

## THE NATURE AND SIGNIFICANCE OF THE RIGHT TO BODILY INTEGRITY

JONATHAN HERRING\* AND JESSE WALL\*\*

**ABSTRACT.** *This article seeks to explain and explore the concept of bodily integrity. The concept is often elided with autonomy in the case law and the academic literature. It argues that bodily integrity is non-reducible to the principle of autonomy. Bodily integrity relates to the integration of the self and the rest of the objective world. A breach of it, therefore, is significantly different to interference in decisions about your body. This explains why interference with bodily integrity requires justification beyond what will suffice for an interference with autonomy. It also explores how this understanding of bodily integrity assists in understanding disability, gender and separated bodily material.*

**KEYWORDS:** *bodily integrity, autonomy, capacity, medical law, disability, gender.*

### I. INTRODUCTION

This article looks at the concept of bodily integrity, particularly as understood in the context of medical law. It has been described by Hale L.J. as “the most important of civil rights”<sup>1</sup> and as “the first and most important of the interests protected by the law of tort”.<sup>2</sup> Despite its eminence and regular appearance in case law, we will argue it is seriously under analysed.<sup>3</sup> Cases where reference is made to the concept are contradictory, and it is very hard to find any definitive legal definition of the concept.

We think this is unfortunate because the concept, while complex, is helpful and important. In this article, we set out the current confused state of the English case law on bodily integrity and provide a sounder definition and

\* Exeter College, Oxford. Address for Correspondence: Exeter College, Oxford, OX1 3DP, UK. Email: jon.herring@exeter.ox.ac.uk.

\*\* Faculty of Law, University of Otago. Address for Correspondence: Faculty of Law, University of Otago, PO Box 56, Dunedin, New Zealand. Email: jesse.wall@gmail.com.

<sup>1</sup> *R. (on the application of Justin West) v The Parole Board* [2002] EWCA Civ 1641; [2003] 1 W.L.R. 705, at [49], per Hale L.J. in her dissenting judgment.

<sup>2</sup> *Parkinson v St. James NHS Trust* [2001] EWCA 530; [2002] Q.B. 266.

<sup>3</sup> Although E. Wicks, *The State and the Body* (Oxford 2016), ch. 1 and J. Wall, *Being and Owning: The Body, Bodily Material and the Law* (Oxford 2015) provide very helpful analysis of the understanding of the body in medical thought.

rationale for the concept. We contrast two conceptions of the right to bodily integrity; one that is reducible to the principle of bodily autonomy and one that is non-reducible to the principle of bodily autonomy. We argue that in adopting the latter conception – “bodily integrity as the integrated body” – we are able to provide some clarity as to the state of the right in the law, and identify some welcome implications for adopting this non-reductionist view. In particular, our conception of the right to bodily integrity is able to explain the legal structure of the right, the normative weight of the right, and the ambiguous boundaries of the right.

## II. PRELIMINARY DEFINITIONS OF AUTONOMY AND BODILY INTEGRITY

It is widely acknowledged that autonomy plays a central role in medical law.<sup>4</sup> But the emphasis put on autonomy is misleading. Certainly it is misleading to talk of a right of a patient having a positive right to make decisions about what should happen to their body. It is clear there is a significant difference between the legal responses to cases where a patient is consenting to treatment and cases where a patient is refusing treatment. If competent, apart from a few well-defined exceptions, a patient’s exercise of autonomy to refuse treatment must be respected. However, a competent patient has no right to demand treatment does not have to be respected. A medical professional need not, indeed arguably may not, provide treatment that they believe to be harmful to a patient.<sup>5</sup> As Lord Phillips M.R. in the Court of Appeal explains in *R. (on the application of Burke) v GMC*:

The relationship between doctor and patient usually begins with diagnosis and advice. The doctor will describe the treatment that he recommends or, if there are a number of alternative treatments that he would be prepared to administer in the interests of the patient, the choices available, their implications and his recommended option. In such circumstances the right to refuse a proposed treatment gives the patient what appears to be a positive option to choose an alternative. In truth the right to choose is no more than a reflection of the fact that it is the doctor’s duty to provide a treatment that he considers to be in the interests of the patient and that the patient is prepared to accept.<sup>6</sup>

So the weight attached to autonomy depends on whether we are dealing with a case to consent to treatment or refuse it. In brief the patient has the right to refuse treatment, but not to demand it. To take a homely example, the patient who exercises their autonomy to decide not to have cosmetic surgery on their nose can be confident that their autonomy will be respected. Not so the patient who seeks such surgery. More dramatically

<sup>4</sup> C. Foster, *Choosing Life, Choosing Death: The Tyranny of Autonomy in Medical Ethics and Law* (Oxford 2009), ch. 1.

<sup>5</sup> Other reasons, such as the need to ration health care resources, are at play here.

<sup>6</sup> *R. (on the application of Burke) v GMC* [2005] EWCA Civ 1003; [2006] Q.B. 273, at [51].

the patient seeking to refuse treatment so that they can die can be confident their wishes will be respected, not so the patient seeking to be given treatment so that they die.

This distinction can be explained in various ways. For example, it can be explained in terms of the rights of the medical practitioner. Giving a patient the right to consent to treatment proposed by the medical professional has little impact on the professional's rights. Giving the patient the right to demand treatment that the health care professional does not want to give leads to an interference with the professional's rights.

However, there is another argument of greater significance for the purposes of this article. That is that giving a patient treatment they do not want is interfering with not only their autonomy but also their right to bodily integrity. While refusing treatment to a patient who wishes it is interfering in their autonomy alone. The right to bodily integrity is seen as enhancing and giving a special strength to an autonomy claim, making it particularly hard to justify an interference. It is here, in explaining the distinction between the exercise of autonomy to refuse or consent to treatment, that the right to bodily integrity becomes particularly relevant.

Moving to bodily integrity, we will be proposing a fuller definition later in this article, but for now we set out what we take the right to bodily integrity to refer to. In short it is the right not to have your body touched or your body interfered with without your consent. Walker L.J. in *Re A (Conjoined Twins)* expressed the principle in this way:

Every human being's right to life carries with it, as an intrinsic part of it, rights of bodily integrity and autonomy – the right to have one's own body whole and intact and (on reaching an age of understanding) to take decisions about one's own body.<sup>7</sup>

As David Feldman in his *magnum opus*, *Civil Liberties and Human Rights in England and Wales*, puts it the right to bodily integrity is "a right to be free from physical interference".<sup>8</sup> This "covers negative liberties: freedom from physical assaults, torture, medical or other experimentation, immunization and compelled eugenic or social sterilization, and cruel or degrading treatment or punishment. It also encompasses some positive duties on the state to protect people against interference by others".<sup>9</sup>

We might contrast this with what we will call bodily autonomy, which is any exercise of autonomy (any choice or decision) that it is to do with the body. We suggest that in some cases the courts have used the term "bodily integrity" when the term "bodily autonomy" may be clearer. Although in the second part of this article we will discuss the complexities involved in distinguishing these concepts.

<sup>7</sup> *Re A (Conjoined Twins)* [2001] Fam. 147, at 258, per Walker L.J.

<sup>8</sup> D. Feldman, *Civil Liberties and Human Rights in England and Wales*, 2nd ed. (Oxford, 2002), 241.

<sup>9</sup> *Ibid.*, at p. 241.

We will explore the concept of bodily integrity in more detail later. At this point, we raise the question we shall be exploring later of the relationship between bodily integrity and autonomy. Is a claim of breach of bodily integrity simply a claim that a particularly serious breach of autonomy has occurred, or is it a different kind of claim? Closely connected to that question is the role for bodily integrity in cases of people who lack capacity. If it is no more than a subset of autonomy, it is not clear it has much relevance to the treatment of those unable to exercise autonomy.

### III. THE COURTS

Although the concept of bodily integrity has played a significant role in the academic literature, it has received relatively little attention in the courts. In this section we explore how the concept has been used by the judiciary.

#### *A. The Nature and Existence of the Right*

The first point to make is that it is clear that the right to bodily integrity (however that is understood) is an important part of the law. It was referred to in one of most significant medical law cases of recent times: *Montgomery v Lanarkshire Health Board*.<sup>10</sup> The Supreme Court referred to the concept in its key reformulation of the law:

An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments.<sup>11</sup>

The duty to advise a patient, to explain and warn about the treatment proposed and its implications for that patient's bodily integrity and health is a component of the doctor's duty of care to the patient. The primacy of the principles of human rights over our own bodies and of patient autonomy is now universally accepted. Although even in that significant quotation it is apparent the concept of the right to bodily integrity is somewhat under analysed. While on any reasonable definition of the right to bodily integrity, treating a patient without consent will breach that right, it is not clear that a failure to disclose a risk is sufficient to vitiate consent. Indeed the fact their Lordships assessed the case as one involving negligence in failing to disclose a risk, rather than battery in there being no consent, indicates they did not (rightly or wrongly) perceive it to be such a case. This quote appears to have merged the ideas of an interference with

<sup>10</sup> *Montgomery v Lanarkshire Health Board* [2015] UKSC 11; [2015] 1 A.C. 1430.

<sup>11</sup> *Ibid.*, at para. [87].

bodily autonomy and an interference with bodily integrity, as defined above.

Indeed such a blurring between bodily autonomy and bodily integrity is a common aspect of the case law. For example, Mrs. Justice Butler-Sloss in *NHS Trust A v M; NHS Trust B v H* stated, “Article 8 [of the European Convention on Human Rights] protects the right to personal autonomy, otherwise described as the right to physical and bodily integrity.”<sup>12</sup> Another example of the conflation with autonomy and bodily integrity can be found in the speech of Arden L.J. in *Evans v Amicus Healthcare Ltd.*<sup>13</sup> The case concerned a dispute over what should happen to frozen embryos created with the gametes of a couple (Ms. Evans and Mr. Johnson) who had since separated. Ms. Evans still wanted to use the embryos to become pregnant, while Mr. Johnson sought their destruction. Arden L.J. stated:

It is common ground that article 8 [of the European Convention on Human Rights], which has already been set out by Thorpe and Sedley LJ, is engaged because Ms Evans’s bodily integrity (private life) is affected. I do not consider that she could assert any right to family life with a future child whose embryo has yet been transferred to her. However, I agree with the judge that, by regulating the circumstances in which Ms Evans can have an embryo transferred to her, the state has interfered with Ms Evans’s private life for the purposes of article 8.<sup>14</sup>

This statement seems to elide the concepts of bodily integrity and private life. The suggestion that a right to bodily integrity would be interfered with by a refusal to allow her to use the embryos would not be correct if the understanding of bodily integrity proposed in our preliminary definition was used. It seems this is an example of where bodily integrity is being interpreted to mean bodily autonomy. Even more so because Thorpe and Sedley L.J. in fact saw the refusal of treatment as an interference with the right to respect Ms Evans’s private life. They made no mention of bodily integrity.

A more sophisticated analysis of bodily integrity might be found in the Court of Appeal’s judgment in *R. (on the application of Nicklinson) v Ministry of Justice*,<sup>15</sup> where referring to argument of counsel for Tony Nicklinson (Mr. Bowen), the Court of Appeal held that there was a common law fundamental right of autonomy:

We do not underestimate the importance of these concepts in the structure of the law when we say that we have some doubts whether autonomy and dignity

<sup>12</sup> *NHS Trust A v M; NHS Trust B v H* [2001] Fam. 348, at [41], quoted with apparent approval in *Re Y and Z (Children)* [2013] EWHC 953 (Fam).

<sup>13</sup> *Evans v Amicus Healthcare Ltd.* [2004] EWCA Civ 727; [2005] Fam. 1.

<sup>14</sup> *Ibid.*, at para. [108].

<sup>15</sup> *R. (on the application of Nicklinson) v Ministry of Justice* [2013] EWCA Civ 961; [2015] 1 A.C. 657 (upheld on appeal: [2014] UKSC 38; [2015] A.C. 657).

can properly be described as independent common law rights rather than values or principles which inform more specific common law rights, such as the right to bodily integrity and privacy.<sup>16</sup>

The Court of Appeal did not go on to specify the way in which the right to bodily integrity was a more specific right than a more general claim to autonomy. It may well be they had in mind the kind of distinction between bodily integrity and bodily autonomy presented in our preliminary definition.

As we suggest in our preliminary definition, the proper place for the right to bodily integrity in medical law is in cases where a patient is refusing or withdrawing consent to treatment, but it does not apply to exercises of autonomy that do not directly involve interference with the body. This is how it was used by Collender J. in *Connolly v Croydon Health Services NHS Trust*.<sup>17</sup> He quoted the Supreme Court of Canada in *Ciarlariello v Schacter*, which had found that “the patient’s right to bodily integrity provides the basis for the withdrawal of a consent to a medical procedure even while it is underway”.<sup>18</sup>

Such an understanding might also be apparent, although less explicit in *The Mental Health Trust v DD*,<sup>19</sup> where the Court of Protection ordered the compulsory sterilisation of a 36-year-old woman who lacked mental capacity to make the decision. The Court of Protection found that “[t]he ethical, legal and medical issues” that arose were “self-evidently of the utmost gravity” and “profoundly impact[ed] upon DD’s personal autonomy, privacy, bodily integrity, and reproductive rights”.<sup>20</sup>

While authorising the treatment it was clear the decision was seen as requiring a particularly strong justification, more so than an issue which did not directly involve bodily interference. Reference was made to it being an “exceptional case” and the kind of order being made appropriate “in only the most extreme circumstances”.<sup>21</sup>

### B. The Scope of the Right to Bodily Integrity

Lord Browne-Wilkinson in *Airedale NHS Trust v Bland*<sup>22</sup> summarised the key question before their Lordships in this way: “the correct answer to the present case depends on the extent of the right to continue lawfully to invade the bodily integrity of Anthony Bland without his consent”.<sup>23</sup> Notably this indicates that interference with bodily integrity is not simply “entering” a body but remaining inside the body. Indeed, the fact that leaving the feeding tube

<sup>16</sup> *Ibid.*, at para. [50].

<sup>17</sup> *Connolly v Croydon Health Services NHS Trust* [2015] EWHC 1339 (QB).

<sup>18</sup> *Ciarlariello v Schacter* [1993] 2 SCR 119, at [136].

<sup>19</sup> *The Mental Health Trust v DD* [2015] EWCOP 4.

<sup>20</sup> *Ibid.*, at para. [5].

<sup>21</sup> *Ibid.*, at para. [5(iii)].

<sup>22</sup> *Airedale NHS Trust v Bland* [1993] A.C. 789 (HL).

<sup>23</sup> *Ibid.*, at p. 883, per Lord Browne-Wilkinson.

inside his body was “invasive” was relied upon to distinguish withdrawal of artificial food and nutrition from withholding feeding by means of a spoon. Leaving the feeding tube inside his body was “invasive”<sup>24</sup> and hence deemed to be medical treatment and its withdrawal could be justified if not promoting his best interests. Such an approach is consistent with the offence of rape in the Sexual Offences Act 2003, which uses a definition of “penetration” that covers not only the initial act of entering victim’s body, but also the ongoing being inside the victim.<sup>25</sup>

A trickier issue is drawing the borders of a right to bodily integrity. Does it require an entering into the skin of the body or simply a touching? In *R. v Kalam*<sup>26</sup> a punch in the face was described by the Court of Appeal as “a gross intrusion into the victim’s privacy and bodily integrity”,<sup>27</sup> suggesting a touching engages the right. Similarly, in *R. v Rodgers*<sup>28</sup> the Supreme Court of Canada found that the taking of a fingerprint and a DNA sample both involved a degree of invasion of bodily integrity. Although in neither of these cases was there a detailed analysis of the issue it seems the authorities suggest that a touching is sufficient to engage the right.<sup>29</sup>

That said, in s. 18 of the Offences Against the Person Act 1861, we see a reference to “wound[ing] or caus[ing] any grievous bodily harm”. A wound in this context is regarded as breaking through both layers of skin.<sup>30</sup> Notably the offence regards a wound as equivalent to causing grievous bodily harm, even if the wound would not be regarded as serious (e.g. a scratch). This suggests the interference with the skin is regarded as a more serious interference with bodily integrity than a touching. This distinction also played a role in the reasoning in the controversial decision in *Brown*.<sup>31</sup> There their Lordships held that although the consent of the victim could provide a defence to a charge of battery (a mere touching), it was insufficient to provide a defence to a charge involving actual bodily harm or a more serious injury, unless there was an especial justification based in public policy for allowing the conduct. One reading of this case<sup>32</sup> is that an interference with bodily integrity requires a stronger justification than a mere touching and that the consent of the victim is insufficient to justify that.<sup>33</sup>

<sup>24</sup> *Ibid.*, at p. 809.

<sup>25</sup> Sexual Offences Act 2003, s. 79(2).

<sup>26</sup> *R. v Kalam* [2013] EWCA Crim 452.

<sup>27</sup> *Ibid.*, at para. [13].

<sup>28</sup> *R. v Rodgers* [2006] 1 S.C.R. 554, at [39].

<sup>29</sup> In *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 A.C. 962, at [60], it was stated in obiter that for the purposes of battery there is no need to show that the victim “suffered anything other than the infringement of [their] right to bodily integrity”.

<sup>30</sup> *JCC v Eisenhower* [1984] Q.B. 331.

<sup>31</sup> *R. v Brown* [1994] 1 A.C. 212.

<sup>32</sup> An extended discussion of this case can be found in J. Herring, “*R. v Brown* (1993)” in P. Handler, H. Mares and I. Williams (eds.), *Landmark Cases in Criminal Law* (Oxford, 2017).

<sup>33</sup> The case could also be seen as a debate over the relationship between autonomy and dignity, a topic which requires a more extensive discussion than is possible here.

As this last point suggests, the law appears to accept that there can be less or more serious invasions of bodily integrity. In *XCC v AA*, Munby J. held:

I have said that to force a marriage on an incapacitous person is a gross interference with his or her autonomy. Its concomitants, sexual relations and, as a foreseeable consequence, pregnancy, constitute not only a breach of autonomy but also bodily integrity, perhaps one of the most severe that can be imagined, and the consequences may be lifelong.<sup>34</sup>

Although perhaps not beyond question, it seems Munby J. is suggesting that non-consensual sex is one of the most severe interferences with bodily integrity that can be imagined. If that is the correct interpretation, it would certainly be one that would receive wide-ranging support. The fact rape carries a life sentence indicates that the interference involved in bodily integrity in rape is more serious than, the offence of causing grievous bodily harm,<sup>35</sup> for example.

Similarly there are several occasions where unwanted pregnancy has been seen as a breach of bodily integrity. Parker J. in *YLA v PM and MZ* states: “[P]eople with disabilities also have the right to have their bodily integrity and their autonomy protected. And, as I have said elsewhere, to inflict pregnancy and childbearing on a person who cannot consent to that state is about as gross a physical interference as can be imagined.”<sup>36</sup>

Lord Millett in *McFarlane v Tayside Health Board*,<sup>37</sup> considering a claim that conception occurred following negligence in the context of sterilisation, stated: “The *damnum* occurred when Mrs McFarlane conceived. This was an invasion of her bodily integrity and threatened further damage both physical and financial.”

The issue of bodily integrity also arose in the infamous conjoined twins case (*Re A (Conjoined Twins)*).<sup>38</sup> Ward L.J. commented that:

The only gain I can see is that the operation [to separate the twins] would, if successful, give Mary the bodily integrity and dignity which is the natural order for all of us. But this is a wholly illusory goal because she will be dead before she can enjoy her independence and she will die because, when she is independent, she has no capacity for life.<sup>39</sup>

Interestingly he also concluded that the operation had “to be seen as an act of invasion of Mary’s bodily integrity and, unless consent or approval [were to be] given for it, it [would constitute] an unlawful assault upon her”.<sup>40</sup>

<sup>34</sup> *XCC v AA* [2012] EWHC 2183 (COP), at [72].

<sup>35</sup> The offence of inflicting injury without a weapon under s. 20 of the Offences Against the Person Act 1861 has a seven-year maximum sentence. The offence wounding with intent to do grievous bodily harm under s. 18 carries a maximum sentence of life.

<sup>36</sup> *YLA v PM and MZ* (2003) 35 EHRR 1, at [157].

<sup>37</sup> *McFarlane v Tayside Health Board* [2000] 2 A.C. 59 (HL), 107G, per Lord Millett.

<sup>38</sup> *Re A (Conjoined Twins)* [2001] Fam. 147.

<sup>39</sup> *Ibid.*, at p. 184, per Ward L.J.

<sup>40</sup> *Ibid.*, at p. 189, per Ward L.J.



His analysis appeared to be, therefore, that the conjoined state amounted to an interference in bodily integrity, but the operation to end that conjoined state would also amount to an interference in bodily integrity. No doubt that explains his remark that “the principle of bodily integrity, which is fundamental to the court’s approach to these problems, is difficult to apply in the case of conjoined twins”.<sup>41</sup> Interestingly Walker L.J.’s emphasis was on what he regarded as the interference with bodily integrity their condition created, rather than any interference the operation would cause. According to Walker L.J., “By a rare and tragic mischance, Mary and Jodie ha[d] both been deprived of the bodily integrity and autonomy which [was] their natural right”.<sup>42</sup> He reasoned that there was “a strong presumption that an operation to separate them would be in the best interests of each of them”.<sup>43</sup> What is interesting about these observations is the notion one can be born into a state of having one’s bodily identity interfered with.

Rights to bodily integrity are now commonly expressed by English courts in terms of rights under the European Convention on Human Rights (ECHR). In *R. (on the application of DJ) v Mental Health Review Tribunal*,<sup>44</sup> Munby J. explained that “Liberty, autonomy and bodily integrity are interests which traditionally have received a high degree of protection under the common law and are now afforded the added protections conferred by the Convention”.

It seems to be generally accepted that the right to respect for private and family life protected by Article 8 of the Convention includes a right to protection of bodily integrity.<sup>45</sup> The European Court of Human Rights in *Pretty v United Kingdom* stated: “As the Court has had previous occasion to remark, the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person.”<sup>46</sup>

Hence in *YF v Turkey*<sup>47</sup> a forced gynaecological examination while in police custody was found to clearly breach Article 8 rights.

But as with the English case law, the case law of the ECHR blurs the distinction between bodily autonomy and bodily integrity. Judge Greve in his separate opinion in *Price v UK* held:

[T]o prevent the applicant, who lacks both ordinary legs and arms, from bringing with her the battery charger to her wheelchair when she is sent to prison for one week, or to leave her in unsuitable sleeping conditions so that she has

<sup>41</sup> *Ibid.*, at p. 249, per Walker L.J.

<sup>42</sup> *Ibid.*, at p. 258, per Walker L.J.

<sup>43</sup> *Ibid.*, at p. 259, per Walker L.J.

<sup>44</sup> *R. (on the application of DJ) v Mental Health Review Tribunal* [2005] EWHC 587 (Admin), at [132].

<sup>45</sup> *Nottinghamshire Health NHS Trust v RC* [2014] EWHC 1136 (COP); *B v Responsible Medical Officer, Broadmoor Hospital* [2005] EWHC 1936 (Admin), at [75]; *NHS Trust A v M*; *NHS Trust B v H* [2001] Fam 348.

<sup>46</sup> *Pretty v UK* ECHR 2002-III 155, at [61], citations omitted.

<sup>47</sup> *YF v Turkey* (Application no. 24209/94) (ECtHR, 22 July 2003).

to endure pain and cold – the latter to the extent that eventually a doctor had to be called – is in my opinion a violation of the applicant’s right to physical integrity.<sup>48</sup>

Notably here there was not touching or direct interference with the body of the individual, yet this was regarded as an interference in bodily integrity.

The right to bodily integrity is also protected by Article 3 of the ECHR which protects the right not to be subjected to torture or to inhuman or degrading treatment or punishment.<sup>49</sup> Article 3 extends beyond conduct which breaches bodily integrity,<sup>50</sup> where rights to bodily integrity are breached it seems particularly likely that Article 3 will be invoked. A good example may be *A v UK*<sup>51</sup> where physical chastisement of a child was found to breach Article 3, while it would be unlikely other forms of disciplining a child, such as writing lines or telling off would have invoked Article 3.

### C. Conclusion on Discussion of the Case Law

It is clear from this discussion that the courts place considerable store by the concept of the right to bodily integrity, protected both as a common law right and under the ECHR. However, there is little guidance on the content or nature of the right. In some cases it seems indistinguishable from a general autonomy right, and it is far from clear what the contours of the right are.

## IV. THE INSTRUMENTAL BODY AND THE INTEGRATED BODY

Given the inconsistency with which courts use “bodily integrity” and “autonomy”, we aim to here clarify the relationship between these two distinct concepts. To exercise autonomy is to identify standards, preferences and values and to have your own actions and events in your life to conform to those standards, satisfy those preferences and realise those values.<sup>52</sup> The value of autonomy may general negative duties of non-interference or positive obligations to secure for another access to a range of morally valuable options.<sup>53</sup> *Bodily* autonomy therefore protects a person’s capacity to make his or her own decisions *in relation to his or her body*. The right to bodily

<sup>48</sup> *Price v UK* ECHR 2001-VII 153, 169, per Judge Greve.

<sup>49</sup> Art. 3 of the EU Social Charter is even more explicit in protecting bodily integrity: “Everyone has the right to respect for his or her physical and mental integrity.”

<sup>50</sup> *Gäfgen v Germany* [2010] ECHR 759 (Application no. 22978/05); (2010) 52 EHRR 1 (1 June 2010).  
<sup>51</sup> (1999) 27 EHRR 611.

<sup>52</sup> See e.g. T.L. Beauchamp and J.F. Childress, *Principles of Biomedical Ethics*, 7th ed. (Oxford 2013), 101–02; K. 1, “Autonomy and the Subjective Character of Experience” (2000) 17 *J.Appl.Philos.* 71; C. Mackenzie and W. Rogers, “Autonomy, Vulnerability and Capacity: A Philosophical Appraisal of the Mental Capacity Act” (2013) 9 *Int.J.Law Context* 37, at 42; J. Christman, “Autonomy, Self-Knowledge, and Liberal Legitimacy” in J. Christman and J. Anderson (eds.), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge 2005), 330, 332–36.

<sup>53</sup> J. Raz, *The Morality of Freedom* (Oxford 1986), 373.

integrity is conceptually different. It provides for a person's exclusive use and control over his or her body. At face value, there may seem little, if anything, to this contrast. However, as we will explain here, the right to bodily integrity cannot be reduced to the principle of bodily autonomy because it is premised on a moral basis that cannot be reduced to respect for a person's autonomy. In constructing this contrast between bodily autonomy and bodily integrity, we develop alternative accounts of what the right to bodily integrity is *about*. If the right protects "the body" as a set of physiological systems, then bodily integrity is reducible to bodily autonomy. In comparison, if the right to bodily integrity protects "the body" as the point of integration between a person's subjectivity and the remainder of the objective world, then the right to bodily integrity cannot be reduced to bodily autonomy.

The purpose of constructing these alternative accounts of the right to bodily integrity is to demonstrate that understanding the right as protecting "the point of integration" enables us to then better understand a range of legal issues. We develop here a concept of the right to bodily integrity as an explanatory concept. As we will explain in the remainder of this article, understanding the right as protecting "the point of integration" is better able to explain: the legal structure of the right to bodily integrity, the normative weight of the right to bodily integrity, and the troubled boundaries of the right to bodily integrity in contemporary medical law.

Let us start with considering the temptation to conflate the principle of bodily autonomy with the right to bodily integrity. We conflate these standards because we have learnt to think of ourselves as having two levels of existence. At one level, we possess rational agency. Our agency responds to the world by interpreting it, making judgments about it and then translating our understanding of the world into our conscious engagement with it. It is the rational agent that exercises autonomy; it is our rational agency that is able to identify standards and values and to align our own actions and events in our life to conform to those standards and realise those values.<sup>54</sup>

We also think of ourselves as existing beneath this level, as existing as a series of a complex physiological systems that respond to the world in a linear and causal way.<sup>55</sup> Our agency is our personal or subjective level of existence, and our set of physiological systems is sub-personal or

<sup>54</sup> T.M. Powers, "The Integrity of Body: Kantian Moral Constraints on the Physical Self" in M.J. Cherry (ed.), *Persons and Their Bodies: Rights, Responsibilities, Relationships* (Amsterdam 1999), 213.

<sup>55</sup> M. Merleau-Ponty, *Phenomenology of Perception* (first published 1945, English ed. first published 1962, trans. C. Smith, Abingdon 2002), 84: "Where it was desired to insert the organism in the universe of objects ... it was necessary to translate the functioning of the body into the language of the *itself* and discover, *beneath behaviour, the linear dependence of stimulus and receptor, receptor and Empfinder*" (emphasis added).

objective.<sup>56</sup> The exercise of our rational agency is what gives our lives purpose, value and meaning, and our physiological systems provide the necessary (but ultimately uninteresting) casing for our existence. The relationship between the personal level of existence and the sub-personal can be understood instrumentally; the body (as a series of complex physiological systems) is a tool or instrument of our rational agency.

If this understanding of ourselves and our bodies were correct, the right to have autonomy means the decisions of the rational agent ought to be respected, and since such decisions are exercised through the use and control of the body, it follows that we ought to respect a person's right to bodily integrity. The respect for autonomy necessitates the right to bodily integrity. In this way, bodily integrity is to autonomy what the trenches were to Field Marshal Haig; the right to bodily integrity is the grounded application of the more ethereal duty to respect autonomous decisions.

However, this misrepresents the relationship between autonomy and bodily integrity. When a person infringes upon the bodily integrity of another, the infringement amounts to a disrespect that is broader than disrespect for the person's capacity to live life according to reasons and motivations that one takes as one's own (their autonomy). Here we will explain an alternative view: the right to bodily integrity provides for the exclusive use and control over our own bodies on the basis that our bodies are the "site" and "location" of where our subjectivity engages with the world.<sup>57</sup> Since a person's "subjectivity" (the properties or attributes of a person that ground duties towards them) is engaged by the use of the body, there are good moral reasons – that are broader than moral reasons that are grounded in respect for autonomy – for protecting a person's ability to be the final arbiter as to what is done to their body.

To explain this view, let us revisit the "personal" or "subjective" level of our existence. Our subjective experience of the world is broader than identifying rationally formulated standards, preferences and values. As a range of commentators have explained, a person's basis of moral duties towards them – their "subjectivity" – is a basis that is broader than their capacity for rational decision-making. Accordingly we owe duties to others on the basis of their interest in welfare or preference satisfaction,<sup>58</sup> on the basis of their human dignity and the aggregate of objective human thriving,<sup>59</sup> or on the basis of substantive communitarian or relational accounts of

<sup>56</sup> T. Carman, *Merleau-Ponty* (Abingdon 2008), 83; see also E. Husserl, *Philosophy. Second Book: Phenomenological Investigations on the Constitution: Husserliana IV* (Hague 1952), 161; T. Carman, "The Body in Husserl and Merleau-Ponty" (1999) 27(2) *Phil. Topics* 205, at 206.

<sup>57</sup> Wall, *Being and Owning*, pp. 57–66.

<sup>58</sup> See e.g. W. Donner, "A Millian Perspective on the Relationship Between Persons and Their Bodies" in Mark J. Cherry (ed.), *Persons and Their Bodies: Rights, Responsibilities, Relationships* (Dordrecht 1999), 61.

<sup>59</sup> See e.g. C. Foster, *Human Dignity in Bioethics and Law* (Oxford 2011), 15.

decision-making.<sup>60</sup> We all possess a plurality of moral properties that constitute our subjectivity. Our “personal” or “subjective” level is therefore more nuanced than merely exercising the capacity to formulate rationally motivated standards, preferences and values.

Although our subjectivity has various formulations or components, these all have a single point of convergence: *the body*. Hence, what often makes it difficult to disentangle autonomy from welfare, from human flourishing and so on is that they located in the same place. For example, consider the requirement of consent. We can understand such a requirement on the basis of the autonomy of the patient: to act without consent is to bypass the deliberative process of the person and deny their agency. We can also understand the requirement of consent on the basis of well-being; to act without consent is to act against the person’s own assessment of their well-being (an assessment of their well-being that we ought to defer to).<sup>61</sup> It is straight forward that the requirement of consent follows from our respect for the person, but disentangling whether the requirement of consent follows from their agency or welfare (or both) is much less straightforward. Fortunately, we can understand what consent requires from us without having to disentangle the moral properties that it is premised upon.

Whilst it may be possible to conceptualise autonomy as employing the physiological body merely as an instrument, this is not possible for the remaining components of our subjectivity. This is because our well-being, human flourishing, and relational values are experiential states that are “not just causally connected” to the body but are “identical” to the body.<sup>62</sup> In this way, our subjectivity (beyond simply our rational agency) is a physical subjectivity. States of well-being, states of pain and pleasure, states of flourishing, and states of communing and relating are all states that are located somewhere *in* the chain of physiological systems. Whilst we may be able to abstract our decision-making capacities out of the body, the remaining relevant moral properties of the subject remain as embodied properties. Hence, we can appreciate, for example, not having our eyebrows waxed when we had hoped that they would be is distinct from having our eyebrows waxed against our will. Simply because it is the experience of the waxing that matters (in addition to having your eyebrow waxing agency overlooked). In the same way we can appreciate the difference between the harm suffered in

<sup>60</sup> C. Mackenzie, “Relational Autonomy, Normative Authority and Perfectionism” (2008) 39 *J.Soc.Philos.* 512; J. Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1 *Yale J.L. & Feminism* 7; M.A.L. Oshana, “Personal Autonomy and Society” (1998) 29(1) *J.Soc.Philos.* 81; C. Mackenzie and N. Stoljar (eds.), *Relational Autonomy: Feminist Perspectives on Autonomy, Agency, and the Social Self* (Oxford 2000).

<sup>61</sup> M. Madden Dempsey, “Victimless Conduct and the *Volenti* Maxim: How Consent Works” (2013) 7 *Crim. Law and Philos.* 11, at 20: “This is B’s decision. He’s an adult and can decide for himself whether he thinks the risk is worth it. In considering what to do, I will assume that his decision is the right one for him. After all, he is in a better position than I to judge his own well-being.”

<sup>62</sup> Carman, *Merleau-Ponty*, p. 81: “But suppose body and experience are not just causally connected, but identical.”

being unable to access assisted reproductive technologies and the harm suffered in being denied access to abortion so required to continue to full term with an unwanted pregnancy.

Moreover, even autonomy is better understood as not fitting into the instrumental relationship between the personal (subjective) and the sub-personal (objective). Our perceptions of the world; the formulation of our preferences, standards and values; and our engagement with the world are all mediated through the body.<sup>63</sup> Hence our identity can be mediated through our bodily state. Age, sex, race, disability and so forth may be primarily bodily characteristics, but they impact upon and become closely related to our identity. Further, it is our relationships with others that play a major role in our identity, yet those too are mediated through bodily means, be that speech, sport or sex. This can be why an individual who feels restricted/uneasy/pre-judged by their body can feel such profound unease. There is extensive literature on, for example, older people who seek to disguise or escape from their ageing body.<sup>64</sup> In part because they do not identify their “self” with their ageing body and/or are concerned that others will treat them in negative ways because of their body. Transpeople too record being “trapped” in a body that fails to accord with their identity or their treatment by others. For them, modification of the body is often needed to ensure that the body accords with their own identity, but also so that it relates to other people and is acknowledged by others as reflecting a particular gender.

It follows that it is very difficult to locate the “inner self” (or rational agency) to which we can retreat to and formulate standards, values and preferences.<sup>65</sup> All of these subjective states, which we deem to be morally relevant states, are states that are also identical to the bodily states. This does not, in our view, mean that these subjective states disappear in, or are otherwise eclipsed by, the objective body. In other words, *locating* these subjective states in the body does not amount to *reducing* these subjective states to the body. Whilst it is tempting to locate agency and experience (subjective states) as apart from, and forming only a causal connection with, the body (objective states), our view here is that the body is best understood as the integration of these (subjective and objective) states. There is a nonetheless a risk in promoting the role the (objective) body in the right to bodily integrity that we demote the role of these (subjective) states. However, the reasons for protecting the right to bodily integrity are grounded in our respect

<sup>63</sup> I. Kant, *Lectures on Ethics* (first published 1920, trans. I. Louis, London 1963), 147–48: “... our life is entirely conditioned by our body, so that we cannot conceive of a life not mediated by the body and we cannot make use of our freedom except through the body”.

<sup>64</sup> D. Weiss and F.R. Lang “‘They’ Are Old But ‘I’ Feel Younger: Age-Group Dissociation as a Self-Protective Strategy in Old Age” (2012) 27 *Psychol. Aging* 153.

<sup>65</sup> Merleau-Ponty, *Phenomenology of Perception*, p. xii: “... there is no inner man, man is in the world, and only in the world does he know himself”.

for these morally relevant subjective states, and (according to our view) these subjective states are located in, or integrated with, the objective bodily. We can therefore avoid this risk of demoting the subjectivity of a person.

We can therefore construct a conception of the right to bodily integrity that is non-reducible to the principle of autonomy. The right gives a person exclusive use of, and control over, their body on the basis that the body is the site, location, or focal point of their subjectivity (however understood and constituted). It is because the body is where we experience states of well-being, it is the way in which we flourish as humans, it is the medium through which we interact with others,<sup>66</sup> and it is the way in which we execute our agency, that we have such a broad and all-encompassing right over our own bodies.

We can now undertake our first explanatory task and consider the legal structure of the right to bodily integrity. Such a broad and exclusive right is necessary to protect the various ways in which our subjectivity (our well-being, flourishing, relationships, and agency) can manifest itself through our use of our bodies. In light of the impossibility of delineating all the ways in which the use of our bodies promotes our well-being, flourishing, relationships and agency, these morally valuable states are preserved through the ability of the person to exclude all others from his or her body.<sup>67</sup> Hence, the right to bodily integrity is exclusive in the sense that it entails power to exclude all others from the body. In this way, the right to bodily integrity is akin to a property right; the right to bodily integrity “literally and figuratively provide[s] the necessary walls” to separate oneself from others.<sup>68</sup>

As an exclusive right, the right to bodily integrity is exercisable against an open set of persons (or exercisable against “the world”), imposes strict duties of non-interference, and infringement of the right to bodily integrity is actionable *per se*.<sup>69</sup> The “right to have one’s own body whole and intact”<sup>70</sup> and the “right to be free from physical interference”<sup>71</sup> follow from the right to bodily integrity, but such rights-claims do not capture the full legal form of the right to bodily integrity. The right to bodily

<sup>66</sup> Carman, *Merleau-Ponty*, p. 141: “Merleau-Ponty’s alternative account rests on a recognition of the bodily medium of social perception, a medium common to myself and others, and which always already constitutes us as a community prior to our application of concepts such as mind and consciousness, which abstract from the bodily character of the person they describe” (emphasis added); Wall, *Being and Owning*, pp. 63–64.

<sup>67</sup> C.f. J.W. Harris, *Property and Justice* (Oxford 1996), 160; J.E. Penner, *The Idea of Property in Law* (Clarendon 1997), 71; see Wall, *Being and Owning*, pp. 121–22.

<sup>68</sup> J. Nedelsky, “Law, Boundaries and the Bounded Self” (1990) 30 *Representations* 162, at 167.

<sup>69</sup> Wall, *Being and Owning*, pp. 145–55. See p. 149: “To succeed in a claim for assault, battery, or unlawful detention, it is sufficient to show that there was the threat or the application of force to the body or the deprivation of the free movement of the body. The interference with the right to bodily integrity is itself sufficient for an action, without having to show a loss derived from the interference.”

<sup>70</sup> *Re A (Conjoined Twins)* [2001] Fam. 147, 258, per Walker L.J.

<sup>71</sup> Feldman, *Civil Liberties*, p. 241.

integrity is the right to exclude all others from the body, which enables a person to have his or her body whole and intact and free from physical interference.

In saying that, we are not meaning to promote an individualised image of the self or what may be valuable. Indeed, as we have said, it is through the interchanges and interactions of bodies that much self-fulfilment can be found. However, those interactions, touches and exchanges gain their value and meaning largely through being chosen, valued and cherished by the individual. It is the right to exclude and the decision to include that give the value to touching that is wanted and desired. This explains why the same act, say sexual intercourse, could be life-enhancing when desired, but soul-destroying when not chosen. If there was no right to bodily integrity and so no right to exclude, the right to invite would lose its value.

We so far have contrasting conceptions of the right to bodily integrity: a reductionist version that views that right following as a corollary to our duty to respect autonomous decisions and a broader, non-reductionist, version that views the right as premised upon a range of morally relevant states that are identical to bodily states. In formulating this contrast, we have also developed conceptions of the “body” that the right to bodily integrity protects. If the body is sub-personal and stands in an instrumental relationship to the subject, then “the body” is a physiological and objective concept. In other words, if the right to bodily integrity protects the instrumental relationship between a person’s rational agency and their body, then the “body” in the right to “bodily integrity” is an “object”. In comparison, under the broader conception of the right to bodily integrity, the right protects the body as the point of convergence or point of integration of the subject and the objective world. The right to bodily *integrity* therefore protects *the point of integration*, and the “body” is that which provides the point of integration. The right to bodily integrity, in this way, is concerned with the integration of a person’s subjectivity and objectivity. Given this concept of the right to bodily integrity (as integration), we have also been able to offer an explanation of the legal structure of the right. It is because the body is the point of integration of the subject with the objective world that the right to bodily integrity is exercisable against an open set of persons, imposes strict duties of non-interference, and infringement of the right to bodily integrity is actionable per se.

## V. MAKING SOME SENSE OF THE LAW

With this distinction between bodily autonomy and bodily integrity in mind, we can begin to clarify the use of the terms by the courts. We offer clarification on three issues: consent and informed consent, justifications for infringing bodily integrity and autonomy, and the right to bodily



integrity as a specific common law right. These doctrinal features share an underlying conceptual feature. The underlying conceptual feature is that the right to bodily integrity (understood as protecting the point of integration) has a different order of normative weight than the principle of autonomy.

#### A. *Consent and Informed Consent*

In terms of consent, the duty to provide information that is relevant to a treatment decision is a duty grounded in the principle of autonomy. The requirement of *informed* consent follows from our respect for a person's capacity to make his or her own (informed) decisions in relation to his or her body (i.e. bodily autonomy). To act autonomously is to understand, deliberate on and act on information that is relevant to a decision. Being precluded from the opportunity to act on the information that is relevant to a decision is an infringement of the principle of autonomy. In comparison, the requirement that a patient be aware of the nature and quality of the act involved in a treatment option follows from the right to bodily integrity. The exclusive use and control of your own body, in a way that promotes a person's subjectivity, presumes an understanding (on the part of the person) of the nature and quality of the actions that are to be undertaken to the body.

Moreover, the failure to ensure that the person is aware of the nature and quality of the act involved in a treatment option is a much more severe wrong compared to the failure to disclose the information that is relevant to a treatment option.<sup>72</sup> This explains why the former action is judged on the criminal standard and the latter on the civil standard. Misinformation prevents a person from making autonomous decisions in relation to his or her body. Limiting a person's autonomy is a wrongful as it vitiates their rational agency. A misunderstanding as to the nature of the act that is to be done to the body, however, means a person is no longer in control of the use their body; their body is being used by another and not by themselves. The use of the body by another (in the absence of consent) is wrongful at an exceptional level as it bypasses a person's subjectivity and reduces the body to a mere object. The Supreme Court in *Montgomery* conflates this distinction; whilst a doctor is "under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment",<sup>73</sup> this duty follows from the principle of bodily autonomy, not the right to bodily integrity. The Supreme Court is nonetheless right to recognise that "an adult person of sound mind is entitled to decide

<sup>72</sup> This may also explain the difficulty in handling cases of deception in relation to sexual acts. See J. Herring, "Mistaken Sex" [2005] Crim.L.R. 511; contrast H. Gross, "Rape, Moralism and Human Rights" [2007] Crim.L.R. 220. In part the difficulty is that there is a vast array of understanding a sexual act that there no clear reference point in determining whether a deception goes to the "nature of the act" or is additional information. While the distinction might be widely accepted, what constitutes the nature of a sexual act is much more problematic.

<sup>73</sup> *Montgomery* [2015] UKSC 11; [2015] 1 A.C. 1430, at [87].

which, if any, of the available forms of treatment to undergo”<sup>74</sup> and that this entitlement follows from her right to bodily integrity.

### *B. Exceptional or Additional Justifications*

Viewing the right to bodily integrity in a way that is non-reducible to the principle of autonomy also explains why allowing the infringement of the right to bodily integrity is, as the Court of Protection explains in *Mental Health Trust v DD*, “exceptional” and only appropriate in “the most extreme of circumstances”.<sup>75</sup> To touch, constrain, or intrude upon the body of another person (in the absence of consent) is to ignore, or deprioritise, that person’s subjective experience of the world – experiences that are located in the body – in favour of some competing value. To justify such an infringement requires the competing value to have considerable moral weight and practicable urgency. In comparison, we limit the autonomous choices that people make, and justify such limits with reference to competing values, on a much more routine basis. And that is why the criminal law’s most serious offences relate to invasions of bodily integrity and are quite properly seen as far more serious than property offences or other wrongs that do not interfere with the body.

This approach can also explain why the right to bodily integrity is not lost when autonomy is lost, by which we mean a person loses mental capacity.<sup>76</sup> If bodily integrity is based simply on personal autonomy, then if a person has lost autonomy, decisions can be made about their life based on a best interests assessment, with no distinction being drawn as to whether the issue involves an interference with their bodily integrity. But that is not what the law says. The Mental Capacity Act 2005, for example, has extensive (and notorious) provisions that require additional justification where force is to be used against the body of the person lacking capacity. Moreover, we can appreciate the distinction between autonomy and bodily integrity relied upon by Munby J in *XCC v AA*. Whilst “to force a marriage on an incapacitous person is a gross interference with his or her autonomy”, “[i]ts concomitants, sexual relations and . . . pregnancy” constitute “perhaps one of the most severe” breaches of bodily integrity “that can be imagined”.<sup>77</sup> These provisions, which require additional justifications, and this distinction between the magnitude of the wrong inflicted make complete sense under our proposed understanding of bodily integrity as based on different values from autonomy.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Mental Health Trust v DD* [2015] EWCOP 4.

<sup>76</sup> We recognise there is some debate over whether a person who has lost capacity can still retain autonomy. We will not enter that debate here.

<sup>77</sup> *XCC* [2012] EWHC 2183 (COP), at [72].

### C. A Specific Common Law Right

The right to bodily integrity is also a specific right. The law, through criminal provisions and tortious actions, gives legal effect to a person's exclusive use and control over his or her body. Albeit with some well-defined exceptions, the law protects this right by imposing on others duties of non-interference that are categorical in their application, exclusionary in their normative force, and whose transgression generates a distinctive range of responses.

This reflects the moral demand that our claim to bodily integrity has. If our bodies are the site or location of our subjectivity, and if our subjectivity is the basis of the moral duties that are owed to us, then it follows that our ability to use and control our own bodies is a moral and legal right. The same cannot be said for autonomy. We do not have a right to act autonomously. Rather, the autonomy of each person is a morally relevant property that requires consideration in all instances of moral deliberation. The principle of autonomy provides an overarching value that informs a range of rights and duties in relation to a range of legal issues. The principle of bodily autonomy is just one instance of this moral value informing common law rights. This explains why the Court of Appeal in *R. (on the application of Nicklinson)* expressed "some doubt" as to whether "autonomy and dignity can properly be described as independent common law rights rather than values or principles" whilst at the same time describing the rights to bodily integrity and privacy as "specific common law rights".<sup>78</sup>

## VI. BROADER IMPLICATIONS FOR CONTEMPORARY MEDICAL LAW

The contrasting conceptions of the body, and the contrasting conceptions of the right to bodily integrity, developed here also have a number of important implications for the law. If the body stands in an instrumental relationship to the subject, then what counts as "the body" can be determined objectively as a physiological question. Alternatively, if the body is the site of integration of a person's subjectivity and objectivity, then what counts as the body is a question that is answered by a person's subjective engagement in the world. As we will explain here, the latter set of implications ought to be welcomed as they can explain why social attitudes render certain bodily forms as being impeding of agency, how "corrective" medical interventions risk infringing the right to bodily integrity, and why what falls under the ambit of the right to bodily integrity cannot be determined by brute physiological facts. These contemporary issues in medical law share an underlying conceptual feature. That is, if the body is the site or point of integrity between a person's subjectivity and objectivity, then

<sup>78</sup> *R. (on the application of Nicklinson)* [2013] EWCA Civ 961; [2015] 1 A.C. 657, at [50].

there is a latent and unavoidable ambiguity in what amounts to “the body”. This is because what counts as the body is a question that is answered by a person’s subjective engagement in the world. The concept of the right to bodily integrity (as integration) is therefore able to explain why boundaries of the right – that determines what falls under the right’s aegis – is a troubled boundary.

#### *A. The Disabled Body*

One of the great debates in the literature on disability is seeking a definition of disability. Why is, for example, left-handedness regarded not a disability, while not having a left hand is? The debate is complex, and it is not possible to pay due credit to it here. However, our approach does have some insight. In so far as the value of our bodies lies not simply in their ability to “do things” but are about the manifestation of our subjectivity, we can see why left-handedness is not, at least in most societies, as a disability (as it does not impede relationships, flourishing, well-being or agency). This does, however, reveal how there is much truth in the social model of disability.<sup>79</sup> In so much as society has attitudes that render certain bodily forms impeding of agency or inhibiting relationships or fails to provide means by that these can be removed. It also helps understand the claims of those who, for example, suggest that the richness of membership of the deaf community renders deafness not a disability.<sup>80</sup> The deafness for a contented member of the community becomes a positive part of their identity and enables them to manifest their subjectivity in an enriching way. This is why “disability” can in some contexts quite properly be promoted as a positive gain by creating an identity and subjectivity that enable positive engagement with the world.

#### *B. The Fluid Body*

Under the reductionist view, the right to bodily integrity protects a chain of causal connections between the “rational agent” and the physiological body. What counts as the body, under this view, is determined by the physiological function that any given part of the body performs. Where the bodily component can respond to the stimuli of the rational will, the bodily component can form part of an autonomous act. The body, in this way, is objective; its value can be determined with reference to its physiological function. The body can be functional or dysfunctional, abled or disabled, correct or incorrect. Medical intervention that aims to change the physiological function of the body from “incorrect” to “correct” is

<sup>79</sup> T. Shakespeare, *Disability Rights and Wrongs* (Abingdon 2006) provides a helpful introduction to the extensive literature on the nature of disability.

<sup>80</sup> A. Solomon, *Far from the Tree: Parents, Children, and the Search for Identity* (Scribner 2012), ch. 2.

autonomy enhancing (in this, reductionist, sense) since the intervention may be reconstructing the instrumental relationship between a person's agency and instrumental body.

Whilst corrective medical interventions may be autonomy enhancing (that is, in the above sense), it may also be an infringement of bodily integrity. This is because "behind" this objective body is a set of experiential states. A person's subjectivity (a person's agency, well-being, dignity, and capabilities) are experienced and lived through the body. To change the shape, appearance or function of a component of the body is not to change the shape, appearance or function of a tool or instrument, but to interfere with someone's lived experiences. For instance, in the context of the ethics of gender reassignment surgery, there is a temptation to set up an "opposition between interiority (embodied/lived experience) and exteriority (genital appearance)". This approach suggests that the "[r]ight way" to manage intersex persons is to "attend to the interiority of the patient's personhood, their life in their body; and the wrong way is characterized by cosmetic concerns, violent in their superficiality, regarding genital size and shape".<sup>81</sup> But as Morland has explained, "the border between interior and exterior is not fixed after all, but is troubled".<sup>82</sup> The potential injury of "corrective" surgery lies not only in the exterior – the "scarred, atrophied and numbed genitals"<sup>83</sup> – but in the invasion of the "patient's interior in [an] ethically objectionable fashion".<sup>84</sup>

### *C. The Leaky Body*

If the body is "fluid", in that it is defined with reference to the malleable components of subjectivity, then the body is also "leaky". That is, the boundary around what constitutes "the body", which the right to bodily integrity protects, is not a fixed boundary. Innumerable pieces of the physiological body are alienated from us without any sense of a loss of bodily integrity, and just as many pieces of our physiological body are shared, communal and even exotic to us whilst still forming part of our bodily integrity.<sup>85</sup> The boundary between what is captured by bodily integrity, and what is not captured, is not determined by objective and physiological fact, but by whether the bodily component is a point of integration of a person's subjectivity and objectivity.

<sup>81</sup> I. Morland, "Intimate Violations: Intersex and the Ethics of Bodily Integrity" (2008) 18 *Fem.Psychol.* 425, at 426.

<sup>82</sup> *Ibid.*, at p. 428.

<sup>83</sup> *Ibid.*, citing N. Angier, "New Debate over Surgery on Genitals", *New York Times*, New York, 13 May 1997, C1.

<sup>84</sup> *Ibid.*

<sup>85</sup> J. Herring, "The Law and the Symbolic Value of the Body", in B. van Klink, B. van Beers and L. Poort (eds.), *Symbolic Legislation Theory and Developments in Biolaw* (Dorecht 2016).

If the body has a fixed boundary, then the circumstances that arose in *Evans v Amicus Healthcare* do not engage the right to bodily integrity, only the principle of personal autonomy. A frozen embryo is beyond the ambit of the fixed and static body. We may be entitled to make decisions about the use of the embryo (as others may also), but such decision-making authority is premised upon autonomy and the right to private and family life. In comparison, if the body is fluid, then a frozen embryo may retain a “functional unity with the body” in the sense that the embryo continues to be a site of integration of a person’s body and that person’s subjectivity. It will be that such an argument is only likely to be convincing in relation to reproductive material or an identifying part of a body, such as a face.<sup>86</sup> This components of the body can retain a unity with a person’s agency or identity.

Finally, we can also appreciate why Judge Greve in *Price v UK* viewed the act of depriving a person who lacked “ordinary legs and arms” access to her battery charger for her wheelchair as interference with her bodily integrity.<sup>87</sup> A more radical implication of the idea of “leaky bodies” is that external objects that share a functional unity with the body can form part of the body for the purposes of the right to bodily integrity. As Clark and Chalmers have suggested, that if we view our “self” or our “agency” as spreading into the external world, “that in some cases interfering with someone’s environment will have the same moral significance as interfering with their person”.<sup>88</sup> Hence, we can appreciate how, for this particular person and her engagement with the world, being deprived access to the battery can have the same moral and legal significance as being physically interfered with. The confused state of the law, with regards to the relationship between the right to bodily integrity and the principle of autonomy, is attributable (in part) to an inflexible and static conception of what the right to bodily integrity protects. In this final section we have contented that we can better understand some of the contemporary issues in medical law if what counts as the body is a question that is answered by a person’s subjective engagement in the world.

## VII. CONCLUSION

For the most part, the courts appear to be content with treating the right to bodily integrity and the principle of autonomy as interchangeable norms. On one account, they are; since the decisions of the rational agent ought to be respected, and since such decisions are exercised through the use and control of the body, the principle of autonomy is correlative to the

<sup>86</sup> We have in mind here a face removed for transplant.

<sup>87</sup> *Price* ECHR 2001-VII 153, 169, per Judge Greve.

<sup>88</sup> A. Clark and D. Chalmers, “The Extended Mind” (1998) 58 *Analysis* 10–23, at 23.

right to bodily integrity. Here, we have argued for an alternative account. The right to bodily integrity is non-reducible to the principle of autonomy since the right to bodily integrity is concerned with the body as the point of integration between a person's subjectivity and the remainder of the objective world. In terms of current medical law, this alternative account has some explanatory value. First, our conceptual account of the right to bodily integrity is able to explain the legal structure of the right. Second, it is also able to explain the distinction between the requirements of consent and informed consent, the exceptional and additional justifications required for infringing the right to bodily integrity and why bodily integrity is a specific common law right. Third, the alternative account also has some welcome implications for law and medicine in terms of how we understand disability, gender and separated bodily material. The overall purpose of this discussion has been to delineate the doctrinal and moral contours of the right to bodily integrity in the context of medical law. If the right to bodily integrity "is the most important of civil rights"<sup>89</sup> then, at the very least, clarity is needed as to whether the right is a specific right or is reducible to some other principle.

<sup>89</sup> *R. (on the application of Justin West)* [2002] EWCA Civ 1641; [2003] 1 W.L.R. 705, at [49], per Hale L.J. in her dissenting judgment.