The body in time
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ABSTRACT
This paper considers what light historical controversies cast on the way we view the human body and its relationship to medicine and science. I suggest that the past has lessons for the regulation of modern innovation and technology. Science has moved on; attachment to the dead bodies of those we love persists and debates in medieval times about burial intact and dissection remain relevant. I examine why and how the bodies of the long dead still command our attention. Moving to the living body, re-visiting the ancient crime of maim, I explore how the human body was perceived as belonging as much to the community as to the individual who inhabited that body. Finally, I consider touch on how gender affected the legal as well as the physical body examining how contested theories of reproduction influenced English law and may pose warnings about we should approach reproductive technologies today.

KEYWORDS medico-legal history; law and the human body; gender and the body; law and dead bodies

1. Introduction
For common lawyers, the obvious starting point for consideration of the legal status of the body as such lies in the mantra that dead bodies cannot be owned.1 While the source of that legal precedent is dubious,2 the maxim has taken root.3 It has also been extended to the living body and its parts.4 It is but a short step from a ‘no property’ rule to a ‘no value’ conclusion. Any assumption that our ancestors did not value the dead is rebutted by


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the historical evidence of the sheer human effort that went into honouring the
dead. As Matthews put it, ‘[the bodies of the dead should not be regarded] … as other inanimate objects but were to be treated quite differently, even rever-
ently’.\textsuperscript{5} Such a notion of reverence for human remains was deeply rooted in
popular Christian tradition in Europe for centuries and still resonates
today. The outcry generated by revelations of organ retention at the turn of
the millennium, as well as debates about the means of increasing the supply
of organs for transplant, echo theological and popular discourse from the
past.\textsuperscript{6} Bodies are valued by most people but the nature of, and reasons for,
that value differ markedly.

Many of the most controversial questions relating to the law and ethics
impacting on new health technologies revolve around debates about the use
and value of the human body. Who (if anyone) owns the body, living or
dead? What may be done to or with the body? How do we value this flesh
that we inhabit? Can we ‘mix’ our bodies with other human or even non-
human animal bodies? The endless questions are usually robed in modern
or futuristic garb. The puzzles posed for legislators, judges and bioethicists
are perceived as arising from the wonders of late twentieth- and twenty-
first-century science. Yet the human body has been a source of what might
today be regarded as bioethical controversy for well over a thousand years.

Historical perceptions of the living body equally have their historical pre-
cedents and inherent contradictions. Medieval scholars had no doubt that we
did not own our bodies, nor did we have sovereignty over them. The law pro-
hibited self-harm (at least by men), yet sanctioned dreadful forms of mutila-
tion. Females, and especially reproductive female bodies, were the subjects of
anxious concern. In each of the contexts in which we might observe the body
in history, we unearth themes that persist today including sharp division
between those pronouncing orthodox doctrine and popular sentiment;\textsuperscript{7}
contradictions in attitudes to science; class differences; and what may look like a
love-hate relationship with the flesh.

In this paper, I travel back in time to consider what light historical contro-
versies can cast on the way we view the dead bodies of those we love. I
examine why and how the bodies of the long dead still command our atten-
tion. For example, how and why have the bones of a long dead English King,
Richard III, come to be the focus of costly litigation and public fascination
over 500 years after his death?\textsuperscript{8} Moving to the living body, I then go on to
explore how the human body was, in some senses, perceived as belonging

\textsuperscript{6}See Ruth Richardson, ‘Afterword’ in Death, Dissection and the Destitute (University of Chicago Press, 2nd
\textsuperscript{7}Richardson (n 6) 7–29.
\textsuperscript{8}The Queen (on the application of the Plantagenet Alliance) v Secretary of State for Justice [2014] EWHC 1662
(Admin).
as much to the community as to the individual who inhabited that body. Finally, I touch on how gender affected the legal, as well as the physical, body.

In England, medico-legal history is little explored. Medical law is often seen as ‘comparatively young’. One reason for this dearth of literature is that at first sight the issues that concerned our ancestors look very different to the dilemmas about medicine which trouble us today. Five hundred years ago the notion of organ transplants, cosmetic surgery and assisted reproduction would have been beyond the most active imagination. Further reflection however reveals that the underlying problems of modern and medieval men and women were much the same as ours. What can be done to or with the body, living or dead, male or female? Can a coherent and reasoned approach govern all questions of what uses bodies are put to, or must account be taken of emotional attachments, cultural and religious beliefs and popular culture? All these questions troubled individuals, medical practitioners and the law centuries ago as much as today. In considering ‘medical law’ in medieval times, it must be noted that the Roman Catholic Church and its canon law played a major role in ‘lawmaking’.

A historical perspective can aid assessment of the legal and bioethical implications of modern technologies in a number of ways. By identifying core questions about the human body, we can avoid forever ‘re-inventing the wheel’. In addition, we can begin to understand and address how law, especially medical law, an area of law that affects lives so intimately, is framed by the culture(s) in which those laws are made and applied. Problems surface when within one community there are diverse cultures and in this context the conflicts between popular and scientific culture can be seen to be deeply rooted.

Why in this paper do I focus on the significance of dead bodies, limits on what we can do to our own living bodies and some aspects of the impact of gender? In part, the choice was somewhat random. My current research (when completed) will seek to offer a much more comprehensive analysis of the history of the body and medicine. The examples chosen for this paper are, I hope, especially pertinent to the question of the scope and uses of the human body and closely related to fundamental problems we struggle with today about regulation of innovation and the body. Drawing on my three examples, I argue that the difficulties that plague bioethics, law and the body today and lead to bitter dissension derive from a longstanding quest to understand the symbolic importance of bodies at every stage in the life course. Bishops in the Middle Ages would have spoken of the body as the temple

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of the soul. Today we are more likely to consider the body as the symbol of the person and wish to accord dignity to the body as a tribute to that person and representative of our common humanity. Such a modest claim might garner general support but then runs into the quicksands of what is meant by dignity and how this may be expressed in practice when we make laws about the body, and seek to meet the challenges of biotechnology.

2. Valuing the bodies of ‘our dead’ from time immemorial?

From pre-classical times to the present day, monuments to the dead offer a principal source for historical investigations seeking to understand how those dead spent their lives. The people to whom, and often by whom, such monuments were erected sought to extend their influence and power beyond death, taking rigorous precautions to protect the physical remains within the tomb. Such monuments were of course the perquisite of the rich. Yet the poor were equally concerned to protect their dead bodies, to escape the anatomists, and avoid the common paupers’ grave. A reverence for the dead prompted belief that the dead must remain intact in England and Christian Europe through the Middle Ages, into and after the Renaissance, and rested on concerns about the Resurrection of the body on the final Day of Judgment. If the physical corpse was not intact when laid in the grave how could the dead person rise again on the day of judgement? Assertions that it was the soul only that would be resurrected constituted heresy in the eyes of the Roman Catholic Church which dominated Western Europe before the Protestant Reformation.

The coming of the anatomical renaissance and the need of the anatomists for bodies to dissect, sharpened public sentiment about the need to respect the dead. It was a need interpreted in popular culture to mean that dissection was worse than death, for the latter only ended earthly life and the former robbed the individual of his immortality. The gentlemen of science derided vulgar ignorance and superstition. It ushered in a battle between science and popular culture which, as Richardson has shown, endured well into the twentieth century and persists today. Medieval debates about the conflict between the need for bodies to dissect to advance the development of biomedicine, and mistaken beliefs about religious proscriptions against interfering with dead bodies survived the Protestant Reformation.

11Richardson (n 6) 80–83.
12ibid 272–5.
13ibid 57–58.
15Notably a major part of the Cathar heresy brutally suppressed by Church and State in the thirteenth century: Bynum (n 14) 217.
17Richardson (n 6) 409–28.
bodies, are mirrored today in the beliefs of many Muslims and Orthodox Jews (and a number of Christians) that their religion bans organ donation.18

If one literally believes that in some later life this body I inhabit now will be restored to me, then it is not unreasonable to be concerned that it should not be chopped up or missing vital organs. But the Christian church did not as such promulgate that simplistic doctrine. In the fifth century, St Augustine (a Roman Catholic bishop whose writing and preaching influenced Christian doctrine and scholarship for centuries) ruled that, ‘The fate of the body was of no real consequence to its eventual resurrection’.19 In 1482, Pope Sixtus IV wrote that dissection of the corpse was not absolutely prohibited if the body came from an executed criminal and was ultimately afforded proper Christian burial.20 Moreover, the Roman Catholic Church’s veneration of parts of the deceased saints as ‘sacred relics’,21 and the permission given for dispersed burials, ran counter to any absolute dogma concerning the integrity of the corpse. The bodies of Kings and Queens were often divided, with their body parts being buried in different locations. Henry I died in Rouen in France but had wished to be buried in Reading Abbey in England. His entrails, brain and eyes were buried at Rouen to prevent putrefaction and the remainder of his corpse was then taken to Reading.22

Yet, there is no doubt that Christian (and Muslim)23 sensibilities were offended by dissection. Between the seventeenth and the nineteenth centuries,24 Richardson shows that laypeople living in the Renaissance regarded dissection as contrary to their faith, as well as showing a lack of respect for the deceased (whatever the princes of the Church might say). There was, and indeed there continued to be, a huge gap between orthodox Christian teaching and popular culture.25 Measures to allow doctors to claim the bodies of executed criminals for dissection increased opposition to dissection. This added to the taint of criminality involved in the process and contributed to popular belief that dissection was the ultimate punishment, condemning the unhappy criminal to eternal death by depriving him of the hope of Resurrection.26

Orthodox Roman Catholic doctrine seems to have been much more nuanced, allowing what might be described as respectful uses of the body:

19Sawday (n 16) 218.
23Conrad et al (n 20) 131.
24Richardson (n 6) 76–77.
25Richardson (n 6) 17–20.
26Graphically illustrated by Hogarth in his cartoon Fourth Stage of Cruelty 1751: see Richardson (n 6) 33.
note the insistence of Pope Sixtus IV that after dissection the remains be reverently buried. In the context of affording reverence to relics, the Roman Catholic Church acknowledged certain contradictions in revering mortal remains and sought (if unsuccessfully) to prevent trafficking in relics and the growth of superstitious cults. Put rather bluntly, the Roman Catholic Church in the Renaissance did not proscribe the use of dead bodies in the cause of science or religious practice, but rather required their respectful treatment and attempted to ban ‘markets’. In England and Scotland, the suggestion by Pope Sixtus IV that the corpses of executed criminals might be the source of bodies for dissection was implemented first by way of ‘gifts’ of cadavers from the Monarch to surgeons and physicians. In addition, in 1752, the so-called ‘Murder Act’ provided for the further penalty of dissection to be imposed on those convicted of especially gruesome murders.

By the seventeenth century, the demand for bodies to dissect grew ever greater. There were not enough corpses of executed criminals to meet the demands of medicine and science. While a few altruistic individuals donated their bodies, donations did little to reduce the gap between supply and demand and in England and Scotland the mass of the people became ever more opposed to dissection. The scarcity of much-needed corpses made the corpse a valuable commodity, no matter what the common law said about ‘no property’ in the body. That scarcity opened up opportunities for the lucrative trade of the body snatchers, known as the Resurrectionists.

By the eighteenth century, three different values were now ascribed to the dead body: the corpse as depicted in popular culture; the corpse as an anatomical object; and the corpse as a commodity.

I would suggest that not much has changed if we include separated body parts (and not simply the whole cadaver) in this value classification. The dead body of a loved one remains an object of attachment and many families perceive the process of laying that body to rest as the final service they must render to the family member, now departed. However, many people wrongly interpret religious injunctions to treat the dead with respect as a prohibition on any interference with, or use of, the corpse. Bodies and their parts remain a crucial tool in anatomy and thus the education of doctors. In 2015, the desperate need for organs for transplant increases the ‘value’ of corpses as

27Conrad et al (n 20).
28Bynum (n 14) 205.
29Richardson (n 6) 32.
30Richardson (n 6) 32–35; Margaret Brazier and Suzanne Ost, Bioethics, Medicine and the Criminal Process (CUP, 2013) 20–25.
31Richardson (n 6) 52–72.
33See the sermon delivered by the Bishop of Liverpool at a service to commemorate children whose organs had been retained at Alder Hey Hospital; see McGuinness and Brazier (n 18) 304, n 39.
anatomical objects to biomedicine. Body parts are without doubt valuable commodities not only on the black market, but also in English law as legitimate property once transformed by work and skill.\(^{34}\) In addition, since the recent judgment of the English Court of Appeal in Yearworth,\(^{35}\) body parts and products may be for some purposes property in their own right, albeit not a commodity that the original source of the parts can trade in.\(^{36}\) The stage may then seem set for a conflict of values between the grieving family and cultural objections to interference with the dead; the doctors and scientists who are depicted as vultures hovering over the deathbed; and perceived greedy pharmaceutical companies (and others) who profit from the dead in a grisly modern version of the body snatchers.

The continuing importance of the bodies of the dead in popular culture was illustrated in 2001 by the outcry and anger that surfaced when revelations about widespread organ retention became public. The organ retention ‘scandals’ testified to the ease, speed and ferocity with which such conflict between the different values ascribed to the corpse can ignite. Families reacted with fury when they found out that organs, or even small portions of tissue of their family member, had been retained without consent. Some demanded that, where possible, organs and tissue be returned with second, third and even fourth funerals being held.\(^{37}\) Many doctors considered that the outrage and the government’s response were misguided and damaging to medicine,\(^{38}\) no doubt agreeing with bioethicist John Harris that any notion of dead bodies remaining intact was ‘an illusion’ and, as he puts it:

> Illusions are fine, but whether the state and the courts should give judicial or official support to these illusions is more doubtful, particularly when to do so might deprive others of the possibility of life-saving therapies.\(^{39}\)

The conflict was neither necessary nor inevitable and in part due to the failure to learn from history. As previously mentioned, Pope Sixtus IV in the fifteenth century countenanced dissection, but only with the caveat that there was a need for subsequent respectful burial. Can the corpse not be both an object of concern and culture and a key tool in medicine, and even in some cases a commodity, as long as the body of the person who has died is treated with respect and the attachment of those who cared for the person in life is recognised? The history of the use of corpses is not one of respect,

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\(^{34}\)R v Kelly [1998] 3 All ER 741, 749–50; Doodeward v Spence (1908) 6 CLR 406: and see s 33(9) (c) of the Human Tissue Act 2004; discussed in Hardcastle (n 3) 28–40.

\(^{35}\)Jonathan Yearworth and others v North Bristol NHS Trust [2009] 2 All ER 986 (CA).


\(^{39}\)Harris, ‘Law and Regulation’ (n 6) 547–8.
however, but rather one of conscription of the poor and disadvantaged. Pope Sixtus IV set us on the wrong path when he allowed ‘respectful’ dissection but proposed the use of the bodies of executed criminals. Kings across Europe took up his suggestion. Their subjects perceived the fate of the convicted men and women as anything but respectful. Buried in quicklime within the confines of a gaol or chopped up and chucked out with the rubbish in the anatomy school, the final disposal of the body equally lacked respect.

The enactment of the Anatomy Act 1832 (1832 Act) represented an attempt to break the link between dissection and crime, as well as to introduce a framework for the donation of the body in pursuit of the greater good. As Richardson shows, from the point of view of both popular perception and scientific practices, the 1832 Act replaced the bodies of criminals as the principal source of bodies for anatomical dissection with the bodies of the poor from the workhouse, whose families were too impoverished to claim them for burial. Anatomy was seen by much of the population as an instrument of repression whose merits were lauded by the powerful and whose costs were born by the poor. The passing of the 1832 Act provoked riots and the burning of anatomy schools.40 Reverence for the bodies of the dead, and the families who grieved for them, was notably absent from the language of most, though not all, the men of science. When the organ retention ‘scandal’ erupted at the turn of the millennium, a similar lack of respect was also patent.41 Many families objected not so much to what was done to the body of their family member (some had offered organs for transplant), but to what they saw as deceit and misinformation on the part of doctors obtaining consent or removing organs with no consent.42 While some families sought the return of retained organs for further burials, others agreed to authorise continued retention for the purposes of education and research. Among the angriest families were those who found out that nothing useful in relation to teaching or research had been done with their family member’s body parts; instead, they had just been stored in pots.43

3. Valuing the long dead

In the wake of the organ retention scandal, Parliament enacted the Human Tissue Act 200444 (2004 Act) requiring that for the removal, retention or use of any ‘relevant material’ from the dead, appropriate consent was needed either from the deceased in her lifetime or a qualifying relative

40 Richardson (n 6) 263.
42 Brazier (n 6).
43 ibid 552.
44 Scotland enacted its own Human Tissue (Scotland) Act 2006. The Human Tissue Act 2004 will continue to govern removal, storage and use of relevant material in Wales but from December 2015 Wales will introduce an ‘opt out’ system for cadaver transplantation; see the Human Transplantation (Wales) Act 2013.
after her death. In the case of the donation of the whole body for anatomical examination or public display, the deceased herself must have given consent in writing and before witnesses. Proceeding without appropriate consent was made a criminal offence. The 2004 Act exempted ‘existing collections’ and bodies over 100 years dead. Thus, the 2004 Act did not make unlawful the retention and display of the unfortunate Irish Giant’s body by the Royal College of Surgeons.

Nor will archaeologists risk prosecution if they dig up, investigate and retain the body of a Roman centurion just south of Hadrian’s Wall. Such exemptions might well be seen as simple common sense in the current age, as well as avoiding punitive retrospective legislation which might make archaeology almost impossible to practise. Additionally in such cases, many might ask who cares. There is no bond of attachment to the person who once inhabited the body; there is no mother or son or even grandson to mourn the Giant or the centurion. Recent litigation about the final resting place of King Richard III, however, indicates that in some cases a number of people do care about long dead bodies and human remains. The ‘history’ of the immense attention paid to the fate of the body of the King indicates that human remains in and of themselves have an elusive value that is hard to pin down or base on rationality alone. The message to medicine from the story is clearer. Dead bodies cannot be dismissed as disposable materials to be used and/or destroyed at will.

In 2012, archaeologists from the University of Leicester discovered what proved to be the bones of the King under a car park in Leicester. Richard III (the last Plantagenet and Yorkist King of England) died on the battlefield at Bosworth in 1485. He remains one of the best known of the English kings, traditionally seen as the wicked uncle who usurped his nephew’s throne and then murdered him and his younger brother, the Princes in the Tower. Supporters of Richard have argued that he had good reason to set his nephews aside and it was only Tudor propaganda that made the case that he had them murdered. In the end, Richard lost the Crown to the Lancastrian Henry Tudor, who took the Crown as King Henry VII. Richard’s naked body was tied to a horse and paraded through the streets to prove that the defeated King was dead and he was later interred in the Priory at Grey Friars in Leicester. The Priory was subsequently destroyed and it was over

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46 ss 3(3)–(5).
47 s 5.
48 ss 1 and 9. And see s 10 re the retention of existing collection of anatomical specimens.
49 s 1(5).
50 Richardson (n 6) 57–58.
51 A concise account of the relevant history of both the final days of Richard III and the events that followed the discovery of his bones is to be found in the judgment of Hallett VP in The Queen (on the application of Plantagenet Alliance Ltd) v Secretary of State for Justice [2014] EWHC 1662 (Admin) [Plantagenet Alliance].
500 years later that the remains of Richard III were found where the Priory had once stood. It is worth noting that despite giving the order for the humiliating display of Richard’s body, Henry VII was anxious to be reassured that the late king had received a Christian burial. The finding of the body of the king resulted from the labours of the Richard III Society and, in particular Philippa Langley, whose own painstaking work narrowed down the location where the remains might be found. In order to be able to exhume the body from its car park grave, the University of Leicester needed a licence under the Burial Act 1857 from the Secretary of State for Justice for England and Wales. Such a licence would set out what would be done with the remains, how long they would be retained and what arrangements would need to be made for re-interment. Although the Secretary did grant the licence, the identity of the remains was not confirmed at the time; however, both Ms Langley and the Richard III Society were always sure they had found their King.

Although both the Richard III Society and the University wanted the exhumation and the tests to be done on the remains, controversy arose over the plans for their re-interment. The licence granted to the University provided that the remains were to be deposited at the Jewry Wall Museum, or otherwise be re-interred at either Leicester Cathedral, or a burial ground where interments may ‘legally take place’. Once the body was confirmed as that of Richard III, the University indicated that in accordance with the authority granted them pursuant to the licence, the remains would be interred at Leicester Cathedral. Many ‘supporters’ of Richard III, including Ms Langley, objected to this decision as they wanted the remains to be buried in York. This was because this was the place where Richard III had grown up and included his former home; it was also the place where centuries later he is still perceived as a good monarch and not the callous child killer portrayed by Thomas More and Shakespeare.

Consultations by the Ministry of Justice about re-interment of Richard III’s remains embraced a broad range of parties, including the Royal Household. The present Queen is directly descended from Richard III’s niece, Elizabeth of York. However, some argued that the consultation was inadequate and that there should have been a public consultation involving the living relatives of the very late King Richard. As far as is known, Richard III left no direct descendants. The relatives in question were collateral descendants of his siblings who came together under the banner of the Plantagenet Alliance (Alliance) in order to bring an application for judicial review. The Alliance argued, inter alia, that the Secretary of State for Justice acted unlawfully in granting the licence to exhume and re-inter without consulting or requiring the licensee to consult on appropriate re-interment. Similar complaints

52 Plantagenet Alliance (n 51) [24].
53 Plantagenet Alliance (n 51) [46].
about lack of consultation were made against the University and Leicester City Council. The Alliance further argued that there should have been a full public consultation on the issue and, in addition, the identifiable living relatives of Richard III should have had the opportunity to make their views known.

Although the Alliance was given leave to apply for judicial review by Haddon Cave J, its application was ultimately dismissed by the full Divisional Court in *The Queen (on the application of the Plantagenet Alliance Ltd) v Secretary of State for Justice and others* (hereinafter *Plantagenet Alliance*). As Hallett VP noted in giving the judgment of the Court, the ‘case is about procedures, duties and powers’ and is not concerned with the substantive issue of where the remains should be re-buried. For present purposes, my interest here is not in the niceties of the public law arguments made in the case, but instead in how it came to be that the fate of this dead body – the remains of Richard III – generated so many hours of court time, Parliamentary debate and the fascination of the public. Let us consider the ‘family’ first – the collateral descendants of Richard III. In giving judgment, Hallett VP acknowledged that their relationship with the dead king is ‘attenuated in terms of time and lineage’; they are sixteenth, seventeenth and eighteenth generation descendants and there may well be a million such people. Hence, the Divisional Court found that that relationship ‘may not suffice for personal standing’. It is worth noting that Hallett VP said ‘may not’ rather than ‘does not’, and she went on to find that the Alliance had a broader public interest claim for standing as a public interest litigant.

In assessing the duty of the Ministry of Justice, the Court cited the Ministry’s own guidance that for the exhumation of a named individual buried less than 200 years ago, and more usually 100 years ago, it would more often than not be on the basis of an application from the next-of-kin. In the case of exhumations for archaeological purposes of older ‘ancients’, it would not be the usual practice to seek out identifiable descendants. Joint Guidance from the Church of England and English Heritage, and separate guidance from the Department of Culture, Media and Sport (DCMS guidance), both suggested that where feasible, descendants should be consulted. In the end, the Alliance failed to convince the Court that the procedures adopted by any of the respondents were unlawful. Notwithstanding the failure of

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54[2013] Lexis Citation 68.
56[74].
57[82].
58ibid.
59Para 106 and see Ministry of Justice, *Guidance Note on Application for the Removal of Remains*. Applications to exhume and re-bury remains, except where remains are to be removed from one consecrated place to another requires a licence from the Secretary of State under s 25 of the Burial Act 1857.
the Alliance’s application, important questions raised by the case include: just how did the Alliance manage to get so far in pursuing their concerns about where Richard III’s remains should be buried? In addition, why do both the Church of England and English Heritage guidance and DCMS guidance suggest that a remote blood connection may ground a claim to be consulted about the remains of ancestors? I will address the DCMS guidance in the next section of the paper, but I focus here on the general question as to why do old, dead bodies matter? And does this body matter only because he was a King (and a notorious King at that)?

The recognition in the 2004 Act of the claims of qualifying relatives granting consent to the use and retention of parts of their recently deceased relations, or friends of longstanding, derives from the following: first, from an assumption that they will voice the wishes of the deceased if he has not done so; and second, from the impact on the bereaved family of decisions about the body. The parent or child just dead or dead in the relative’s lifetime remains an object of attachment. The parents who discovered that parts of their dead children’s bodies had been retained at Alder Hey hospital in Liverpool, the Orthodox Jewish widow who found out that her husband’s brain had been removed and retained suffered shock and renewal of grief.61 The child, the husband remained loved in memory. They were ‘hurt’ by what had been done. It seems highly unlikely that a person finding himself to be collaterally descended from Richard III would truly suffer emotional pain if the King were to be reburied in Leicester not York. The Alliance rested its main argument, however, on the basis that it sought to be the voice for the long-dead King. He would not wish to be buried in the place that he met a miserable end but to rest in York where he was it is said most happy. Can anyone know? Might the King not have preferred burial with other Kings in Westminster Abbey or in a Roman Catholic Church, not a heretical Anglican cathedral?

The Church of England and English Heritage guidance on the treatment of ancient human remains is instructive. It notes that a whole host of people and organisations have an interest in such cases including descendants, the general public, bodies responsible for the care of the dead, the ‘scientific research community including archaeologists, osteologists and medical and forensic scientists’.62 The guidance echoes Richardson’s classification of corpses as valued in popular culture and the dead as scientific curiosities, anatomical objects. Reflecting on the litigation about the King’s bones, it becomes apparent that his remains are a profitable commodity too. The University of Leicester acknowledged that they would not have embarked on the project at all had they not thought that the body would remain in Leicester. The University and Leicester City Council were well aware of the massive tourist income

61Department of Health The Investigation of Events that Followed the Death of Cyril Mark Isaacs (2003).
62Para 18 (n 60); and see Plantagenet Alliance (n 51) [113].
that this corpse might generate. A £4.5-million-pound visitor centre has been built and the car park grave where the King lay for so many centuries has been opened to the public.\(^{63}\) In May 2015, the bones of Richard III were finally re-interred in Leicester Cathedral. Richard’s new tomb in Leicester Cathedral will generate further income for Leicester that might have accrued to York.

Finding old bones and bodies in building sites is not uncommon. But should my grandfather 16 generations removed be found and I prove not to be one of the Plantagenet descendants, his bones are likely to remain unknown. If identified as William, a scullion, then his bones will perhaps have value only for what ‘William’ can tell the scientists about life and health in the fifteenth century. Richard III was in life a major historical figure. Is it just the historical and commercial value of these bones that matter? The postscript to the judgment of the Divisional Court is instructive. Hallett VP quoted the Dean of Leicester Cathedral who spoke of creating a lasting burial place ‘as befits an anointed King’. She adds that ‘it is time for Richard III to be given a dignified reburial and finally laid to rest’.\(^{64}\) Richard’s kingship cannot be divorced from his body but it is not the whole story. Old bodies, ancestor bones, have value in themselves.

4. Returning the ancestors

More or less contemporaneously with the revelations about organ retention in the United Kingdom (UK), a series of requests were made to British museums holding collections of human remains from across the globe including the bodies and bones of indigenous peoples in Australia and New Zealand. Their descendants and their communities sought to claim back their ancestors. Many of the bodies held in collections had been acquired in dubious ethical circumstances, even if it was not unlawful at the time this took place. For museums who might wish to accede to requests for the return of human remains, a technical legal obstacle remained as to whether the museums could lawfully de-accession parts of their collections. The government set up a Working Group on Human Remains (WGHR) that issued a lengthy report in 2003.\(^{65}\) In response to this report, section 47 of the 2004 Act enabled nine named natural history museums to immediately return human remains less than one thousand years old, once the Act entered into force. After consultation, the DCMS subsequently issued guidance in 2005 to all museums in England and Wales regarding the handling of requests to return human remains.\(^{66}\) The DCMS guidance applies to remains

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\(^{63}\)See *The Guardian* (23 July 2014) 12.

\(^{64}\)Plantagenet Alliance (n 51) [166].


\(^{66}\)DCMS (n 65).
originating in the UK and not just remains from abroad, although it was noted by Hallett VP in *Plantagenet Alliance* that the DCMS guidance had no direct relevance to the case of Richard III whose remains had lain in a car park and not in a museum. Moreover, the guidance itself states that it is primarily drafted in terms of claims for the return of human remains of overseas origins. In its report, the WGHR stresses the importance to overseas communities of burial of their peoples in their own land and according to their own customs and faith stating that: ‘To many indigenous peoples the return of their ancestors to the homeland is essential to the health of the descendant community.’ The WGHR also stresses the value of the bodies of ancestors as having immense cultural significance in the countries from which the remains originated and concluded that such a value outweighed the claims made for scientific value. Perhaps that claim is a little simplistic. A number of the retained bodies and body parts had little remaining scientific value but instead had continuing appeal as public exhibits in some cases (for example, the Irish Giant), becoming little more than a freak show.

The WGHR report also adopted a wider concept of the importance of ancestors stating, ‘All human remains whatever their age must be treated with respect and dignity, regardless whether they are the subject of any claim or controversy.’ The crux of the WGHR’s findings appears to be that all of us have obligations to our forebears, with such obligations not resting on any blood link. One of the members of the WGHR, Sir Neil Chambers, Director of the Natural History Museum, dissented from the findings of the report. He did so on the grounds that although he did not dissent from the principle of respect, he considered that there should not be any knee-jerk view that respect meant return and burial. He went on to describe the report as ‘heavily slanted, both in tone and substance’, supporting the case for return to claimant communities at the expense of medical, scientific and other research.

The controversy about the exhumation and re-burial of Richard III, and the campaigns to repatriate remains of ancestors, both emphasise the cultural significance of dead bodies. The latter shows that the importance of the corpse is not a belief exclusively derived from Christian doctrine in Western Europe but a value that crosses several cultures and faiths and not solely focused on direct attachments to the person whose body it is (or was). The potential conflicts between the integrity of the body and the goods that scientists, and

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67*Plantagenet Alliance* (n 51) [115].
68WGHR (n 65) para 311.
69See too the case of Saarti Baartman known as the ‘Hottentot’ Venus exhibited in her lifetime to display her pronounced buttocks and genitals and whose remains were on show at Musee d’Homme in Paris until returned to her homeland South Africa in 2002.
70WGHR (n 65) para 386.
72Ibid.
others, may hope to derive from uses of the body are highlighted. Contradictions are exposed. Much time and effort was deployed in arguments about how best to respect Richard III in relation to his re-interment. Few asked whether digging him up in the first place and subjecting his bones to a battery of tests was respectful.

5. The living (corruptible) body

Examining the depiction of the body in medico-legal history, it often seems that dead bodies dominate the stage. The wealth of historical material relating to laws and custom governing the fate of the corpse is not obviously mirrored by similar debates about the living body. In part this may be ascribed to the contempt in which many ‘Fathers of the Church’ (the great bishops and theologians who dominated the development of Roman Catholic doctrine in medieval times) held the flesh. St Augustine put it baldly: ‘The corruptible Body is a burden to the Soul.’73 This attitude pervaded and affected the development of medicine especially under the auspices of the Church. Pre-Reformation, many priests were also physicians and ministered to body and soul. The monasteries ran hospitals. The canon law (the laws promulgated by the Roman Catholic Church) might be seen as the precursor of modern medical law addressing as it does many questions relating to medical treatment and the obligations of doctors.

Yet the Church hierarchy had qualms about priests undertaking a dual role as both religious men and physicians. Conrad et al note that at the Lateran Council of 1215, clerics of the higher orders were prohibited from shedding blood (a prohibition assumed to cover the medical practice of blood-letting) but they go on to suggest that this prohibition should ‘not be seen as an attack on surgery for those in lower orders and laymen could still do it – but an attempt to maintain the dignity of the higher ranks avoiding the manual and bloody craft of surgery’.74 The Council did not confine its rulings about medical practice to physicians who were also clerics. This is highlighted by Canon 22 which required any secular ‘physician of the body’ to ensure that he had advised his patient ‘before all’ to call for a ‘physician of the soul’ so that ‘spiritual health being restored bodily health will follow’.

Eight centuries later, the latter might be seen as an endorsement of holistic medicine. However, it is important to underline that the Christian Church’s canon law for many centuries re-enforced distaste for bodies and the classification of surgery as a rather dirty craft not fit for holy men. Secular physicians were to echo those sentiments and distance themselves from the physical body of the patient, which in many cases resulted in lowly surgeons being called

73 Sawday (n 16) 17.
74 Conrad et al (n 20) 137. The Lateran Council 1215 was one of many Councils of the Church that met to review and develop Church law (the canon law).
upon to administer the favoured remedy of blood letting. Attitudes of disgust and something close to contempt for the body pervaded the thinking of many of those treating the living. Such attitudes stood in marked contrast to the anatomists’ fascination with the dead body. They still resonate today with debates about body and mind and an ongoing suspicion about the uses to which we may put our bodies.

6. Bodily sovereignty: you certainly did not ‘own’ your body

Body ownership in relation to the living is the source of much rich literature today and is becoming a much-litigated matter. While proprietary interests in separated and unseparated parts of the living body are debated, the right to determine what you may or may not do or have done to your body has generated a wealth of bioethical, legal and sociological literature. Even if I do not own my body as I own my house, do I nonetheless have sovereignty over that body at least while I enjoy the mental capacity to exercise that sovereignty? In lay terms, is ‘my’ body mine to control? Bodily sovereignty provokes practical questions about sale of organs in vivo, the legality of elective amputation, and the limits of extreme cosmetic surgery (body modification). It also calls into question how far any consensual conduct between adults can constitute a criminal assault.

For centuries, the English common law was unequivocal in its answer to the central question of whether you do have sovereignty over, or otherwise ‘own’ your body. The answer was no. Traditionally, the crime of maim (or mayhem) limited any form of self-harm. This crime was committed whenever a ‘man’ was subject to certain kinds of severe and irreparable bodily injury, whether inflicted by another or himself. The Offences against the Person Act 1861 (1861 Act) created a new ‘code’ setting out a gradation of crimes of assault and other offences covering harm inflicted by one person on another. The 1861 Act is silent as to maim and it has been argued that it rendered the crime obsolete; however, it only deals with half the story of maim and makes no provision for self-harm.

So what kinds of self-harm did maim proscribe? There is no certain answer and the leading texts addressing the criminal law before the 1861 Act differ in detail. Russell on Crime makes it clear that bodily injury, even disfigurement,
was not enough and one of three further conditions had to be met. First, the man must be deprived of some part of the body or a sense that made him unfit to fight. For many lawyers writing about the criminal law, the focus on military fitness is the major issue. Hawkins speaks of the infliction of bodily harm resulting in ‘such a hurt of any part of a man’s body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary’. Stephen focuses on the loss ‘of any member of his body or of any sense which he can use in fighting, or by the loss of which he is generally and permanently weakened’. Second, the man must have injured himself in such a way as to enhance his success as a beggar. Third, castration was seen as a particularly grave form of maim: self-castration is difficult to envisage but feasible!

What rationale lay behind the crime of maim and does it have any lessons for medical law in the twenty-first century? Maim did not bar all self-harm. The first ground may be construed as enforcing a duty to the community and the Crown. The subjects of the King could not so damage themselves as to unfit themselves to defend ‘King and country’. The second might be seen as having a double justification. Self-mutilation was prohibited on the grounds that cutting off a hand to generate sympathy and alms for example might be perceived as a form of fraud. More crucially, perhaps, the amputee became a potential charge on the parish. Castration is more problematic. Such mutilation did not necessarily ‘unfit’ the man to fight as the eunuch regiments that served the Ottoman Empire proved; nor did it necessarily make a man unable to make his own living, though bungled self-mutilation might have that effect.

What of women? It remains unclear if a woman might have faced such a charge. Given that until the twentieth century, the notion of a woman fighting in the armed forces was close to unthinkable, female self-mutilation would not be considered to damage the defence of the realm. However, might a woman (just as much as a man) harm her body to gain greater credence as a worthy beggar? The crux of the question is whether depriving one’s self of reproductive capacity in itself was seen as maim. Penney Lewis considers this question in her paper examining the history of contraceptive sterilisation. She examines debates in the early twentieth century on the legality of non-therapeutic sterilisation. She cites Lord Riddell who, in an address to the Medico-Legal Society in 1925, argued that although vasectomy differed from castration,

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82 Russell suggests that the first two categories of self inflicted maim constituted only misdemeanours while castration remained a felony: (n 79) 625.
83 Note Stephen indicates that the man (or woman) must be permanently weakened by self-harm, see Stephen (n 81).
and would not have the same effect of weakening the patient as castration, that was not the point. The essence of the matter was that he was ‘deprived of his powers of procreation’. Thus, the sterilisation of a woman was ‘just as objectionable’. It is interesting to note that in 1934, a committee on sterilisation which had been established by the Department of Health, found that there were ‘military objections to allowing a man to do or undergo anything which disabled him from begetting sons’. As Lewis notes, such a ‘conception of the law of maim would not be limited to men’.

In the twentieth century, the ‘ghost’ of maim was invoked to boost arguments that non-therapeutic sterilisation was contrary to public policy. I say ‘ghost’ because, as noted above, the survival of the actual crime of maim after the enactment of the 1861 Act is dubious. In *R v Brown*, Lord Mustill explicitly rejected limiting the capacity to consent to self-harm on the basis of the ancient crime of maim. The importance of the history of maim in an analysis of the history of the law and the body lies not in any attempt to contend that the crime in its focus on self-harm did or did not survive the 1861 Act, but rather in the message it sends about the contradictions in law’s attitude to bodies through time.

In 2015, legal constraints are still imposed on what we can do with our bodies. For example, we cannot license others to inflect actual bodily harm on us, unless some public interest is established such as the need for proper medical treatment or the importance of indulging in manly sports, which is held to legitimise such harm. The ‘pleasure’ of wholly consensual sadomasochistic sexual encounters will not suffice to form such public interest. Female genital mutilation is expressly proscribed by the Female Genital Mutilation Act 2003, even if it is proven that an adult woman freely consented to such harm. Conversely, bizarre forms of vaginal cosmetic surgery which are difficult to distinguish in terms of the physical intervention to alter the woman’s genitalia, appear to be implicitly accepted as lawful. Having said that, it is interesting to note that Mr Keith Vaz MP, Chair of the House of Commons Home Affairs Committee, recently called for a wider ban on any form of ‘cosmetic’ genital mutilation, although he did restrict his proposal to minors.

Modern criminal law endorses the role of the public interest in limiting the individual’s sovereignty over his or her own body and does so without any

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85 Ibid 299.
86 Ibid.
88 Lewis (n 84) 299.
89 *Bravery v Bravery* [1954] 1 WLR 1169.
90 *Brown* (n 77) 262.
91 *R v Coney* (1882) 8 QBD 534.
92 *Brown* (n 77).
clearly articulated rationale to determine where the boundaries of bodily sovereignty lie. Maim had at least some degree of coherence and transparency making it clear that in certain cases the claims of the community outweighed the rights of the individual. This would seem to set a higher bar to interference with bodily freedom than the controversial majority speeches in *R v Brown*.95 Maim articulated a policy that limited any liberty to self-mutilate and gave reasons for those limits, even if the reasons would not meet universal approval today. However, apparent contradictions of a different kind beset any retrospective examination of the crime.

The English common law condemned at least extreme self-mutilation, yet condoned the infliction of the most hideous mutilations on some convicted criminals, including the lopping off of ears and the branding of foreheads. If the secular courts imposed mutilation as punishment for bad individuals, then the Church endorsed self-mortification for the pious, which included the use of hair shirts, as well as scourging and the wearing of belts that bit into, and wounded, the skin. Penitential practices endorsed by the Church, while they might result in permanent harm via infection of the wounds, or the proliferation of lice in hair shirts, were not designed to weaken the body permanently. Self-mortification recognised the imperfections of man and God’s claim on his mortal body. None of these practices necessarily contradicts the essential message of the crime of maim, which was that your body was not wholly yours. The state, the Crown, and your parish all had claims on your body of which you could not opt out.

**7. The reproductive (female) body**

Women’s (dead) bodies were much prized by the anatomists;96 they were also much harder than male bodies to obtain. The principal focus for the physicians and surgeons lucky enough to receive a female cadaver for dissection was to examine the womb as the site of reproduction. The womb was often depicted as a source of fear and as having some mysterious will of its own.97 As Sawday ironically notes, it was often reproductive labour itself that led the unfortunate woman first to the scaffold having been convicted of infanticide of an unwanted child, and then on to the dissecting room.98

For women through time, their biological role in reproduction has framed much of the legal discourse about them. In particular, the relationship between the woman and the fetus has often dominated such discourse. Despite views to the contrary,99 it is important to note that English law has

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95 See (n 77).
96 Sawday (n 16) 220.
97 ibid 10.
98 ibid 220.
never wholly prohibited abortion. The history of abortion law is well addressed, if much contested. An examination of this divisive issue is outside the scope of this paper. I focus here instead on how ‘scientific’ understandings of the process of conception and gestation has affected the development of the law as it pertained to the married female with reproductive potential and then consider whether this historical perspective has lessons for the regulation of Assisted Reproductive Technologies (ARTs) today.

The restrictions that English laws imposed on married women, and many jurisdictions still do impose, originated in ancient understandings of female biology and help explain laws that classified the wife as the ‘property’ of her husband. Until the early 1980s, the vestiges of a husband’s proprietary rights in his wife endured in English law in the form of his right to consortium. The husband had a legal right to his wife’s affections and sexual intercourse with her. That right gave him a legal claim against any third party who ‘stole’ his wife’s affections, or otherwise interfered with his right to consortium. She enjoyed no such reciprocal right. The right to consortium and other proprietary rights once enjoyed by husbands and fathers in their wives, children and servants were only finally abolished by the Administration of Justice Act 1982.

Medieval beliefs about the role of the woman in reproduction help to explain the evolution of English laws that made married women to a great extent the property of the husband; placed such a strong emphasis on wifely fidelity; and regarded the offspring of the couple as the ‘property’ of the father. The changing views of women’s contribution to reproduction, as well as the then scientific debates about female biology, can be seen to have had the same kind of impact on societal attitudes and law as the development of ARTs do today. Science, and in particular popular understandings of science, interacted with philosophical (and theological) debates in framing legal principles.

From classical times to the eighteenth century, arguments raged about how far women contributed anything to the embryo/fetus, save for the ‘seed bed’:

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101 Best v Samuel Fox & Co Ltd [1952] 2 All ER 394, 398 (HL) (Lord Goddard).
102 See Davies and Naffine (n 1) 81–83.
103 For example, by so injuring the wife that she was unable to have sexual intercourse with her husband and/or carry out usual wifely duties.
104 Best v Samuel Fox & Co Ltd (n 101).
105 See s 2 Administration of Justice Act 1982. See also Margaret Brazier, ‘Embryos, Property and People’ (1996) 8 *Contemporary Reviews in Obstetrics and Gynaecology* 50–53; And note that not until 1991 did the House of Lords finally rule that husbands were not immune from prosecution for marital rape, see *R v R* [1991] 1 AC 599.
the womb in which the child would grow.\textsuperscript{107} The womb was essential to reproduction, but was viewed as only a necessary medium in which the father’s seed could grow. Aristotle argued that the embryo was formed when the male seed interacted with menstrual blood. The woman nourished the seed.\textsuperscript{108} Galen disagreed, contending that women too produced seeds, albeit ‘weaker in nature’ than the male seed.\textsuperscript{109} The womb was seen as playing a role in the formation of the child, however, with Maclaren describing such views of the generation of the fetus as epigenetic: that is to say that the environment of the womb contributed to the characteristics of the child to be, and those characteristics were not wholly the outcome of the genetic make-up of the child.\textsuperscript{110}

Anatomical investigation in the seventeenth century began to offer a better understanding of female reproductive organs, and that women produced eggs. At much the same time, anatomists examining semen under the microscope discovered sperm, originally described as ‘animalcules’.\textsuperscript{111} The view (described as pre-formationism) developed that the fully formed child was present either in the male sperm or female egg. The stage was set for a battle between those who maintained that the tiny future child was located in either the female egg or the male semen.\textsuperscript{112} The two schools of thought came to be known as ‘ovism’ and ‘animaliculism’. The supporters of ‘ovism’ regarded the sperm as something like a firelighter that set off the development of the being concealed in the egg. ‘Ovism’ was rejected by many doctors, philosophers and theologians, as well as popular opinion.\textsuperscript{113} ‘Ovism’ downgraded the male role and the majority of male ‘experts’ argued that it was in sperm that the tiny person was to be found. The ‘male sperm formed the embryo, and the only contribution a woman can offer is to receive the sperm and nourish it’.\textsuperscript{114} It should be noted that both proponents of ‘ovism’ and ‘animaliculism’ accepted that the uterine environment could affect the fetus but they had moved quite some distance away from the view that the womb played a major role in the formation of the child, that is to say the epigenetic role of the womb described by Maclaren above.\textsuperscript{115}

What relevance can theories of conception, which we now know to be wrong, have for critically examining questions that beset developments in reproductive medicine today and, in particular, questions about women’s (reproductive)

\textsuperscript{108} Ibid 207–208.
\textsuperscript{109} Ibid.
\textsuperscript{110} MacLaren (n 106).
\textsuperscript{111} De Renzi (n 107).
\textsuperscript{112} Both parties accepted the notion of ‘preformationism’ ie that within sperm or egg the fully formed individual resided.
\textsuperscript{113} De Renzi (n 107) 213.
\textsuperscript{114} Antoni van Leeuwenhock quoted in De Renzi (n 107) 213.
\textsuperscript{115} See (n 106).
bodies? First, history illustrates how ‘scientific’ debate plays a major role in forming laws; and second this contested interplay between science, law and popular attitudes, offers cautionary lessons for today. Attempt for a moment to accept the mindset of those people – doctors, scientists and lay people – who in one way or another adhered to ‘animalculism’ (see above). The substance of the tiny being that would become the son or daughter of the man was nothing to do with its mother. Her womb was simply the source of shelter and nutrition while it grew. The mother was in effect a ‘gestational carrier’, looking after the father’s child. In return for this service, the husband was obliged to provide for the needs of his wife: the woman whose womb was essential to his reproductive enterprise. His interest in the child was magnified by the firm belief that the child was ‘his’ – the product of his body.

It follows then that the husband had the strongest of interests in ensuring that first, no other man’s ‘animalcule’ was carried in the wife’s womb and passed off as his own. Infidelity resulting in pregnancy by another man lost the husband not 50% but 100% of his investment. Second, the function of the married woman was to make her womb available to nourish the man’s children, and this she contracted to do when she married. Third, coupled with the dogma that a wife could not refuse consent to marital intercourse, the husband enjoyed something akin to what we might classify today as a right to procreate, and the wife a duty to provide the means by which he might do so. Fourth, the husband had a further strong interest in ensuring that the behaviour of the ‘gestational carrier’ did not compromise his reproductive enterprise. That sadly did not mean that all husbands acted positively to promote the health of the wife. The high rates of child mortality and, at many times in history, the surplus of women over men might mean that quantity in reproduction was the primary objective, which involved generating as many children as possible and replacing ‘worn out wombs’ with fresh stock. Finally, the desire for sons and the laws of primogeniture again make sense. When he reproduces, a son will create a grandson who shares your blood. A daughter, however beloved she may be, would carry a child that although formed in part by her womb would develop principally from her husband’s ‘animalcule’, which meant that it would be seen as having no direct ‘genetic’ contribution from its maternal grandfather.

A number of flaws affect the claims I have made to explain fully the proprietary rights that family law bestowed on husbands until very recently. Logically, if no substantive contribution was made by the female, and a daughter passed on none of her father’s substance, women should be barred from succession to his property at all. Yet under the English common law, while the eldest son

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116 The right to sexual intercourse was not solely linked to the right to reproduce but theological suspicions of sexual pleasure even in marriage, the notion that the primary purpose of marriage was the procreation of children in theory demoted the non-procreative role of marital intercourse to a subordinate role.

117 See R v R (n 105).
would always succeed to paternal property in preference even to elder sisters, in the absence of an entail, if a man died intestate with no sons, then his daughters shared the estate as co-parceners. Women were not wholly excluded from inheriting paternal property and thus transmitting that property to their husbands’ sons. In the kingdoms of both England and Scotland, a daughter could inherit the Crown in the absence of a son. This was not the case in much of continental Europe where Salic laws barred women from the Crown.

In England, however, most estates with substantial land and assets were nevertheless entailed to ensure patrilineal descent. Women were excluded from succession, with preference given to collateral males over direct female descendants. Accounts of resemblance of children to their mothers might be expected to provoke doubt about the child being generated wholly by paternal seed. However, theories of ‘animalculism’ did in fact allow some role for the womb, that is to say, for environmental influences on the developing fetus. Failure to succeed in procreation or failure to produce a male heir was ascribed to a defective uterus, a barren wife whose womb failed in its duty. Our ancestors may well have noted flaws in the logic of theories of generation, or otherwise intuited that mothers contributed more than simply being an incubator for the child. In forming popular attitudes, in the framing of laws by the common law courts, and in legislation, the reception of science was incomplete. It did not follow that one scientific theory was received whole and applied with rigorous logic.

What lessons might we learn today from the relationship between what may seem bizarre theories of reproduction and the evolution of laws that marginalised the reproductive woman? The primary lesson might be one of caution. Women should never be at risk of ever again being perceived as walking wombs. The trend in the United States to prefer the term ‘gestational carrier’ to surrogate mother should provoke unease. That unease may be exacerbated by the growing practice of some male commissioning couples to separate the functions of female reproduction choosing one woman as an egg donor and implanting the embryo in a second woman. She is to be seen as simply a ‘gestational carrier’ whose only role is as an incubator and whose conduct may be strictly constrained by the contract for services she signs. The ‘gestational carrier’ finds herself in much the same case as the medieval wife. Her contract is of course time limited and she may have choices the sixteenth-century wife did not enjoy. But there is growing evidence that some

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118 Note that even today ss 29 and 48 of the Human Fertilisation and Embryology Acts 1990 and 2008 respectively provide that succession to titles of honour are not subject to the statutory provisions on parenthood relating to children born using donor gametes. Patrilineal descent is retained.

119 The fate of Henry VIII’s first Queen, Katherine of Aragon.

‘gestational carriers’ in developing countries such as India, are increasingly becoming objectified, valued only for their womb.\footnote{ibid.}

Valuing some women only for their womb and, in effect, granting others (commissioning couples) ‘tenancy’ of that womb risks a return to the perceptions of days past where reproduction was women’s central role. A barren woman was, if not worthless, then worth less. Her husband, the putative father, had claims to control the womb he needed to complete his own reproductive enterprise. If certain modern fathers (and in some cases commissioning mothers) can in effect rent a womb and disassociate that womb from the woman, then it may again become acceptable to see all childbearing women as objects whose womb is no longer solely ‘theirs’. In many countries, surrogacy contracts are enforceable and provide not only for the obligation to surrender the baby but also set out detailed rules about how the ‘gestational carrier’ should behave to protect the fetus. The commissioning couple ‘police’ the womb that they have rented. If fetuses carried by a surrogate are so protected, it is likely that fetal rights’ campaigners will argue that the welfare of the fetus should not depend on the womb it inhabits, heavily protected if within a ‘gestational carrier’s’ womb, but left to the mercy of an ‘ordinary’ pregnant woman. The autonomy of all pregnant women may be at risk and women once again be valued and judged primarily for their wombs.

\section*{8. Conclusion}

Bodies are messy whether they are ‘noisome corpses’\footnote{Richardson (n 6) 15.} in need of burial, objects of self-harm, or engaged in the physicality of reproduction. Bodies are wonderful in the sense that as yet no machine comes close to copying their multiple functions. Bodies today can be used to enable one person to make a gift (in life or after death) of much needed organs to another, saving the recipient from premature death or years of poor health. Donation of tissue (ante and post mortem) offers doctors the opportunity to gain a greater understanding of disease. A woman can offer her womb to give others the joy of parenthood. Bodies are a source of wonder as they have been over the centuries. But human bodies fail to fit nicely into consistent and coherent theories of what may and should be done to or for them. Fewer people may believe in the soul. Uncoupling the physical body from the person, reducing the body to an object has, as history suggests, usually resulted in failure and controversy. Popular culture often diverges from orthodoxy thinking, whether that orthodoxy is proclaimed by the medieval Christian Church or the twenty-first-century scientific establishment, or indeed by distinguished philosophers. Many medieval people were wholly convinced that
were their bodies not buried intact, they would be denied Resurrection – whatever the more nuanced message from the Church may have been.

Efforts may be made to correct misunderstandings of science, although the precedents are not overly helpful. What the historical evidence suggests will not change is the impossibility of divorcing the body, whole or parts, living or dead from the person she is or once was. The recently dead will rarely be seen as simply a carcase to be harvested for any useful parts and then disposed of. Attachment does not end with the death of someone loved. Attachment may be irrational but it is part of human nature. Nor does the significance of the dead body solely rest in the relationship between the deceased person and those who mourn her. As the reburial of King Richard III and the pressure to repatriate ancestor bodies show, human remains are viewed by very many people as deserving of respect. Living or dead, we are subjects not objects. That does not necessarily mean that as subjects we have untrammeled freedoms. Our mutual dependency may place limits on what we may do to our bodies and may require that some things we would rather not have done to our bodies be done for the good of the community. It does not follow that I may at will so disable myself that others must care and provide for me. Nor does it follow that if I have objections to tampering with my dead body, I can veto a coronial autopsy undertaken as part of a criminal investigation. It does mean that we must be wary of developments that objectify certain bodies, given that for so long society and the law has objectified female (reproductive) bodies.

A historical perspective does not offer solutions either for modern controversies surrounding innovations that affect the body or a prescription for effective regulation. Instead, history provides warnings about how not to manage change and how not to regulate human behaviour, especially in relation to medicine. Examples such as those in this paper will not tell us what sort of laws we should enact to govern transplantation or how to regulate surrogacy and other ARTs. They do make clearer the need to take full account of culture and the emotions generated in relation to the body (alive and dead). They highlight the need to accord dignity to the body as it is inseparable from the person, and to respect that person’s own wishes and beliefs. That respect may take many different forms. In relation to the dead, it does not mean a ban on uses of materials from the corpse. To the contrary, respect for many people, including me, would entail honouring wishes to be a donor. It does not mean banning surrogacy or other ARTs but ensuring that women and men who will be subjects in such enterprises are fully protected and not simply used as a means to an end. Perhaps the core message is that human bodies for the present are still ‘special’ and scientists and regulators ignore that message at their peril.
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