.

¹⁴² *Ibid.*, at 92.

¹⁴³ *Ibid.*, at 32.

¹⁴⁴ Merrill & Smith, n139, at 385.

¹⁴⁵ Friedmann, n112; M A Heller, 'The Boundaries of Private Property' (1999) 108 Yale L. J. 1163.

¹⁴⁶ *Veedfald v Amtskommune*, Case C-203/99 (Judgement of the Fifth Chamber, 10 May 2001).

Interestingly, Ruiz-Jarabo Colomer, the Advocate General, considered the question of whether the perfusion fluid qualified as *product* under the Directive¹⁴⁷; having regard to the third recital which requires products to be industrially produced, the Advocate General observed that the perfusion fluid ‘is a single preparation which is specially made up each time it is required for use in a transplant operation. In those circumstances, I must conclude that this was not an industrially produced product’.¹⁴⁸ The Advocate General regarded the case as one concerning a failure of service rather than product because the manufacture and use of the perfusion fluid were merely incidental to the predominant aim of providing medical services to the claimant. Thus, the Advocate General concluded that the ‘directive is not applicable to a case such as the one before the Højesteret (Danish Supreme Court)’.¹⁴⁹ Having held that the defective perfusion fluid was not a product under the Directive, the Advocate General nevertheless proceeded to consider a range of questions on the assumption that the perfusion fluid qualified as a product under the Directive; one of such questions concerned the legal nature of the damage caused to the excised kidney by the defective perfusion fluid. Was it a personal injury or damage to property, and who was the victim of the damage?

This required engagement with Article 9 of the Directive, which defines *damage* as ‘damage caused by death or personal injuries’ and ‘damage to, or destruction of, any item of property’. In this connection, the respondent argued that the damage to the excised kidney in question could neither be construed as a personal injury to the appellant-intended recipient of the kidney,¹⁵⁰ nor damage to the claimant’s property ‘since property cannot be exercised in relation to human organs, which are not items of property’.¹⁵¹ Rejecting this argument, the Advocate General held that the damage to the kidney caused by the perfusion fluid amounted to a personal injury under Article 9 of the Directive. Notice that this somewhat counterintuitive conclusion by the Advocate General was reached only through a process of elimination, in a sort of ‘either/or’ situation of choice; thus, once the Advocate General *assumed* that the perfusion fluid qualified as a product under the Directive, he was by the terms of Article 9 required to decide that the damage to the kidney qualified *either* as a damage to property *or* amounted to a personal injury. In the event, having eliminated the choice of ‘damage to property’, because of the Directive’s extremely narrow definition of property in Article 9,¹⁵² the Advocate General was left with no further option than to hold that the damage to the kidney qualified as a personal

¹⁴⁷ *Ibid.*, (Opinion of Advocate General Ruiz-Jarabo Colomer, 14 December 2000). Council directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products; OJ 1985 L210/29. Transposed into English and Welsh law by the Consumer Protection Act 1987.

¹⁴⁸ *Veedfald*, n146, para13.

¹⁴⁹ *Ibid.*, para. 12.

¹⁵⁰ The living donor did not take part in the litigation.

¹⁵¹ *Veedfald*, n146, at para. 32.

¹⁵² To qualify as property under Article 9, the item must be ‘of a type ordinarily intended for private use or consumption’, and ‘was used by the injured person mainly for his own private use or consumption’; apparently, the excised organ did not qualify as such.

injury.¹⁵³ Accordingly, the Advocate General observed that ‘the conclusion must be that, in a case such as the one before the Court, the damage can only be damage caused by personal injuries’.¹⁵⁴ But this conclusion invites an interesting question as to the identity of the victim of the alleged personal injury—was it the appellant-recipient or the living donor? The Advocate General declined to engage with that question, preferring to leave it for the decision of the Danish Supreme Court.¹⁵⁵ Contrast with *Yearworth* where the damaged sperm samples were ejaculated by the claimants for their own future use; Lord Judge CJ held *obiter* that in situations ‘in which the products [body parts] are intended for use by other persons, for example donated products...claims might be brought by the donors or even perhaps by any donees permissibly specified by the donors’.¹⁵⁶ On the whole, the Advocate General concluded that the perfusion fluid did not qualify as *product* under the Directive, nor the damaged kidney as property. The Fifth Chamber skirted these issues on the jurisdictional ground that the ECJ is not permitted to concern itself with the application of law to the specific facts of a case referred to it.¹⁵⁷ Thus, the Fifth Chamber did not comment on the opinions of the Advocate General above.

The remedial difficulty faced by a claimant in the Danish Kidney type of cases is not limited to actions based on product liability. A negligence action would not have done better because there was no want of care in the production of the perfusion fluid or in the perfusion of the kidney itself; the defect was simply undiscoverable, thus the damage was not negligent. *Roe* provides a good analogy here¹⁵⁸; there, anaesthetic in glass ampoules were contaminated due to their immersion in a sterilising solution of phenol. The contamination occurred through invisible cracks in the ampoules. The claimants suffered paralysis when the contaminated anaesthetic was administered on them in a minor surgical procedure. At the time of the accident (1947), the risk was unknown, and was described for the first time in a medical text published in 1951. Denning LJ held that there could be no liability in negligence for such undiscoverable defects, and observed that ‘he (anaesthetist) did not know that there could be undetectable crack, but it was not negligent for him not to know it at that time. We must not look at the 1947 accident with 1954 spectacles’.¹⁵⁹ Similarly, in *Perlmutter v Beth David Hospital*,¹⁶⁰ the claimant was infected by hepatitis as a result of the contaminated blood transfused into him in the 1950s. At that time, there was no diagnostic test for detecting the presence of hepatitis in the blood. However, the action was brought under the sale of goods

¹⁵³ In contrast, Lord Judge CJ observed in *Yearworth*, n40, at 11: ‘We agree with the judge that damage to, and consequential loss of, the sperm did not constitute “personal injury”... it would be a fiction to hold that damage to a substance generated by a person’s body, inflicted after its removal for storage purposes, constituted a bodily or “personal” injury to him’.

¹⁵⁴ *Veedfald*, n146, para. 33.

¹⁵⁵ *Ibid.*, para. 34.

¹⁵⁶ *Yearworth*, n40, at 19–20.

¹⁵⁷ *Veedfald*, n146, para. 31.

¹⁵⁸ *Roe v Minister of Health* [1954] 2 QB 66.

¹⁵⁹ *Ibid.*, at 84.

¹⁶⁰ *Perlmutter v Beth David Hospital*, 300 N.Y. 100 (C.A.N.Y 1954).

legislation in New York, probably because a negligence claim would have failed in the circumstances. Thus, much of the case concerned the question of whether the provision of blood amounted to a sale or service.¹⁶¹ Fuld J, however, observed *obiter* that ‘informed opinion is at hand that there is today neither a means of detecting the presence of the jaundice-producing agent in the donor’s blood nor a practical method of treating the blood to be used for transfusion so that the danger may be eliminated’.¹⁶² Fuld J implied that the non-discoverability status of the hepatitis would have guaranteed the failure of a negligence action in that case.

Nor would a battery action succeed in these sorts of cases, as suggested by *Yearworth*. Battery protects our interests in bodily autonomy and physical well-being¹⁶³; hence it does not apply to separated parts of the body which are no longer functional parts of the whole body.¹⁶⁴ Of course, there was no question of battery in the Danish Kidney case because both the excision and perfusion of the kidney were done with consent. But a battery claim might potentially arise in other contexts where, for instance, a bodily part initially obtained with consent was put to an unauthorised use; such as where blood consensually obtained to test for rubella was surreptitiously used to test for HIV.¹⁶⁵ Even here, an action in battery might fail since the blood was obtained with consent and the complaint only relates to the test.¹⁶⁶ Similar remedial difficulties attach to other potential non-proprietary causes of action.¹⁶⁷ For instance, a claim in contract would not arise since medical treatment under the NHS is free and non-contractual.¹⁶⁸ A claim in unjust enrichment is out of the question in the Danish Kidney type of cases because the defendants were not monetarily enriched by the damaged kidney.¹⁶⁹ Reflecting on this sort of problem,¹⁷⁰ Mason and Laurie wondered ‘where an effective remedy is to be found in consent-based law. A property model would certainly provide one,

¹⁶¹ Held that it was a *service*, but a *sale* in *Carter v Inter-Faith Hospital of Queens*, 304 N.Y.S. 2d 97 (1969).

¹⁶² *Perlmutter*, n158, at 106.

¹⁶³ MM Shultz, ‘From Informed Consent to Patient Choice: A New Protected Interest’ (1985) 95 Yale LJ 219.

¹⁶⁴ *Hecht v Kaplan*, 221 AD2d 100 (Sup Ct New York 1996).

¹⁶⁵ As in *Doe v High-Tech Institute, Inc*, 972 P 2d 1060 (1998).

¹⁶⁶ There could be criminal prosecution under s.45 of the Human Tissue Act 2004; and a claim under the Data Protection Act.

¹⁶⁷ Although this article focuses on the flexibility of property rights in relation to the Cathedral, it was rightly pointed out to me by one of the journal’s anonymous reviewers that the deficiencies of the battery action above, as well as those of other non-proprietary causes of action, could be ameliorated through the creative development of ‘personal rights’. Arguably, a ‘personal rights’ approach to such difficulties would avoid the objections of commodification and objectification of the body usually encountered in relation to proprietary approaches to body parts. As this interesting issue requires significant space and development, it is best left for a future article.

¹⁶⁸ *Appleby v Sleep* [1968] 1 WLR 948; *Pfizer Corporation v Ministry of Health* [1965] AC 512.

¹⁶⁹ P Birks, *Unjust Enrichment*, 2nd ed. (Oxford: Oxford University Press, 2005) at 3; S Stoljar, ‘Unjust Enrichment and Unjust Sacrifice’ (1987) *Modern Law Review* 603 at 606.

¹⁷⁰ M Quigley, ‘Propertisation and Commercialisation: On Controlling the Uses of Human Biomaterials’ (2014) 77 *MLR* 677; RN Nwabueze, ‘Donated Organs, Property Rights and the Remedial Quagmire’ (2008) 16 *Medical L. Rev.* 201.

for such dealings would be tantamount to conversion...and would, therefore, offer a cause of action'¹⁷¹; the authors suggested that 'in light of these significant attitudinal shifts, we consider that it is time to revisit the property exemplar, not as an alternative to the consent model, but as a partner for it'.¹⁷² In the same vein, I suggest that the remedial difficulties above might be ameliorated with the Cathedral's flexible framework.

A judge committed to the Cathedral's framework would consider that although the defendant-hospital in the Danish Kidney case was not negligent, yet it was presumably known in the transplant community that such an accident might occur. Analogy can be drawn to *A v National Blood Authority* where the claimants received transfusion of hepatitis C infected blood,¹⁷³ at a time when there was no test for detecting the virus, although the risk of hepatitis C infection through blood transfusion was known to the medical community. The claimants brought a product liability claim for damages under the Consumer Protection Act 1987. Having assumed without argument that blood qualified as product under the Act,¹⁷⁴ Burton J held that the infected blood in that case was defective, and that a development risk defence did not apply.¹⁷⁵ He observed that the defence failed because the risk of hepatitis C infection in transfused blood was known to the medical community, although there was no means of detecting its occurrence in a particular blood sample. Similarly, since the risk of damage to an organ undergoing perfusion is known to the transplant community, a judge applying the Cathedral would hold that the defendant-hospital was in a better position to prevent the accident. Thus, the judge would impose liability on the defendant-hospital. As highlighted in the subsection above examining the *Consequences of the Rules*, the Cathedral imposes liability on the party or person who can most cheaply avoid the costs of harm or accident.¹⁷⁶ In an earlier work, Calabresi also suggested that liability should be imposed on the *best cost avoider*, that is, the person who could prevent or minimise the risk of an accident.¹⁷⁷ I suggest that the best cost avoider in the Danish Kidney case is the defendant-hospital. The defendant-hospital's liability could be based on conversion because it damaged or destroyed the kidney. Of course, it would not matter that the damage to the kidney was unintentional because conversion captures an act of the defendant that brought about damage or destruction of the claimant's good or property to the prejudice of the claimant.¹⁷⁸ Imposing liability on the defendant-hospital suggests allocation of entitlement in the damaged kidney to the

¹⁷¹ K Mason and G Laurie, 'Consent or Property? Dealing with the Body and its Parts in the Shadow of Bristol and Alder Hey' (2001) 64 Mod. L Rev. 710 at 728.

¹⁷² *Ibid.*, at 724.

¹⁷³ *A v National Blood Authority* [2001] 3 All ER 289.

¹⁷⁴ *Ibid.*, at 298, 307.

¹⁷⁵ The defence is covered by s. 4(e) of the Act, to the effect that the 'state of scientific and technical knowledge at the relevant time was not such that a producer...might be expected to have discovered the defect...'

C Newdick, 'The Development Risk Defence of the Consumer Protection Act 1987' (1988) CLJ 455.

¹⁷⁶ Cathedral, n8, at 1119; Posner, Killing, n102, at 216.

¹⁷⁷ Calabresi, Book, n104, at 175.

¹⁷⁸ *Fouldes v Willoughby* [1841] 151 E.R. 1153 (Ex. Ct).

claimant-recipient.¹⁷⁹ Thus, the remaining question is how to protect that entitlement? On the facts and circumstances of the Danish Kidney case, a court can only award damages regardless of the remedial rule it applies (whether property or the liability rule). For instance, if a property rule (Rule 1) was the chosen option, no proprietary remedies such as injunction and specific performance would be awarded because the kidney had been irreparably damaged, was unusable and could not be returned to the claimant in any meaningful sense. Thus, a property rule protection can only result in damages in the circumstances. The same outcome would materialise if, on the other hand, the liability rule (Rule 2) was the chosen option—the claimant would get damages. As noted above, however, damages might be assessed differently under the two rules. In terms of preference, the obvious rule of decision would be the liability rule (Rule 2), partly because of the potential difficulty in obtaining a market evaluation of the kidney under the property rule (Rule 1). In this way, therefore, a claimant in the Danish Kidney sorts of cases might obtain a remedy that would prove elusive under non-proprietary frameworks.

Conclusion

As the liability rule does not necessarily imply that the underlying interest is non-proprietary, it does not justify an exclusive non-proprietary approach to body parts. Non-proprietary approaches to body parts remain important and legitimate and should be deployed in appropriate cases.¹⁸⁰ However, the suggestion here is that non-proprietary frameworks should be considered along with proprietary frameworks. The Cathedral facilitates this flexible, eclectic and cooperative approach. By exploring the interface between the Cathedral's rules and body parts, I hope to have put back on the front burner the question of whether proprietary remedies should be applied to body parts, even on a limited basis and alongside non-proprietary remedies.¹⁸¹ I suggest that the search for regulatory solutions should embrace an approach that is holistic, an approach which does not exclude proprietary frameworks *ex ante*; the Cathedral is one of such approaches. Interestingly, in his reminiscence of the Cathedral, Calabresi suggested that the framework should be applied to the realm of body parts.¹⁸² In part, this essay has tried to wrestle with that sort of analysis by expounding the analytic framework of the Cathedral and its rules for entitlement protection. I have applied the Cathedral to the Danish Kidney case to show the difference it could make to the remedial fortunes of a claimant involved in litigation over body parts.

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¹⁷⁹ Note the debate above on the relative rights of donor and recipient.

¹⁸⁰ L Skene, 'Raising Issues With a Property Law Approach' in Goold, n2, at 263.

¹⁸¹ For interesting debate on the issue: Goold, n2.

¹⁸² Calabresi, Remarks, n108, at 2206.

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