Mary Warnock

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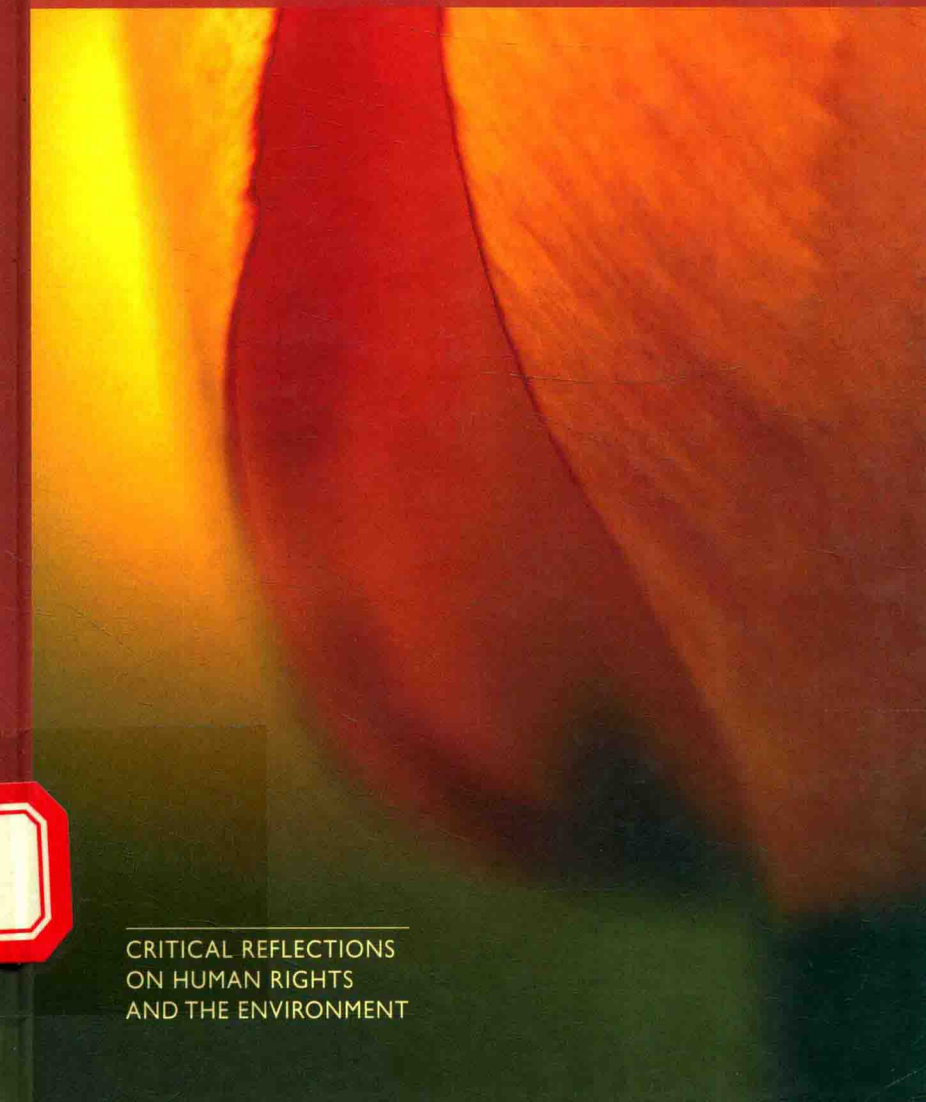
# CRITICAL REFLECTIONS ON OWNERSHIP



CRITICAL REFLECTIONS
ON HUMAN RIGHTS
AND THE ENVIRONMENT

# Critical Reflections on Ownership

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# Editorial introduction

**Anna Grear, Karen Morrow and Evadne Grant**

In the context of critical reflections upon the relationship between human rights and the environment, it is difficult to imagine many themes more central to the human–environmental nexus than that of 'ownership'. Lying at the heart of the widely impugned subject–object relations that set up the human as 'master' (and 'owner') of the earth and its living order, the notion of ownership raises a profoundly natural–cultural (in the rich sense evoked by Haraway[1]) knot of puzzles and dilemmas. The impulse towards forms of what we can broadly think of as 'ownership' is, at one level, deeply 'natural'. Such impulses can be read, for example, in the struggle within and between various non-human animal species for territory, burrows, warmth and food.

Humans have, of course, turned 'ownership' impulses into something more complex and institutionalised. The human institution of ownership has long formed a contested theme in political and legal theory, and 'ownership' has often featured in fraught questions of intra- and inter-species justice. Some humans have even deployed notions of 'ownership' (and closely related justifications drawing upon a 'natural' entitlement to 'property') as a legitimation for historical and contemporary practices of dispossession. Salient examples include the extensive enclosure of the commons in the service of industrial agriculture in England;[2] the dispossession of indigenous peoples under European colonialism;[3] predatory neo-colonialisms

[1] D. Haraway, *When Species Meet* (University of Minnesota Press, Minneapolis MN 2007).

[2] See, for example, E.M. Wood, *The Origins of Capitalism* (The Monthly Press, New York 1999) at 67–94.

[3] J. McLean, 'The transnational corporation in history: lessons for today?' (2004) 79 *Indiana Law Journal* 363–77.

imposed on the global South;[4] global industrial ravaging of the environmental commons;[5] asymmetrically distributed patterns of privilege and privation even *within* the global North;[6] and the internal predatory extension of neo-colonial practices embraced by elites in the global South at the expense of the poor in general and indigenous peoples in particular.[7]

It is perhaps no accident that historically patterned, familiar injustices congealing around legitimations based upon an appeal to 'ownership', 'mastery' and entitlement have tended to reflect the fact that socioeconomic dominance – and the related enjoyment of 'ownership' – has most often been the possession of the 'master subject' of Western political, economic and legal theory: the white, European, property-owner–citizen *homo politicus–economicus–juridicus*. Certainly, historically (and contemporaneously in many cultures by effectively replicating and propagating all aspects of the Western master subject paradigm bar its 'whiteness', effectively extending its reach to newly constituted male political, economic and legal elites) this has been a recognised and relatively stubborn pattern. In either case, women, children, the nomadic, the indigenous and/or other marginalised human groups have not been/are not quintessential exercisers of 'ownership' rights. This particular construct of the 'owner'

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[4] See, for just one example of an extensive literature on specific cases of corporate malpractice and state complicity, C. Kamphuis, 'Foreign mining, law and the privatization of property: a case study from Peru' (2012) 3/2 *Journal of Human Rights and the Environment* 217–53. More generally, see, for example, C. Jochnick, 'Confronting the impunity of non-state actors: new fields for the promotion of human rights' (1999) 21 *Human Rights Quarterly* 21, 56–79 at 65; S. Joseph, 'Taming the Leviathans: multinational enterprises and human rights' (1999) *46 Netherlands International Law Review* 171, 173–4; and the reports of the Special Rapporteur to the Commission on Human Rights on the dumping of toxic waste: Commission on Human Rights (20 January 1998).

[5] See, for example, L. Westra, 'Environmental rights and human rights: the final Enclosure Movement', in R. Brownsword (ed.), *Global Governance and the Quest for Justice: Volume 4: Human Rights* (Hart, Oxford 2004) 107–19.

[6] Increasingly apparent under the pressures of recent austerity doctrine.

[7] See, for example, discussion in E. Burke III and K. Pomeranz (eds), *The Environment in World History* (University of California Press, Berkeley CA 2009).

has particular implications for the human–environmental nexus. The ontology of modern 'man', as is well known, builds upon a problematic subject–object split fully reflected in 'man's' position as the agential and epistemic 'centre' of the world[8] – a position of assumed mastery thoroughly associated with long patterns of environmental degradation and well-rehearsed practices of human intra-species injustice.

Ownership then, is a subject of pivotal importance to critical reflections on the multifaceted and complex relationship between human rights and the environment.

Warnock offers an extended engagement with this important theme. The brief of the *Critical Reflections* series for authors is to offer a relatively unconstrained critical reflection upon a theme relevant to the nexus of human rights and the environment. Warnock begins by asking a threshold philosophical question: 'can absolutely anything be owned?' and subsequently refines her discussion by carefully confining the scope of her inquiry to the ownership of 'property' (itself a subject of immense importance for the theme of this book series). Her writing is an enriching mix of the personal, the autobiographical, the philosophical, the political and the legal brought into lyrical engagement with the questions of what ownership means and what difference ownership makes.

Warnock's reflective journey takes her readers from an account of the origins of society and property as a social institution, into the intimate realms of ownership in action in an almost phenomenological meditation upon 'gardening', characterised by contemplating the relationships between property, intimacy and privacy. Here, Warnock is at her most self-revealing – almost autobiographical in tone and focus – carefully foregrounding her discussion in a personal meditation on the power of affective and aesthetic ties to a sense of place. Next, Warnock subjects broader societal notions of common ownership to a critical reflection, examining first communism and then some 'more modest forms' of common ownership, before moving on to explore the expansive vistas of the 'unowned' in the romantic idea of 'wilderness'.

It is only after offering this panoramic beginning that Warnock

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[8] See, for example, C. Merchant, *The Death of Nature: Women, Ecology and the Scientific Revolution* (Harper Collins, New York 1980); V. Plumwood, *Feminism and the Mastery of Nature* (Routledge, London 1993).

turns her attention to the ethical implications of ownership: how do we take responsibility for the planet? The planet, for Warnock, is an 'orphan' thing – a term she uses to emphasise the impossibility of exercising ownership over 'the planet itself'. In her discussion of 'taking responsibility for the planet', Warnock calls, yet again, on the profound sense of connection to, and love for, the 'thing itself' that characterises the intimate heart of our richest human experiences of ownership – and extends it to embrace the planet – acknowledging a kind of 'love' increasingly recognised towards the environment itself and fortified by understanding the complexity and intricacy of the balance of earth-systems and the interdependencies between layers and forms of life on earth. Warnock, in a sense, opens up her autobiographically intimate journey through ownership to create a sense of a shared biographical location for human beings and to build thereon a conception of intimate responsibility towards the planet as inherent in our shared human situation – but there is more. We have arrived, Warnock insists, at a changed view of what it even means to be human – at an emphatic rejection of Cartesian dualism (and, thus, the subject–object relations of mastery). There is, she suggests, a deepening philosophical sense of our human interdependency, co-situation and kinship with multiple non-human others. This sense, she suggests, could be the beginning of a movement towards an adequate sense of responsibility for the planet. How then, she asks, can this new sense of responsibility be forged and expressed *without* recourse to empty metaphors of stewardship or by appeals to the invention of new gods (such as Gaia)?

Warnock's working position adopts a 'generally favourable view of ownership' as a form of living connection with something which is expressed in practical terms in a series of 'useful compromises'. As prosaic, in a sense, as gardening itself, ownership responsibility can express a kind of love – a kind of care – for a thing itself, and the 'useful compromises' that Warnock has in mind are instances of balancing rights of ownership with forms of access rights and other interventions that diversify the relations that communities can have with land in particular: The Countryside and Rights of Way Act 2000; the National Trust; the designation of green-belt land – all examples, as it were, of 'compromise conservation' that are as deeply British, in a way, as Warnock's passion for gardens and gardening. *Owning*, then, just as much as 'belonging', shapes our

experience and ethics, generating in turn the feelings and values that are so fertile for the production of responsibility taking. But love of home alone cannot take us all the way. Research and education, in Warnock's view, become the lynchpins of future progress: they will 'lead us slowly in the direction of the goal: that we assume common responsibility for a world that we do not own, which lies beyond our backyard but which we jointly inhabit; and I also believe nothing else will do so' (see Chapter 8).

Having established why we might take responsibility for what we do own, and how that could be extended to what we do not own, Warnock confronts the final philosophical question in her critical reflection on ownership: 'why do we want to preserve the natural world?'. Here, she suggests, the answer is not love, but fear: 'Promethean fear' – a rational fear of what we ourselves have unleashed: 'fear seems to me to be a powerful motive to bring us to adapt our behaviour and even to make sacrifices of some of the things that technology has brought us. If this means that we must educate people to be afraid, then we should reflect that this is, after all, a not uncommon purpose of education' (see Chapter 9).

Warnock calls us – in the final analysis – to abandon human arrogance, calling on a sense of humility and on fear to regulate our relations with the environment. Such a call, unsurprisingly, tends to echo critical philosophical accounts challenging the human master–subject and insisting that all relations with the living order are but provisional 'cuts' made in a world newly understood, by some philosophers and scientists at least, as a space in which humans are no longer the 'centre' but thrown into the 'middle'.[9]

Warnock's rich, philosophically authoritative and refreshingly intimate reflection provides a lyrical and insightful path towards potentially transformed understandings of just 'who we are'[10] in 'the world' we share and inhabit. Warnock skilfully weaves an account of ownership that moves it away from ill-considered assumptions

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[9] See A. Philippopoulos-Mihalopoulos (ed.), *Law and Ecology: New Environmental Foundations* (Routledge, Abingdon 2011), especially his own chapter in that collection.

[10] A persistent question underlying the epistemological enquiry in L. Code, *Ecological Thinking: The Politics of Epistemic Location* (Oxford University Press, Oxford 2006).

of exploitative human mastery towards a sensitive, nurturing, eco-engaged mode of responsibility building on something approaching a scientifically informed awe responsive to the complexities – and to the dangers – of a planetary system tipped into crisis by human historical arrogance and instrumentalism.

# Contents

# 1. The scope of the investigation: can absolutely anything be owned?

'Well! Some people talk of morality, and some of religion, but give me a little snug property'.[1] I have in my day talked of both morality and religion, but now it is time to talk of property. Everything that is a property must have an owner, though ownership may be of things other than property, such as rights. However, in my investigation of the concept, I shall confine myself to the ownership of property, which is what 'ownership' in the commonest sense implies. For I want to discover, if I can, what it is actually like to own things, that is, what difference it makes to us whether we own something or not. But of course 'us' includes 'me'; and I am conscious that my investigation is necessarily conducted from my own point of view, and laden with my own prejudices. Properly scientific readers may therefore find it lacking in objectivity, indeed often lapsing into undisguised autobiography. I can apologise to them for this weakness but not, I fear, change its character.

I shall consider whether the private ownership of property can be judged an intrinsically good thing, or, on the contrary, whether having everything in common with other people is an ideal to which we should aspire, and whether common or shared ownership can have the same 'feel' about it as private ownership. And, crucially, I shall consider what is entailed by a thing having no owner, 'orphan' things, such as is the planet itself.

Lawyers have found it difficult to arrive at a definition of ownership. Ownership, they insist, is 'of things'. But since any possible object of discourse, from a pig to a philosophy of life, from a horse to a horoscope may be referred to as a 'thing', this does not help very much. In old-fashioned legal terminology, 'things' were called

[1] Maria Edgeworth, *The Absentee* (1812) ch. 2.

'choses', and were divided into two kinds, 'choses in possession', which are material objects such as buildings or jewellery, and 'choses in action' which are rights that can be enforced by legal action. In this chapter, I shall raise the question whether absolutely any 'thing' can be owned; and without giving a definitive answer to that question, I shall at least delimit the kind of 'things' ownership of which I shall be exploring, and rule out certain others, as outside the scope of this enquiry, which will be concerned, for the most part, with 'choses in possession'.

Whatever the difficulties of defining ownership, what is certain is that ownership is a complicated relationship between people, in that, if you claim to own something, you as owner are claiming rights which other people must respect. Now to talk of rights is at once to talk in legal, or quasi-legal terms. I am perfectly aware that philosophers and politicians talk of 'natural', or 'inalienable' rights, and though we now have the Human Rights Act on the Statute Book, there is no definitive list of such rights, nor any intelligible answer to the question how they came into being. For in normal language, if I claim a right, I am implying that this right has been conferred on me either by law or in virtue of some conventional relationship, such as being your pupil, your client, your customer or your spouse. To appeal to natural or human rights thus seems to me to be to use a metaphor, though one that is easily intelligible; it supposes a natural or moral law that lies behind, or is superior to, positive law. Thus Sophocles makes Antigone declare to the tyrant Creon that she is entitled by a greater law than his to throw dust on the body of her brother. In modern parlance, she is claiming that it is a human right that people should not be prevented from burying their dead according to their own conventions of decency. Broadly speaking, then, the idea of a human right is used to define what should be the proper relationship between an individual and the state of which he is a member. Ownership confers rights, because there are ways of acquiring things that are recognised by law, or at least by convention (I shall return to this in the next chapter), and it would be a violation of those rights if the owner were to be deprived, whether by another person or by the state itself, of the enjoyment of what is his.

Ownership, it should be observed, is not the only thing that confers rights: I may have a right of way or other right of access to land created by legally recognised usage that is undoubtedly yours, not mine. But this particular right must derive from some local

byelaw, to which I can appeal if you accuse me of trespass. A jealous wife may claim that she has a right to know where her husband has been passing his time, because (probably unwisely) she regards the relation between husband and wife as necessarily entailing total openness. In a civilised society, that is, one where the rule of law is established, the law will protect not only a person, but his property; thus the concept of ownership and that of law are closely linked, indeed are central to such a society. If, without my consent, you take something that is owned by me you have committed theft, a criminal offence in any society that we would consider civilised; and if there were no such thing as ownership, there would be no such offence as theft. Historically, we may assume that laws have developed largely in order to define the rights of ownership as distinct from mere possession, that is, what you actually have about your person. As A.M. Honoré put it 'A people to whom ownership was unknown, or who accorded it a minor place in their arrangements, who meant by *meum* and *tuum* no more than "what I (or you) presently hold" would live in a world that was not our world'.[2] And he later says 'When children understand that Christmas presents go not to the finder but to the child whose name is written on the outside of the parcel . . . we know they have at least an embryonic idea of ownership'.[3] It is this idea that I want to explore.

But, at the outset, we should recognise that '*meum*' and '*tuum*', 'his', 'our', 'their', though they are known in the grammar books as possessive pronouns (and sometimes referred to in America as 'ownership pronouns'), are not by any means always used to indicate ownership or possession. We speak naturally and intelligibly of 'my mother', 'my psychiatrist', 'my children' without in the least implying ownership. There is indeed a number of different uses of the possessive pronoun which absolutely cannot denote ownership. Take, for example, 'my country': while it is perfectly proper to refer to the ownership of pieces of land by the use of the possessive pronoun, as in 'my garden' or 'your field', to refer to 'my country' has no such connotation. Yet it may be used rhetorically as if it had. When the Countryside Bill was going through parliament in the year 2000, supporters of the Bill held up banners declaring 'The country

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[2] A.M. Honoré, 'Ownership', ch. 5 in A.G. Guest (ed.), *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford 1961) p. 107.

[3] Ibid., pp. 114–15.

is yours' and 'Give us back our country'. These slogans involved not only two senses of 'country', but two senses of 'your'. To demand the 'right to roam' is a rhetorical device aiming to suggest that 'property is theft', and yet at the same time that the countryside is owned by the ramblers.

Let us return to the legal insistence that ownership is of things. This, as we have already seen, is hopelessly inclusive. But at least the proposition was put to powerful use in the Act of Parliament of 1833, which prohibited the ownership of living persons as property, the Act which abolished slavery. 'Things' do not and may not lawfully include people. In the same year, across the Atlantic, William Lloyd Garrison formed the American Anti-Slavery Society, and in 1854 he wrote:

> I am a believer in that portion of the American Declaration of Independence in which it is set forth, as among self-evident truths, 'that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness'. Hence, I am an abolitionist. Hence I cannot but regard oppression in every form – and, most of all, that which turns a man into a thing – with indignation and abhorrence.[4]

A fellow human being is not a thing. But things may be living or inanimate; it is only human beings who are not things. I may properly enjoy full ownership of my pets.

Increasingly, moreover, 'things' that can be owned include non-physical objects, such as patents, copyright, bright ideas and the research results that are the outcome of such ideas, 'intellectual' as well as material property. Ownership of property entails, among other things, the exclusive right to the use of the property by the owner, its sale if he wishes to sell, and, as we have seen, the possibility of the charge of theft (or in the case of copyright, plagiarism or piracy) against someone who unlawfully gains access to it. All these are 'choses in action'.

It is easy to see how the concept of intellectual property arose, by analogy with material property such as land, building or jewellery. Patenting was introduced in Britain three or more centuries ago, and the law governing intellectual property has grown more and more complex and controversial since the Copyright Act of 1956.

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[4] W.L. Garrison (1854), *The Liberator*, 4 July.

Many people still think of the world of ideas as a world within which everything should be freely shared, especially since, if I share my idea with you, or with the world at large, I am not myself deprived of it, or its use. Moreover it seems (or seemed to the Coalition government in legislation proposed in 2012, but, at the time of writing yet to be enacted) that authors and composers have a duty to help to educate the young by allowing schools and colleges free access to their works. But authors and composers as well as inventors have to live, and it would be impossible for them to do so, if the concept of intellectual property were to be abolished. More worryingly still, freedom of information legislation threatens to allow open access to research in progress at university laboratories to anyone seeking it, regardless of the danger that incomplete or misleading results might thus be published. It is to be hoped that this legislation, also proposed in 2012, will be appropriately limited.

One way or another, with the growth of information technology, as well as the insistence on transparency in public life, the enforcement of laws designed to protect the ownership of intellectual property becomes increasingly difficult, some would say impossible. At any rate in what follows, I shall not be pursuing the issues that arise in connection with intellectual property rights. I am concerned solely with the ownership of material objects. This is the primary sense of 'ownership', going along with the primary sense of 'property', and it is this primary sense that I shall attempt to investigate further in the next few chapters.

Within this class of ownership, however, there are two particular cases which give rise to controversial questions, about which I must say something here. The first is the question whether we can be said to have ownership of our own bodies, while we are alive. A body is, after all, a physical or material object, though of an exceedingly complex kind. We have seen that we may not have ownership of other people's bodies while they are alive. Such ownership is slavery, officially abolished in the mid-nineteenth century. Slavery turned a man into a thing, and in doing so deprived him of freedom to make his own decisions and choices. Those who are not slaves retain these attributes: they can each say 'I am my own person'. But we have seen that the use of the possessive pronoun does not necessarily entail ownership; and there seems something irredeemably odd about saying that I own my body, though it is undeniably mine, not yours. The oddity lies, I believe, in the fact that I am too closely connected

to my body for it to be my property. I am my body: there is no 'I' separate from 'it'.

If I were René Descartes, or any other philosophical dualist, I might not find the concept of ownership of my body so strange. For Descartes famously believed that the only thing whose existence he could not doubt was the existence of himself as a thinking or doubting entity, a *res cogitans* as opposed to a *res extensa*, or physical object occupying space. 'I think, therefore I am.' Everything else in the world was different from this central 'I', because it was subject to Cartesian doubt, and could be imagined away as a delusion under the spotlight of radical scepticism. Mind and body were thus two completely different kinds of substance, mysteriously (and implausibly) conjoined through the rarified spirituous Pineal gland. Other animals than man were totally physical, moving mechanically, according to mechanical laws, incapable of thought or feeling. Man alone was essentially a rational, thinking being, conscious of his own self, and distinct from his body. Christianity, and especially the Platonism that exercised so powerful an influence on the early Fathers, encouraged such a belief. For Platonism taught that the soul of man was a temporary inhabitant of the body, longing to escape its limitations and tribulations, but, at least in aspiration, in control of the body while its sojourn on earth lasted. I, my rational thinking self, am like a leaseholder, with full rights of possession of the habitation which for the time being I occupy.

By now, however, it is hard to defend such dualism. For one thing, we cannot escape our post-Darwinian place in history. We, most of us, have no inclination to divorce ourselves completely, as Descartes did, from other animals. We know how much of our DNA, out of which our life is built up, is shared by non-human living organisms. Moreover we know, though still very imperfectly, how our brains function with our central nervous system, to give rise to physical feelings, emotions, memories and thoughts (all of which were classed by Descartes as '*pensés*', 'thoughts', that which I discover by introspection and which can be articulated in language). And brains are physical objects. For me, therefore, my body, including my brain, is my way of being-in-the-world, my entrée into the universe. I cannot think of it as one of my possessions, just one among others.

English law confirms this common-sense view. If my grandson comes in, pouring blood, and says he has been mugged, we know that mugging is made up of two elements, assault and theft. He has

lost a tooth in the attack, but he does not count this as theft. He has also lost his mobile phone; and this was the theft element of the crime. He did not own his tooth in the same way as he owned his phone. In the case *R v Bentham*,[5] the Appellate Judges in the House of Lords (now the Supreme Court) considered whether a person who concealed his hand under his jacket to give the impression that he was concealing a firearm there was rightly charged with being in possession of an imitation firearm, contrary to subsection 17(2) of the Firearms Act 1968. The original trial judge held that a person could be convicted on those facts, and the Court of Appeal upheld the decision. The House of Lords, however, reversed the decision of the Court of Appeal, and quashed the conviction. Lord Justice Bingham, summing up, said 'One cannot possess something which is not separate and distinct from oneself. An unsevered hand or finger is part of oneself. A person's hand or fingers are not a thing'. The jurist J.E. Penner also argues that all property rights are rights to things that are only contingently connected to an individual and are not intrinsic to a human being. The idea of separability is central to his concept of what constitutes a 'thing', and may therefore be the subject of ownership.[6]

The case of a severed hand or finger is, by implication, a different matter; and this is the second kind of case I must briefly consider (though only to rule it out from detailed examination), for it has become extremely controversial in recent years. In the invented case of my grandson, above, it could be argued that his tooth, once it had been knocked out, became his property over which he had rights of ownership, as much as over his mobile phone. The legal question, which is now much disputed, is this: who owns biological material, such as a tooth, derived from a particular individual who is its source? This question may arise, whether the material is a severed limb, an organ, a blood sample, or a sample of DNA. All such biological material has become enormously important in medical research, in organ transplant and in research carried out commercially by pharmaceutical companies, as well as in criminal investigations and in issues about proof of paternity. The question is whether the source of the biological material can claim ownership rights over

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[5] [2005]UKHL18; [2005]WLR1057(HL).

[6] See J.E. Penner, *The Idea of Property* (Oxford University Press, Oxford 1997) p. 111.