

LOCATING THE BODY IN ‘BODILY HARM’

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This article critically engages with the legal boundary of the human body by exploring what kinds of harm can and should count as ‘bodily harm’ within criminal law. It argues that medical and technological developments involving the body have overtaken the current legal conception of the body in this area. It proposes that refocusing on the connection between the body and the person will provide a more satisfactory account of the body in ‘bodily harm’.

I INTRODUCTION

Western legal systems have long placed prohibitions on the doing of harm to the human body. Over the years a multitude of legal offences— maiming, wounding, causing bodily harm, grievous bodily harm, physical injury, serious physical injury, etc— have been developed in order to criminalise various aspects of this harm.¹ The key assumption underlying this range of offences is that the bodily nature of such harm is readily identifiable and distinguishable as such. In situations involving cut skin, bruised flesh and broken bones, this may indeed be unproblematic. However, it is not so easy to identify whether the body has been harmed in all possible situations. For example, does cutting off part of a person’s hair constitute harm to their body? Does damaging an internal organ that has been medically removed from one person and that is awaiting transplantation into another? Destroying a person’s prosthetic limb? Hacking a person’s subdermally-implanted technological device?

As the human body has become increasingly well-understood by medical science and increasingly interconnected with the wider world it is necessary to revisit criminal law’s conception of the “body” that it seeks to protect from harm. This article critically engages with the boundary of the human body within the criminal law by exploring what kinds of harm can and should count

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¹ For an overview of some of the non-fatal offences against the person that have historically been used under English law see Phil Handler, ‘The Law of Felonious Assault in England, 1803-61’ (2007) 28(2) *The Journal of Legal History* 183.

as ‘bodily harm’. In the course of this analysis the article draws on doctrinal criminal law, theoretical work on the nature of criminal law and legal personhood, and an emerging body of academic commentary dealing with the legal implications of current and future technologies. The article brings together elements of each of these strands of thought in order to argue that the law’s current conception of the body in ‘bodily harm’ does not properly account for the complexity of 21st century human bodies, and to develop a novel proposal for a path forward that involves reinterpreting ‘bodily harm’ in light of the connection between the body and the person.

This argument is worked through across the next three Parts. Part II charts the current legal conception of the body in ‘bodily harm’ by setting out the relevant statute sections and case law in Australia and England. Part III problematises the legal conception of the body that emerges from Part II by demonstrating the blurred ontological distinction between persons and objects. This Part argues that the law’s current conception of the body as flesh, blood and bone that are neatly bounded by the skin, does not provide a satisfactory account of the increasingly malleable and interconnected body of the 21st century. Part IV offers a path towards a broader and more encompassing legal conception of the body in ‘bodily harm’. This Part proposes a new guiding interpretive principle for understanding the legal body here, namely as the means by which the “person” experiences and participates in the world.

An important caveat is needed before the argument in this article can begin. The boundary of the human body is negotiated across a multitude of different legal areas. Within criminal law notions of the ‘body’ are important to a number of offences and procedures, including *inter alia* property crime,² and victims’ compensation.³ Within civil law notions of the ‘body’ are relevant to various kinds of compensation claims,⁴ and have proved particularly problematic in relation to various aspects of medical and property law.⁵ This

² See, eg, *Doodeward v Spence* (1908) 6 CLR 906; *R v Kelly* [1999] QB 621.

³ See, eg, *R v Fraser* [1975] 2 NSWLR 521; *West v Morrison* [1996] QCA 266 (6 September 1996); *Alfonso v NT* [1999] NTSC 117 (29 October 1999).

⁴ The recent case of *Pel-Air Aviation Pty Ltd v Casey* [2017] NSWCA 32 (9 March 2017) is one of the latest developments in a long line of authorities and commentary on whether certain forms of ‘mental harm’ should be compensable as harm to the body. See also Christine Forster and Jeni Engel, ‘Reinforcing Historic Distinctions Between Mental and Physical Injury: The Impact of the Civil Liability Reforms’ (2012) 19 *Journal of Law and Medicine* 593; Ian Freckelton, ‘Compensability for PTSD Under the Montreal Convention: Psychiatric Injury as Bodily Injury’ (2015) 22(5) *Psychiatry, Psychology and Law* 639.

⁵ A voluminous amount of scholarly discussion has emerged around the body in these inter-related areas. For a small selection of such sources see, eg, James Edelman, ‘Property Rights to Our Bodies

article, however, is concerned solely with the issues arising from the criminal law offences involving assaults that cause bodily harm. These offences exist in both a number of Australian states and territories as well as in England, and so the legal analysis and discussion below shall also cross these jurisdictional lines.

II THE LEGAL DEFINITION OF 'BODILY HARM'

In Part III this article will argue that the current legal conceptualisation of the body in 'bodily harm' is deficient in that it fails to capture important aspects of how the human body functions in the 21st century. To reach this point it is necessary to first set out how the criminal law around the concept of 'bodily harm' has operated historically and how it continues to operate today. To this end, this Part provides an overview of relevant statute and case law on 'bodily harm'.

To unlawfully assault someone, that is to apply or threaten to apply force to them without their consent and without authorisation for doing so, is a well-recognised offence across Australia and England.⁶ Assaults are treated more seriously by the criminal law where they result in certain kinds of harm to the person who has been assaulted. Thus, Australian criminal law jurisdictions recognise 'two different levels of harm: injury or actual bodily harm and serious injury or grievous bodily harm',⁷ and English law also recognises a hierarchy of actual bodily harm and grievous bodily harm. This article focuses on the scope and meaning of the concept of 'bodily harm'.

Specific statutory provisions exist in the Australian Capital Territory and New South Wales that make it an offence to assault somebody and thereby cause 'actual bodily harm' to them.⁸ The Australian Capital Territory also criminalises the intentional or reckless infliction of 'actual bodily harm'.⁹ In

and Their Products' (2015) 39(2) *University of Western Australia Law Review* 47; Imogen Goold, 'Why Does it Matter How we Regulate the Use of Human Body Parts?' (2014) 40 *Journal of Medical Ethics* 3; Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Hart, 2007); Loane Skene, 'Proprietary Interests in Human Bodily Material: Yearworth, Recent Australian Cases on Stored Semen and the Implications' (2012) 20(2) *Medical Law Review* 227.

⁶ See, eg, *Crimes Act 1900* (ACT) s 26; *Crimes Act 1900* (NSW) s61; *Criminal Code (NT)* s 188; *Criminal Code* (Qld) s 335; *Criminal Code* (Tas) s 184; *Criminal Code* (WA) s 313; *Criminal Law Consolidation Act 1935* (SA) s20; *Summary Offences Act 1966* (NSW) s 23; *Criminal Justice Act 1988* (UK) s 39.

⁷ Kenneth J Arenson, Mirko Bagaric and Peter Gillies, *Australian Criminal Law in the Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 2011, 3rd ed), 271.

⁸ *Crimes Act 1900* (ACT) s 24; *Crimes Act 1900* (NSW) s 59.

⁹ *Crimes Act 1900* (ACT) s 23.

Queensland and Western Australia it is an offence to assault somebody and thereby cause ‘bodily harm’ to them.¹⁰ Australian law’s contemporary usage of the term ‘bodily harm’ owes much to the English common law origins of this term. Notably, ‘bodily harm’ has long appeared in s47 of the *Offences Against the Person Act 1861* (UK), under which any person convicted ‘of any assault occasioning bodily harm’ is liable to a term of imprisonment. Because the phrase was not defined elsewhere in this statute, a ‘time-honoured definition’ of what constitutes bodily harm has since developed through a series of cases.¹¹ In *R v Donovan* (1934) the King’s Bench held that “bodily harm” has its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the [victim]. Such hurt or injury need not be permanent, but must, no doubt, be more than merely transient and trifling.¹² This definition has subsequently been widely followed in both England¹³ and in Australian common law jurisdictions that utilise ‘bodily harm’.¹⁴ Furthermore, parts of this particular wording are echoed in the statutory definitions of a number of Australian criminal Code jurisdictions.¹⁵ For example, both the Queensland and Western Australia Codes define ‘bodily harm’ to mean ‘any bodily injury which interferes with health or comfort’.¹⁶

A sizeable number of cases have accumulated around how to define and apply the concept of ‘bodily harm’, despite the fact that this has been held to ‘require no elaboration’ and its component words are to be given their ordinary meaning.¹⁷ Whether a particular injury will constitute ‘bodily harm’ is a matter that will turn on the facts of each individual case and is something that will be determined by the jury or judicial officer as fact-finder. Nevertheless, Syrota

¹⁰ *Criminal Code* (Qld) s 339; *Criminal Code* (WA) s317. Whilst these jurisdictions omit to use the common law wording of ‘actual’ before bodily harm this does not appear to alter the overall test in an important way. In *R v Chan-Fook* [1994] 1 WLR 689 it was held that “[t]he word “actual” indicates that the injury ... should not be so trivial as to be wholly insignificant’: at 694. It is doubtful that wholly insignificant injuries would thereby be capable of legal recognition in Qld and WA simply because of this change in wording.

¹¹ *R v Clarence Barrington Morris* [1998] 1 Cr App R 386, 393. The UK Law Commission recently described the term ‘actual bodily harm’ as being ‘hallowed by usage’ and having ‘boundaries [that] have been clarified judicially’: The Law Commission, *Reform of Offences Against the Person*, LAW COM No 361, 2015, 75.

¹² *R v Donovan* (1934) 2 KB 498, 509.

¹³ See, eg, *R v Clarence Barrington Morris* [1998] 1 Cr App R 386; *R v Brown* [1994] 1 AC 212.

¹⁴ See, eg, *Markou v R* [2012] NSWCCA 64 (23 April 2012), [17]-[18].

¹⁵ In Australia, the jurisdictions where the criminal law has been codified are the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia, whereas the common law remains a key source of criminal law in New South Wales, South Australia and Victoria.

¹⁶ *Criminal Code* (Qld) s 1; *Criminal Code* (WA) s 1.

¹⁷ *R v Chan-Fook* [1994] 1 WLR 689, 694.

lists the following '[t]ypical examples' of harm that will fall within the legal definition of 'bodily harm': 'a fractured bone, a broken nose, severe bruising or burning, a deep cut or cuts, or multiple minor injuries'.¹⁸ Two recent Australian cases further illustrate the kinds of harms that do and do not constitute 'bodily harm'. Firstly, in the Western Australian Supreme Court case of *Trewin v Weston* [2015] the victim suffered swelling, extensive bruising and pain after being swung to the ground head-first: this was held to constitute bodily harm.¹⁹ Secondly, in the Australian Capital Territory Supreme Court case of *R v Burdon* [2011] the victim suffered some brief skin redness, tenderness and the feeling of being "blurry" after allegedly being lifted off the ground by a scarf around her neck: this was held to not amount to bodily harm.²⁰ Given the multitude of potential injuries that can occur as the result of an assault, where does the law draw the line?

To cause bodily harm it is not enough that an assault merely interferes with the victim's 'health' or 'comfort', this interference must also be the result of some kind of 'injury' or 'hurt or injury' (depending on the jurisdiction). As such, simply 'producing a sensation of pain is not of itself and without more to do that person a "bodily injury"'.²¹ Thus being held in a painful headlock for a few minutes cannot constitute bodily harm,²² and neither can the pain, burning sensation and temporary blindness that results from applying pepper spray to the eyes.²³ However, the fact that an assault causes the victim ongoing pain may nevertheless be significant in establishing injury. In the Western Australian Supreme Court case of *Brown v Blake* [2000] the victim was kicked twice in the ribs and gave evidence that afterwards she felt pain in this area for a couple of days.²⁴ In the absence of medical evidence of an underlying injury Heenan J nevertheless held that it was legitimate to infer the existence of an injury here,

¹⁸ George Syrota, 'Consensual Fist Fights and Other Brawls: Are They a Crime?' (1996) 26 *University of Western Australia Law Review* 169, 172. Weait offers another list of examples: '[a] deep cut, a broken bone, a poisoning, a bruised internal organ, psychological illness, infection with a disease': Matthew Weait, 'Harm, Consent and the Limits of Privacy' (2005) 13 *Feminist Legal Studies* 97, 107.

¹⁹ *Trewin v Weston* [2015] WASC 358 (1 October 2015).

²⁰ *R v Burdon* [2011] ACTSC 90 (1 June 2011).

²¹ *Brown v Blake* [2000] WASCA 132 (28 April 2000), [5].

²² *Scatchard v The Queen* (1987) 27 A Crim R 136.

²³ *Thwaites v WA* [2004] WASCA 197 (27 August 2004). Though a kick to the head causing temporary unconsciousness has been held to constitute bodily harm because it was regarded as 'an injurious impairment to the victim's sensory functions': *T v DPP* [2003] EWHC 266 Admin, para [6] per Kay J. See also Daraius Shroff, 'What Occasions Actual Bodily Harm?' (2004) 42(2) *Law Society Journal* 75; Ben Fitzpatrick, 'Actual Bodily Harm: Sufficiency of Momentary Loss of Consciousness' (2004) 68 *The Journal of Criminal Law* 11.

²⁴ *Brown v Blake* [2000] WASCA 132 (28 April 2000).

because as ‘a matter of ordinary human experience one knows that, if pain has lasted, as [the victim] said, for a couple of days then the body has suffered damage’.²⁵

Conversely, it is also important to note that an assault that causes ‘hurt’ or ‘injury’ to the victim cannot constitute bodily harm unless this also interfered with their ‘health’ or ‘comfort’. Thus in *Smejlis v Matthews* [2004], another Western Australian Supreme Court case, medical evidence that the victim suffered a bruise to her face that lasted three days may have demonstrated injury but did not establish ‘bodily harm’ in the absence of any ‘express evidence that the bruise interfered with her health or comfort’.²⁶ In this case Jenkins J noted that there may very well be ‘situations where a person receives a bruise but it does not hurt or interfere with the recipient’s comfort’,²⁷ perhaps where it does not cause them any noticeable pain. The term ‘health’ in the context of bodily injury has been understood to refer to interference with the ‘functioning of the body’,²⁸ but a minor laceration by itself may not be said to interfere with the functioning of the skin.²⁹

A partial conception of the legal body in ‘bodily harm’ emerges from the cases discussed above. If we amalgamate all the different types of body parts whose bruises, cuts and breaks have been held to constitute ‘bodily harm’— jaw, thumb, legs, ribs, eyes, buttocks, face— then the legal body is also constructed part-by-part. However, a more holistic conception of the legal body can be found in a series of cases dealing with the particular issue of whether so-called ‘mental harm’ could constitute bodily harm. Over a number of years, a line of English authorities came to hold that causing a person a diagnosed psychiatric condition constitutes causing them bodily harm.³⁰ The initial barrier here was

²⁵ Ibid [6]. This reasoning was subsequently followed in *Robinson v Smith* [2005] WASC 99 (20 May 2005), where the fact that the victim experienced the sensation of having a ‘lump’ in his throat for a number of months enabled the inference of bodily ‘damage’ beyond the mere sensation of pain/discomfort: *Robinson v Smith* [2005] WASC 99, [27].

²⁶ *Smejlis v Matthews* [2004] WASC 158 (29 July 2004), [44].

²⁷ Ibid.

²⁸ *R v Tranby* [1992] 1 Qd R 432, [443] (De Jersey J), though this case concerned the meaning of ‘health’ in the context of a legal test for grievous bodily harm rather than bodily harm. See also *Wayne v Boldiston* (1992) 85 NTR 8.

²⁹ *Gaykamangu v Court & Anor* [2014] NTSC 29 (24 July 2014), [40]-[41].

³⁰ See, eg, *R v Miller* [1954] 2 QB 282; *R v Chan-Fook* [1994] 1 WLR 689; *R v Clarence Barrington Morris* [1998] 1 Cr App R 386; *R v Ireland* [1998] AC 147; *R v Dhaliwal* [2006] EWCA Crim 1139. Though some commentators have argued that legal protections for the mind need to go further than this: see, eg, Jan Christoph Bublitz and Reinhard Merkel, ‘Crimes Against Minds: On Mental Manipulations, Harms and a Human Right to Mental Self-Determination’ (2014) 8 *Criminal Law and Philosophy* 51.

the argument that the term 'bodily harm' could not cover 'mental harm' as the body and mind were two separate things.³¹ But as cases progressed this dualistic thinking was eventually rejected in favour of the recognition that the brain is a physical part of the body that is closely integrated with the functioning of the mind. In the landmark case of *R v Chan-Fook* [1994] the English Court of Appeal observed that:

The first question on the present appeal is whether the inclusion of the word 'bodily' in the phrase 'actual bodily harm' limits harm to harm to the skin, flesh and bones of the victim. [The trial judge] rejected this submission. In our judgment he was right to do so. The body of the victim includes all parts of his body, including his organs, his nervous system and his brain. Bodily injury therefore may include injury to any of those parts of his body responsible for his mental and other faculties.³²

The reasoning in this case has been subsequently affirmed,³³ and this particular passage has been cited with approval by Australian courts.³⁴ The fact that the drafters of the original *Offences Against the Person Act 1861* (UK) could not have envisaged mental harm to fall within the scope of s47 has been regarded by the courts as 'immaterial' because '[t]he only relevant enquiry is as to the sense of the words in the context in which they are used'.³⁵ The statutory framework around bodily harm should be understood as 'always speaking', to the effect that the term 'bodily harm' is to be 'interpreted in the light of the best current scientific appreciation of the link between the body and psychiatric injury'.³⁶

Through law's engagement with the interconnections between mind and body in these cases, the legal conception of the body in 'bodily harm' emerges more completely. From an analysis of the law here we know that the legal body includes the skin, flesh, bones, organs, nervous system and brain. The legal body also includes the mind insofar as specific thought processes can be linked

³¹ See, eg, the arguments in *R v Miller* [1954] 2 QB 282.

³² *R v Chan-Fook* [1994] 1 WLR 689, 695.

³³ Such as in *R v Ireland* [1998] AC 147.

³⁴ *West v Morrison* [1996] QCA 266 (6 September 1996), 4 (Macrossan CJ); *R v Burdon* [2011] ACTSC 90 (1 June 2011), [25]. The concept of 'mental harm' is now also written into many Australian criminal law statutes as a form of legally recognisable harm: *Crimes Act 1958* (Vic) s15; *Criminal Code (NT)* s1A; *Criminal Law Consolidation Act 1935* (SA) s21.

³⁵ See, eg, the arguments in *R v Miller* [1954] 2 QB 282.

³⁶ *R v Ireland* [1998] AC 147, 158 (Lord Steyn).

³⁷ *Ibid* 159 (Lord Steyn). Cited favourably by the High Court recently in *Aubrey v R* [2017] 343 ALR 538, 550-551.

back to a biological substrate. Furthermore, the boundary of the legal body is not entirely fixed but is instead subject to renegotiation over time, especially as deeper understandings about the body's mechanisms are developed by science. But the connection between the mind and brain is not the only aspect of the body that is potentially subject to scientific advancement. As the next Part will show, due to various medical and technological developments the boundary of the legal body is in need of more widespread renegotiation.

III THE BOUNDARY OF THE LEGAL BODY

In an incisive chapter written some twenty years ago, Naffine observed that the body constructed by criminal law is the body of the liberal subject: a 'discrete' individual whose rights to 'bodily integrity and autonomy' provide a buffer zone that separates that person from interference from other individuals unless such interference is consensual.³⁷ Because '[t]he starting assumption of criminal law is that it is unlawful for one person intentionally to touch another without their consent' we are all legally constituted as 'bounded and separate', effectively cordoned off 'in closed body bags'.³⁸ She identified the 'boundary' of the individual's 'body bag' as being 'the skin',³⁹ — what Golder terms 'the epidermal border' in his summary of Naffine's work⁴⁰— an observation that is borne through in the overview of the law set out in Part II as the cuts, bruises, breaks and the like are all locatable either at or under the surface of the skin.

Naffine emphasised that this particular conception of the body is an artificial construction of the law and is not a reflection of an actual body that is somehow 'prior to law' and whose boundary comes 'preconstituted' by nature.⁴¹ The legal body is also not necessarily equivalent to the body as it is understood by medical science, though medical understandings of the body can influence the law here.⁴² Indeed, as Herring and Chau have argued, the complexities of actual bodies are not adequately reflected in the legal conception of the body as bounded and relatively fixed. In particular, they note that our actual bodies are not 'immutable' but 'constantly changing', with 'cells dying' and 'new cells

³⁷ Ngaire Naffine, 'The Body Bag' in Ngaire Naffine and Rosemary J Owens (eds), *Sexing the Subject of the Law* (Sweet and Maxwell, 1997) 79, 85.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ben Golder, 'The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform' (2004) 11(1) *E Law*, [27].

⁴¹ Naffine, above n 37, 83-84.

⁴² Such as in the recognition of some forms of 'mental harm' as 'bodily harm', as discussed above.

being created', and with factors like illness and obesity making bodily changes that we may have 'only limited control' over.⁴³ They also note that our actual bodies are fundamentally 'inter-connected with the wider world', through processes such as ingestion and excretion, and phenomena such as external/internal microbial inhabitation.⁴⁴ As such, whilst 'the legal concept of bodily harm suggests the prior existence of a body in a state of functional equilibrium, whole and inviolate,'⁴⁵ this does not match the reality of actual bodies. Recognition of the complex ways that actual bodies function gives weight to the suggestion raised by Nedelsky that we should re-think the 'wall-like' nature of the boundary of the legal body and instead treat it more like actual 'human skin': something that is 'permeable, slowly and constantly changing ... and a source of sensitive connection to the rest of the world'.⁴⁶ But effectively challenging the legal conception of the 'discrete, bounded ... [and] impermeable'⁴⁷ body is a 'Herculean' task, because the notion of clear 'borders and boundaries literally and figuratively set the limits of one's understanding.'⁴⁸

Building on these theoretical observations about the limitations of the legal conception of the body, this Part interrogates and challenges the body in 'bodily harm' by focusing on situations that call the neat legal boundary of the body into question. It argues that in a world of exponentially increasing medical and technological developments the criminal law can no longer sustain a simplistic conception of the clearly-bounded body consisting of just flesh, blood and bones. This Part begins with a discussion of a particularly pertinent English High Court case involving assault occasioning bodily harm: *DPP v Smith* [2006].⁴⁹ This case makes it evident that the criminal law is already struggling to police the boundary of the body in 'bodily harm', and as this Part progresses it becomes apparent that the key factors identified in this case do not offer a compelling nor coherent method for managing the boundary of the 21st century body.

⁴³ Jonathan Herring and P-L Chau, 'My Body, Your Body, Our Bodies' (2007) 15 *Medical Law Review* 34, 51.

⁴⁴ *Ibid* 49.

⁴⁵ Wait, above n 18, 107.

⁴⁶ Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162, 176.

⁴⁷ Golder, above n 40, [28].

⁴⁸ *Ibid* [57].

⁴⁹ *DPP v Smith* [2006] 1 WLR 1571.

A *DPP v Smith*⁵⁰

On the 6 June 2005 Miss Tether went to the home of her ex-partner, entered his bedroom and woke him up. He then pushed her onto the bed and, without her consent, cut off both her ponytail and some additional hair on her head with a pair of kitchen scissors. Whilst this caused Miss Tether to be upset, she suffered no cuts to her skin and there was no evidence that she suffered any diagnosable psychological harm. The ex-partner was charged with assault occasioning bodily harm under s47 of the *Offences Against the Person Act 1861* (UK). The trial court found that these facts disclosed no evidence of bodily harm and acquitted the ex-partner on the basis that he had no case to answer. On appeal the Queen's Bench Division of the English High Court was tasked with resolving the following question: was it 'wrong in law to decide that the cutting of the complainant's hair did not constitute bodily harm'?⁵¹ Sir Igor Judge P (Cresswell J concurring) held that hair cutting was capable of constituting actual bodily harm and remitted the matter for trial.

In his leading judgment Sir Igor Judge P made a number of observations about the nature of bodily harm. He began with the general proposition that 'actual bodily harm means what it says' and generally requires no elaboration,⁵² and reiterated the passage from *R v Chan-Fook* [1994] that the concept of bodily harm 'applied to all parts of the body'.⁵³ Turning to the particular case before him, Sir Igor Judge P then applied these general principles of law to hair:

In my judgment, whether it is alive beneath the surface of the skin or dead tissue above the surface of the skin, the hair is an attribute and part of the human body. It is intrinsic to each individual and to the identity of each individual. Although it is not essential to my decision, I note that an individual's hair is relevant to his or her autonomy. Some regard it as their crowning glory. Admirers may so regard it in the object of their affections. Even if, medically and scientifically speaking, the hair above the surface of the scalp is no more than dead tissue, it remains part of the body and is attached to it. While it is so attached, in my judgment it falls within the meaning of 'bodily' in the phrase 'actual bodily harm'. It is concerned with the body of the individual victim.⁵⁴

⁵⁰ Ibid.

⁵¹ Ibid 1572.

⁵² Ibid 1575.

⁵³ Ibid.

⁵⁴ Ibid 1576.

In delivering this decision Sir Igor Judge P rejected the various arguments made to the court that hair could not constitute part of the legal body, including that medically the shaft of the hair is no more than 'dead tissue' and that hair constantly grows and regularly falls out in a natural manner.⁵⁵ In his brief concurring opinion, Cresswell J agreed fully with Sir Igor Judge P and made the following additional comments:

The body, for the purposes of the word 'bodily' in section 47 of the 1861 Act, includes all parts of the body, including the hairs upon the scalp. On the evidence called by the prosecution, there was a case to answer of actual bodily harm. As Sir Igor Judge P has said, to a woman her hair is a vitally important part of her body. Where a significant portion of a woman's hair is cut off without her consent, this is a serious matter amounting to actual (not trivial or insignificant) bodily harm.⁵⁶

This matter was not without controversy. It was contemporaneously described as 'the grossest case of overcharging',⁵⁷ and the gendering of the importance of hair in Cresswell J's additional comments has not escaped the notice of commentators.⁵⁸ Whilst the case's ultimate decision is a logical doctrinal extension of the pre-existing authorities, the legal conception of bodily harm employed here may challenge intuitive understandings. It would be a rare person who would readily identify themselves as having suffered (consensual) 'bodily harm' after a visit to the hairdresser.⁵⁹

Importantly for the purposes of this article, the way in which this case was resolved reveals the blurry nature of the boundary of the legal body. Other than those cases involving so-called 'mental harm' the courts have typically had very little to say about the bodily nature of 'bodily harm': the body has simply been unproblematically located in the flesh, blood, bones and organs without any real explanation or justification. As with American law, so too Australian and English law seems to implicitly draw from some intuitive and unspoken

⁵⁵ Ibid 1574-1575.

⁵⁶ Ibid 1576.

⁵⁷ James Richardson, *Criminal Law Week*, 06/03/07, cited in Dilys Tausz and D C Ormerod, 'Case Comment: Assault Occasioning Actual Bodily Harm: Whether Cutting off Hair Amounting to Actual Bodily Harm' (2006) June *Criminal Law Review* 528, 530.

⁵⁸ Jesse Elvin, 'The Continuing Use of Problematic Sexual Stereotypes in Judicial Decision-Making' (2010) 18 *Feminist Legal Studies* 275, 291-293; Jonathan Herring, *Criminal Law: Text, Cases, and Materials* (Oxford University Press, 2012, 5th ed) 336.

⁵⁹ Tausz and Ormerod, above n 57.

‘common understanding’ of what constitutes bodily harm.⁶⁰ However, in the case of *DPP v Smith* [2006] the court was much more explicit as it was forced by the nature of the case to engage in direct boundary-setting work around the legal conception of the body. This is because hair, unlike flesh, blood and bones, troubles our intuitions about the body in a number of ways: whilst it may be biological in origin it is ‘dead’ tissue, it is insensate and the connection of individual hairs to the body is tenuous (they constantly drop off or are pulled away). Hair is also particularly troublesome for the law as it is located partly within and without the skin, and thus it straddles the traditional legal boundary.

In order to find that hair did indeed constitute part of the legal body despite its troublesome nature, Sir Igor Judge P made clear a number of underlying assumptions about the body that ordinarily go unspoken by law. Central to his judgment was the concept of attachment: whether a thing is part of the body or not depends largely on whether it is attached to things already recognised as ‘bodily’. Also important was consideration of whether that thing was an attribute of the body, whether it was intrinsic to the individual and their identity, and (in passing) whether it was relevant to their autonomy. In justifying the ‘bodily’ nature of hair specifically this case reveals the factors that are used to police the boundary of the legal body generally, and thus more than just the legal status of hair is at stake here. There are many things that might attach or detach from the body that might be considered an attribute of the body, intrinsic to the individual and their identity, and relevant to their autonomy. However, as the analysis in this article turns from hair to the multitude of other things that trouble the boundary of the body, it will demonstrate that attachment, attribution, identity and autonomy are not factors that draw a satisfactory boundary around the body of ‘bodily harm’.

B *Trouble at the Boundary*

Before engaging directly with the boundary of the body in ‘bodily harm’ it is important to make clear exactly what lies beyond this boundary. If the legal body is, as Naffine notes,⁶¹ coterminous with the liberal subject then beyond this boundary we will find only objects. Drawing the boundary of the legal body is thus an ontological process that creates a ‘dichotomy between persons and

⁶⁰ Francis X Shen, ‘Mind, Body, and the Criminal Law’ (2013) 97 *Minnesota Law Review* 2036, 2040.

⁶¹ Naffine, above n 37.

things'.⁶² This dichotomy has moral consequences⁶³ as well as practical legal consequences. Offences against persons are treated markedly differently from offences against things in terms of how they are charged, how they are proved and how they are punished (this is the difference between assault and stealing, wounding and damage to property, etc).

To begin thinking through the boundary between bodies and objects we can start with the body itself. As has been noted already, the skin, bones, flesh and organs of the body have all been unproblematically located by the law as part of the legal body in 'bodily harm'. Whilst these are all examples of 'living' tissue, *DPP v Smith* [2006] is authority for the bodily status of 'dead' hair as well. The reasoning in this decision would also seem to potentially extend to our nails and dead skin as things that are similarly produced by the body and that can remain attached to the body (at least for a time). Not all things produced by the body, however, would necessarily be considered part of the legal body. Faeces, urine, sweat, mucous, etc, may not be considered to be sufficiently attached to the body as they are all only temporarily connected to it and are regularly expelled from the body. They may also not be important to the embodied person and indeed are typically regarded as 'waste' products. However, there are a number of 'living' things that are produced by the body and that are generally regarded as important but that do not remain attached to the body at all times.

Consider the example of re-attached body parts. It would undoubtedly be the case that if someone were to cause damage to a kidney, lung, cornea, etc, that has always remained *in situ* then the law would consider this to constitute damage to the body. But the temporary severing of one's body part due to accident or misadventure, say the loss of a limb as a result of a car crash,⁶⁴ should not preclude that body part from being part of the legal body after medical re-attachment. Similarly, the relocation of tissue from one part of a person's body to another, such as through a skin graft from an undamaged area of the body to a damaged area, should also not preclude the 'bodily' status of that tissue. Should this conclusion change if a body part that was surgically

⁶² Bernard M Dickens, 'The Control of Living Bodily Materials' (1997) 27(2) *The University of Toronto Law Journal* 142, 145.

⁶³ Maartje Schermer, 'The Mind and the Machine. On the Conceptual and Moral Implications of Brain-Machine Interaction' (2009) 3 *Nanoethics* 217, 224.

⁶⁴ An occurrence that is unfortunately so common that Dickens notes that '[r]oad traffic and industrial accidents cause an annual total of completely severed limbs and digits comparable to the carnage of traditional warfare': Dickens, above n 62, 174-175.

attached to a person's body was originally attached to someone else's body? If an organ such as a lung had been transplanted from one person to another it arguably should not thereby lose its legal 'bodily' status either because of its temporary detachment from its original body or because it was not produced by the transplant recipient's body.

Consider also the example of detached but 'living' body parts. If body parts both before and after transplantation are part of the legal body, then what about body parts that are currently detached in the middle of transplantation? There may be a period of time during such a process when the body part in question— be it skin, a lung, corneas, a kidney, etc— will not be physically attached to any body. Similarly, in the course of some medical procedures body parts may be temporarily removed in order to facilitate treatment, such as when a cancerous organ is to be exposed to a high level of radiation.⁶⁵ Surely the criminal law should protect these organs if they were to come to some form of unauthorised harm during this transitional period? If so, would not such harm be most appropriately regarded as harm to the body?⁶⁶ In January 2018 a surgeon pled guilty to two counts of assault by beating at the Birmingham Crown Court in England.⁶⁷ This surgeon, Simon Bramhall, had apparently used an argon laser beam to brand his initials onto two human livers whilst transplanting those organs into his patients.⁶⁸ It is unclear from the reporting at what exact stage of the transplantation process the brandings took place, but the initial charges that were brought against the surgeon were assault occasioning bodily harm.⁶⁹

Beyond transplantation there are a number of situations in which detached body parts retain both their status as 'living' tissue and their viability for future bodily use. For example, in the Scottish civil law case of *Holdich v Lothian Health Board* [2014]⁷⁰ a man had his sperm cryopreserved prior to testicular cancer treatment. The sperm was 'damaged' by improper storage, in the sense that if used it would have reduced chances of conception and heightened

⁶⁵ *Holdich v Lothian Health Board* [2014] SLT 495, [6].

⁶⁶ Though if this is a case of *inter vivos* transplantation the relevant question may then become: whose body has been harmed? The transplant recipient or donor?

⁶⁷ Crown Prosecution Service, *Updated: Surgeon Sentenced for Burning Initials on Patients' Livers* (12 January 2018) <<https://www.cps.gov.uk/west-midlands/news/updated-surgeon-sentenced-burning-initials-patients-livers>>.

⁶⁸ "Liver Branding" Surgeon Simon Bramhall Fined £10,000, *BBC News* (online), 12 January 2018 <<http://www.bbc.com/news/uk-england-birmingham-42663518>>.

⁶⁹ *Ibid.*

⁷⁰ *Holdich v Lothian Health Board* [2014] SLT 495.

chances of any resulting child having birth defects.⁷¹ The resulting civil action brought by the man included *inter alia* a claim for mental injury due to the negligence of the storage facility. Under Scottish law compensation would have been easier for the man to achieve if this mental injury could be said to be 'a consequence of or associated with negligently caused bodily injury, even though the bodily component may be trivial.'⁷² In an initial procedural hearing about the viability of the claim, Lord Stewart of the Outer House of the Scottish Court of Session mused:

Would it be unreasonable to extend the concept of injury to damage to viable biomatter produced or removed for the purpose of the living subject's own reproduction or medical treatment? ... Thinking of autologous grafts, transplants and transfusions, would it be far fetched to deal with viable biomatter outside the body as part of the subject's person? Would it do violence to the law? Would it run counter to current norms of medical practice? Would it be inconsistent with the regulatory regimes? Would it offend morality?⁷³

Although he was not required to ultimately decide on this matter, in passing Lord Stewart noted favourably a German legal theory that treated stored gametes as body parts because of their 'functional unity' with the body.⁷⁴ If a currently detached body part continues to retain its viability for either reattachment or use in some bodily process or function (such as reproduction) the argument could be made that the criminal law should also continue to regard it as being part of the body.

We can also consider the nature of what constitutes 'attachment' to the body and whether and why this should be legally important.⁷⁵ Whilst the body will typically grow and develop certain attached components (skin, teeth, bone, etc), externally generated and non-biological things can also become effectively attached to the body as well. But not all forms of joining or connection to the

⁷¹ Ibid 498.

⁷² Ibid 499.

⁷³ Ibid.

⁷⁴ Ibid 496. An English translation of part of the German case from which this is derived can be found here: *Case: BGHZ 124, 52 VI. Civil Senate (VI ZR 62/93)* (1 December 2005), Texas Law <<https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=830>>. This case is also discussed in Erica Palmerini, 'A Legal Perspective on Body Implants for Therapy and Enhancement' (2015) 29(2-3) *International Review of Law, Computers and Technology* 226, 236-237.

⁷⁵ The *Macquarie Dictionary* relevantly defines 'attach' to mean 'to fasten; affix, join; connect': *Attach* (2017) Macquarie Dictionary <https://www.macquariedictionary.com.au/features/word/search/?word=attach&search_word_type=Dictionary>.

body may be sufficient for something to be considered part of the legal body. Dickens gives the example of ‘a shoplifter who swallows a diamond ring’ and notes that they could not thereby ‘claim that upon ingestion the object ceases to exist and becomes part of the person’.⁷⁶ And yet the diamond ring will not be readily separable from the shoplifter’s body, may be indistinguishable from the body upon external inspection and will be encased beneath both the boundary of the skin and numerous layers of flesh within the body (at least for a time). Makeup and accessories also lie in intimate proximity to the body, and clothing can bind, constrict and adhere to the body in various ways.⁷⁷ Many different forms of body modification physically connect objects to the body, such as piercings which join jewellery through holes in the skin of the earlobes, lips, nipples, noses, genitals, etc, and tattooing which deposits ink underneath several layers of skin. In addition to being attached to the body in these ways, clothing, makeup, jewellery and tattoos may all be considered by the person who utilises them to be important parts of their identity, expressions of their autonomy and may be the basis upon which their bearer is admired— all factors considered important to determining legal bodily status by Sir Igor Judge P in *DPP v Smith* [2006]. Because these kinds of things all ‘touch the body so closely’ do they thereby also deserve legal recognition as part of our ‘right to bodily integrity’?⁷⁸ To what extent, if any, should it matter that they are not produced by the biological processes of the body? Or that their attachment comes in different degrees of transience/permanence?

As technology has developed into the 21st century, the human body has also become more thoroughly intertwined with the wider world for medical and other functional purposes. An increasing number of people have medical devices implanted either on or below the surface of their skin for a variety of reasons. For example, pacemakers can help maintain the rhythm of the beating of the heart, cochlear implants aid in the sensorial reception of sound, corneal implants facilitate eye vision, insulin pumps are used to regulate glucose levels, and Deep Brain Stimulation devices can influence the functioning of the brain.⁷⁹ Prior to implantation and separate from the body these medical devices

⁷⁶ Dickens, above n 62, 145.

⁷⁷ For a discussion of the effect that dress can have on one’s lived reality of the world see Gowri Ramachandran, ‘Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing’ (2006) 66 *Maryland Law Review* 11, 36-37.

⁷⁸ *Ibid* 34.

⁷⁹ See, eg, the description of these technologies in Mark N Gasson and Bert-Jaap Koops, ‘Attacking Human Implants: A New Generation of Cybercrime’ (2013) 5(2) *Law, Innovation and Technology*

would undoubtedly be considered objects by the law, but once put in place within the body should their legal status change?⁸⁰ It is relevant here to think of these devices as not simply being joined to the body but as being deeply imbricated and 'forming intimate links' with it.⁸¹ Whilst they may literally comprise 'dead' matter (plastic, metals, silicon, etc) and may not be produced by the body itself, they are nevertheless intrinsic parts of the body's living, biological processes. Given this, is it right to say, like Dickens, that such 'therapeutic materials ... retain their separate identity within the body'?⁸² Or should criminal law instead allow that '[a]rtefacts that are physically incorporated into the body and restore physiological functions ... be considered as body parts'?⁸³

Prosthetic limbs are a key example of the complex attachments that bodies have with technology. Prosthetic limbs are typically understood as artificial replacements for lost or absent parts of the body,⁸⁴ and can come in the forms of hands, feet, legs, arms, etc. As the technology that informs the manufacture of prosthetic limbs has exponentially increased so too prostheses become 'increasingly advanced',⁸⁵ such that 'we no longer inhabit a world where a prosthetic [sic] is just a carven piece of wood worn for aesthetic effect'.⁸⁶ Modern prostheses can cost tens of thousands of dollars, can involve finely-calibrated electronics and some even interface with the user's nervous system in order to enable sensorial functions and control by thought.⁸⁷ Prosthetic limbs are now 'more capable of functionally replacing a missing body part than ever before.'⁸⁸ Indeed, many users of prosthetic limbs subjectively consider their prosthesis to be part of their body (and not simply a tool that they utilise).⁸⁹ On

248, 251-256; Palmerini, above n 74, 227-228; Woodrow Barfield, *Cyber Humans: Our Future with Machines* (Springer, 2015); Colin Bockman, 'Cybernetic-Enhancement Technology and the Future of Disability Law' (2010) 95 *Iowa Law Review* 1315, 1323-1327; Schermer, above n 63, 218-220.

⁸⁰ Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stanford Law Review* 957, 966-967.

⁸¹ Gasson and Koops, above n 79, 248.

⁸² Dickens, above n 62, 146.

⁸³ Palmerini, above n 74, 237.

⁸⁴ Though it has been argued that some prostheses could be understood as 'enhancements' rather than 'replacements': Isabel Karpin and Roxanne Mykitiuk, 'Going Out on a Limb: Prosthetics, Normalcy and Disputing the Therapy/Enhancement Distinction' (2008) 16 (Autumn) *Medical Law Review* 413.

⁸⁵ Schermer, above n 63, 222.

⁸⁶ Bayard Brown, 'A Farewell to Arms (and Legs): The Legal Treatment of Artificial Limbs' (2013) 47 *Columbia Journal of Law and Social Problems* 69, 102.

⁸⁷ Gasson and Koops, above n 79, 257.

⁸⁸ Brown, above n 86, 70-71.

⁸⁹ Shawn H E Harmon et al, 'Struggling to be Fit: Identity, Integrity, and the Law' (2017) 14(2) *Scripted* 326, 331; Schermer, above n 63, 222.

this basis it has been argued that the law should treat prosthetic limbs in the same way as biological limbs.⁹⁰

The broad issues discussed here were raised in the United States case of *State v Schaffer* (2002).⁹¹ In this case David Schaffer, who had a prosthetic arm, refused a staff request for him to move from his hospital room. Hospital security officers were called and a verbal altercation ensued. Schaffer swung his prosthetic arm at one of the officers, hitting the officer on the head and causing an abrasion. A grand jury indicted Schaffer on two counts of aggravated assault, with Count One charging that Schaffer had used his prosthetic arm as a 'deadly weapon' or 'dangerous instrument'. The trial court granted a motion to dismiss Count One and the prosecution appealed to the Court of Appeals of Arizona. The Court of Appeals allowed this appeal and found that a prosthetic arm could legally constitute a 'dangerous instrument'. They rejected the argument that the prosthetic arm 'is [David's] arm ... even though it is made of plastic and metal components rather than flesh and bone' because it was being used like a biological arm.⁹² Instead the Court found that 'a prosthesis is not a "body part," but is a device designed to be used as a substitute for a missing body part', and likened its use in an assault to 'the use of an object (whether the object be a rock, gun, knife, or something else)'.⁹³ The Court here did not entertain the proposition that a prosthesis that was a functional substitute for a missing body part could thereby effectively become that body part. This line of thinking was presumably precluded by the assumption that the 'body' is something that could only possibly be made up of flesh, blood and bone.

Prosthetic limbs clearly problematise the legal conception of the body in 'bodily harm'. As Barfield identifies, whilst a prosthetic limb could be 'a weapon used in an assault', such as in *State v Schaffer* (2002), conversely it could also be 'the subject of an assault against the wearer'.⁹⁴ If someone were to (unlawfully and without consent) strike the prosthetic limb of another and thereby cause it significant damage, could this ground a charge of assault occasioning bodily

⁹⁰ Brown, above n 86. Another persuasive reason for this would be providing equal treatment, and due respect, for persons with disabilities. It is a requirement under Article 5 of the United Nations *Convention on the Rights of Persons with Disabilities* that 'all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law'. A failure to recognise a person's prosthetic limb as being part of their body for the purpose of offences involving bodily harm could be argued to be a failure to provide that person with an equal level of protection as a person with a biological limb.

⁹¹ *State v Schaffer*, 48 P.3d 1202 (Ariz. Ct. App 2002). As identified in Brown, above n 86, 98-99.

⁹² *State v Schaffer*, 48 P.3d 1202 (Ariz. Ct. App 2002), [8].

⁹³ *Ibid* [16].

⁹⁴ Barfield, above n 79, 196.

harm? The mere fact that a prosthetic limb can be repaired/replaced does not prevent damage to it from being considered 'bodily harm', as there is no legal 'need for the harm to be permanent'.⁹⁵ Neither does the fact that damaging a prosthetic limb may not necessarily cause pain to the user of the prosthesis prevent it from constituting 'bodily harm', as there is no legal 'need for the harm to cause pain— as where injury is caused to a part of the body which is already numb or anaesthetised'.⁹⁶ Following the factors identified by Sir Igor Justice P in *DPP v Smith* [2006] it could be argued that a prosthetic limb may be closely attached to the body, important to the identity of the person who uses it, and also important to their autonomy. In determining whether damage to a prosthetic limb can constitute bodily harm, to what extent should these factors weigh up against the fact that a prosthetic limb is not a 'living', biological part of a person's body?

The narrowing gap between objects and the human body extends beyond situations where technology is used in a medical capacity to monitor, maintain or replace the functionality of a body part that is either missing or damaged. Legal scholars who are concerned with future trends have noted other potential points of interconnection between bodies and technology, in particular where the 'functions of the body are ... enhanced by implanted devices'.⁹⁷ Indeed, the implantation beneath the skin of microchips that can store and transmit data is currently taking place. They have already been used in nightclubs and workplaces as 'keys' that provide access to secured spaces.⁹⁸ In February 2018 it was reported that an Australian scientist planned to commence legal action against the New South Wales government because it had cancelled his travel card (used to pay for public transport services) after it learned that he had removed the chip from the card and implanted it in his left hand.⁹⁹

⁹⁵ Tausz and Ormerod, above n 57, 530.

⁹⁶ Ibid 530. Though in the absence of immediate pain some other factor would be needed in order to fulfil the legal requirement of an effect on the prosthetic limb user's 'health' or 'comfort'.

⁹⁷ Gasson and Koops, above n 79, 259. See also Woodrow Barfield and Alexander Williams, 'Law, Cyborgs, and Technologically Enhanced Brains' (2017) 2 *Philosophies* article 6, 1-3 <<http://www.mdpi.com/2409-9287/2/1/6/pdf>>.

⁹⁸ Joseph R Carvalko, 'Law and Policy in an Era of Cyborg-Assisted-Life: The Implications of Interfacing In-The-Body Technologies to the Outer World' (2013) *IEEE International Symposium on Technology and Society* 204, 205.

⁹⁹ Australian Associated Press, 'Biohacker Fights for "Cyborg Rights" After Implanted Travel Card Cancelled', *The Guardian* (online), 15 February 2018 <<https://www.theguardian.com/australia-news/2018/feb/15/biohacker-fights-for-cyborg-rights-after-implanted-travel-card-cancelled>>; Bruce Baer Arnold, 'No, You Can't Tap Your Hand to Get on the Train— Where Biohacktivists Stand Under the Law' (20 February 2018) *The Conversation* <<https://theconversation.com/no-you-cant-tap-your-hand-to-get-on-the-train-where-biohacktivists-stand-under-the-law-92024>>.

Furthermore, it has been predicted that ‘in the near future’ such ‘chips will automatically debit bank accounts, reward shoppers to stop at selected points of purchase, verify “no fly lists”, replace credit cards and do not resuscitate (DNR) bracelets as well as supply employment verifications.’¹⁰⁰ They could also be ‘used as identification or location devices, which enable a person to be identified and their personal (and medical) data or criminal records accessed, or their movements tracked’.¹⁰¹

However, although such kinds of technological enhancements may provide additional functionality to the body they can also simultaneously produce additional vectors of potential harm to the body. At some point, if not already, it may be ‘possible to talk in terms of a human (albeit a technologically enhanced human) becoming for instance infected by a computer virus or “hacked” by a third party’.¹⁰² That is, an implanted chip could be externally accessed by someone without the consent of the implanted person, and that chip’s data could then be copied, modified or erased, or malicious data could be added. Given the subdermally-implanted nature of such chips, it has already been suggested by some commentators that criminal law offences aimed at protecting the human body— assault, battery, bodily harm, wounding and the like— may have a future role to play in prohibiting these kinds of threats.¹⁰³

As the discussion has progressed in this Part, it has become apparent that the current legal boundary of the body in ‘bodily harm’ is neither clear nor conceptually coherent. This boundary is troubled not only by the body’s own products and processes, such as hair, dead skin, nails, urine, etc, but also by everyday and unremarkable bodily practices, such as makeup, dress and body modification. The legal boundary is also fundamentally challenged by the ongoing advances in medicine and science that have enabled body parts to be manipulated, rearranged, detached, re-attached, and integrated in complex and sophisticated ways with the wider world. Internal organs can now be removed and replaced or transplanted; bodily tissue can be detached and stored

¹⁰⁰ Carvalko, above n 98, 205. See also the possible applications detailed in Kenneth R Foster and Jan Jaeger, ‘RFID Inside: The Murky Ethics of Implanted Chips’ (2007) 44(3) *IEEE Spectrum* 24.

¹⁰¹ Palmerini, above n 74, 228.

¹⁰² Gasson and Koops, above n 79, 260. Indeed, Carvalko gives examples to show how implanted devices such as pacemakers and insulin pumps can be externally accessed and even controlled: Carvalko, above n 98, 207.

¹⁰³ Gasson and Koops, above n 79, 272-275. As Carvalko observes: ‘There is no evidence to suggest that the criminal law will not flex its muscle to deter and punish for criminal behavior that actually or potentially harms individuals, as society increasingly incorporates technology into the human anatomy’: Carvalko, above n 98, 208.

externally in a viable, 'living' condition awaiting future use or reintegration; some people's biological processes have been replaced by, or are reliant upon, implanted or attached devices; and the future promises only further interlinkages between subjects and objects. The criminal law can no longer rely on simplistic understandings of the body as simply flesh, blood and bone when determining bodily harm, instead a more nuanced conception of the legal body is needed. The boundary of the legal body can no longer be located unproblematically at the skin as this cannot account for the increasingly complex interconnections between bodies and technology. Furthermore, the set of prerequisite factors identified by Sir Igor Judge P in *DPP v Smith*, namely attachment, identity and autonomy, do not provide satisfactory guidance for resolving all of the issues involved in fixing the boundary of the body. The legal conception of the body in 'bodily harm' needs to change.

It is not an adequate response to this state of affairs to note that other areas of the criminal law could be used here in lieu of offences involving bodily harm. It could be argued that it is an offence to damage or otherwise interfere with a person's property without their consent and that such offences could already be said to provide legal protections against some of the situations discussed in this Part.¹⁰⁴ For example, in *DPP v Smith* [2006] even if Miss Tether's hair was not held to be a part of her body then it could nevertheless be regarded as her property, and by cutting off her ponytail and some additional hair her ex-partner could be argued to commit some kind of property-based offence. Similarly, damaging a person's prosthetic limb or subdermally-implanted medical device without their consent could also constitute some form of unlawful interference with property if these things were not conceptualised as part of that person's body. However, it is not appropriate to rely on property-based offences in all such cases because these offences do not adequately capture the nature of the wrong that has been committed. The wrong that is captured by the offence of assault occasioning bodily harm is a wrong of a particular kind, bound up with notions of violence and with a more direct and immediate impact on victims themselves than the wrong of a property-based

¹⁰⁴ See, for example, the range of potentially relevant English property-based offences, including criminal damage and unauthorized access, discussed in Herring, above n 58, ch 11. In the Australian context, all jurisdictions maintain offences that cover damage to property, for example: *Crimes Act 1900* (ACT) s 116; *Crimes Act 1900* (NSW) s 195; *Criminal Code* (NT) s 241; *Criminal Code* (Qld) s 469; *Criminal Law Consolidation Act 1935* (SA) s 85; *Criminal Code* (Tas) s 273; *Crimes Act 1958* (Vic) s 197; *Criminal Code* (WA) s 444.

offence.¹⁰⁵ Indeed, consideration of the nature of the wrong of causing bodily harm provides a useful way forward for re-envisioning the legal body in ‘bodily harm’ and it is to this task that this analysis now turns.

IV OF BODIES AND PERSONS

This Part proposes that a turn towards the ‘person’ can help generate a more sophisticated and appropriate legal conception of the body in ‘bodily harm’. This is not an argument that the law should institute new offences or new offence wording to replace ‘bodily harm’ (such as ‘assault occasioning personal harm’ or something similar). Rather, it is an argument that the boundary of the body in ‘bodily harm’ should be understood through the lens of the connection between the body and the person. If we accept the notion that the statutory framework around bodily harm should be understood as ‘always speaking’,¹⁰⁶ then we should also accept that the concept of ‘bodily harm’ should be open to change and is not a frozen and ‘never-changing physical (or mental) condition’.¹⁰⁷ On this basis, this article argues that recognition of the close link between bodies and persons will allow the law to more effectively negotiate the changing boundary of the increasingly interconnected and technological body of the 21st century.¹⁰⁸

To justify the importance this article places on the ‘person’ in understanding bodily harm we need to remind ourselves that offences involving violence, including assault occasioning bodily harm, have historically been categorised as ‘offences against the person’.¹⁰⁹ This classification is more than just ‘an organizational label’ and instead reflects something deeper about the

¹⁰⁵ Alice Ristroph, ‘Criminal Law in the Shadow of Violence’ (2011) 62 *Alabama Law Review* 571, 573-574.

¹⁰⁶ *R v Ireland* [1998] AC 147, 159 (Lord Steyn). Cited favourably by the High Court recently in *Aubrey v R* [2017] 260 CLR 305, 322 [30].

¹⁰⁷ David Kell, ‘Bodily Harm in the Court of Appeal’ (1993) 109 *Law Quarterly Review* 199, 202.

¹⁰⁸ This paper’s proposal that law should focus on the ‘person’ when interpreting ‘bodily harm’ is inspired by Schermer’s turn towards ‘personhood’ as the key moral benchmark for resolving the various moral and legal issues raised by the increasing interconnections between brains, minds and machines. In particular, the following passage: ‘Certain moral entitlements, obligations and responsibilities are connected to that state of “being a person”. This notion ... helps to resolve the confusion surrounding the cyborg. Rather than classifying him as either man or machine, we should be looking at personhood. Personhood is what really matters morally...’: Schermer, above n 63, 224.

¹⁰⁹ Note that the offence of causing bodily harm appears within an English statute entitled the *Offences Against the Person Act 1861* (UK), and under section headings including ‘Offences against the person’ within various Australian statutes, such as *Crimes Act 1900* (ACT) Part 2; *Crimes Act 1900* (NSW) Part 3; *Criminal Code* (Qld) Part 5; *Criminal Code* (WA) Part V.

kind of wrong encapsulated by these offences.¹¹⁰ The particular wrong of causing bodily harm is bound up in the close legal connection between bodies and persons. Not all legal persons have bodies (such as corporations) and not all bodies are connected to legal persons (such as corpses).¹¹¹ However, all natural persons are embodied and our bodies are the key means by which we experience the world and participate in it. Ramachandran describes the '[e]mbodied subjectivity' of persons as the fact that 'we experience the world not as consciousnesses separate from and encapsulated within a body, but rather *through* our bodies'.¹¹² Importantly for the criminal law our bodies are 'susceptible' to damage and the category of 'offences against the person' reflects this fact.¹¹³ Because our bodies are 'vulnerable' and 'feel pain' they therefore 'need protection',¹¹⁴ and this is what these offences provide. Legal persons can suffer harm in many different ways that do not involve harm to their body, such as through damage to their property or damage to their reputation. Bodies can also be harmed without thereby harming a legal person, such as through interference with a corpse. But the specific wrong that is criminalised by the offence of assault occasioning bodily harm lies at the intersection of persons and bodies; the criminal law does not protect flesh *qua* flesh, blood *qua* blood, and bone *qua* bone, rather it protects these things to the extent they are part of the embodiment of the person. The wrong of causing 'bodily harm' lies in directly harming the means by which a person experiences the world or participates in it. This core understanding of the wrong of bodily harm is inherent in its longstanding legal definition: 'bodily harm' does not cover all kinds of 'hurt' or 'injury' but specifically just those that 'interfere with ... health or comfort'.¹¹⁵

In a world of increasing medical and technological developments, it cannot be denied that the ways in which people experience the world and participate in it are also changing. A person's experience of the world may be reliant on technological devices, for example where they may not be able to hear sound without a functioning cochlear implant. Similarly, a person's ability to

¹¹⁰ Ristroph, above n 105, 578.

¹¹¹ Indeed, the legal boundary of personhood is fraught with many political and philosophical implications: see Ngaire Naffine, 'Who are the Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66 *Modern Law Review* 346.

¹¹² Gowrie Ramachandran, 'Against the Right to Bodily Integrity: Of Cyborgs and Human Rights' (2009) 87(1) *Denver University Law Review* 1, 36 (emphasis in original).

¹¹³ Ristroph, above n 105, 578.

¹¹⁴ *Ibid* 621.

¹¹⁵ *R v Donovan* (1934) 2 KB 498, 509.

participate in the world may be reliant on technological devices, for example where they may not be able to do their own grocery shopping without their Mobility Assistance Device.¹¹⁶ Furthermore, a person's understanding of their own body may incorporate non-biological elements, such as the user of a prosthetic limb who regards it not as a tool but as a part of themselves.¹¹⁷ Given these kinds of 21st century technologies, '[t]raditional distinctions ... between human bodies and things, and between the exterior and interior of the body need to be re-interpreted'.¹¹⁸

As part of this reinterpretation, law should appreciate that an increasingly important manner of thinking about the nature of the person is the trope of the 'cyborg'.¹¹⁹ To think of a person as being a cyborg or cyborg-like is to think of them simultaneously as being both 'a hybrid of machine and organism' and as transcending these categories.¹²⁰ The cyborg is not simply a dualistic addition of human plus machine but is instead an intertwined fusion such that any boundary between these constituent parts is broken down and 'made thoroughly ambiguous'.¹²¹ This article is not arguing here that criminal law should collapse any and all distinctions between subjects and the objects they interact with.¹²² Instead, it is arguing that the trope of the 'cyborg' can help law think about the 'person' differently, specifically because it 'compels us to delay categorization— in familiar terms of human or machine— at least for the moment and so creates a space for further exploration'.¹²³ The world is no longer populated simply by subjects and objects who can be divided from each

¹¹⁶ Linda MacDonald Glenn, 'Case Study: Ethical and Legal Issues in Human Machine Mergers (Or the Cyborgs Cometh)' (2012) 21 *Annals of Health Law* 175.

¹¹⁷ Harmon et al, above n 89, 331; Schermer, above n 63, 222.

¹¹⁸ Gasson and Koops, above n 79, 270.

¹¹⁹ Barfield and Williams, above n 97; Barfield, above n 79; Bockman, above n 79; Schermer, above n 63; Benjamin Wittes and Jane Chong, *Our Cyborg Future: Law and Policy Implications*, September 2014, Brookings Institute.

¹²⁰ Donna Haraway, 'A Cyborg Manifesto: Science, Technology and Socialist-Feminism in the Late Twentieth Century' in Donna Haraway, *Simians, Cyborgs and Women: The Reinvention of Nature* (2013, Taylor and Francis) 273, 274.

¹²¹ *Ibid* 279.

¹²² Think, for example, of our relationship with our modern mobile phones. The closeness of this was recently described by Chief Justice John Roberts of the Supreme Court of the United States as being of 'such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy': *Riley v. California* 573 U. S. ____ (2014), 9; *Riley v. California*, 134 S.Ct. 2473 (2014). Whilst this judicial comment has provided fuel for thought for commentators on law and technology (such as Wittes and Chong, above n 119, 2; Barfield and Williams, above n 97, 4), it would seem far-fetched at present to suggest that law treat damage to someone's mobile phone as a form of harm to their body.

¹²³ Schermer, above n 63, 222.

other in a bright-line manner.¹²⁴ '[N]ew biological and medical technologies' have 'fractur[ed] the conceptual orderings and constructs from which social and legal meanings have been derived' around the human body and the world of things.¹²⁵ As technological devices come to be 'viewed by a person as part of their body and very being' the divisions that law draws between bodies and things, subjects and objects, 'becom[e] blurred.'¹²⁶ Law needs to accept and respond to the reality 'of the leakiness of bodies and boundaries' here, and, accordingly, make room for a more 'open response.'¹²⁷

A more open response from the criminal law should be one that recognises that '[b]oth the objects of the criminal law (property, person, and so on) and the means of wrongdoing (how the wrong may be inflicted or caused) are relational', that is that they are context-dependent, linked to current 'social understandings' about the nature of things and subject to both spatial and temporal change.¹²⁸ Technology has fundamentally altered how bodies come to be constituted, how they operate and how they are understood: it has changed the spatial characteristics of the 'body' as it operates in the world. Unfortunately, 'new forms of vulnerabilities' follow these changes,¹²⁹ allowing for new means as well as new types of harm to the body. If the purpose of offences against the person, such as assault occasioning bodily harm, is to 'guard and protect [the] physical integrity' of the person,¹³⁰ then the legal conception of the body must be responsive to the different ways in which people experience the world and participate in it. To remedy this, the criminal law needs to be more responsive to contemporary means of wrongdoing and accordingly should provide protection in new ways too.¹³¹

Drawing all of these strands of thought together, this article proposes a new guiding interpretive principle for understanding the body in 'bodily harm': the protection of the legal person from their embodied vulnerability and susceptibility. Following this approach, the legal concept of the 'body' here

¹²⁴ Indeed, Naffine would argue that the law has not historically recognised 'a neat cleavage of the legal world into two mutually exclusive categories: being and thing.' For example, '[c]orporations are created as both persons and property and so have a dual status': Naffine, above n 111, 347.

¹²⁵ Roxanne Mykitiuk, 'Fragmenting the Body' (1994) 2 *Australian Feminist Law Journal* 63, 69.

¹²⁶ Barfield and Williams, above n 97, 3.

¹²⁷ Margrit Shildrick, *Leaky Bodies and Boundaries: Feminism, Postmodernism and (Bio)Ethics* (Routledge, 1997) 217.

¹²⁸ Lindsay Farmer, 'Time and Space in Criminal Law' (2010) 13(2) *New Criminal Law Review* 333, 339.

¹²⁹ Palmerini, above n 74, 231.

¹³⁰ Schermer, above n 63, 224.

¹³¹ Ristroph, above n 105, 621.

should not be restricted solely to flesh, blood and bone but should be understood more broadly as the means by which a person experiences the world and participates in it. This new approach to 'bodily harm' should still undoubtedly include *in situ* flesh, bones and blood, as well as the forms of mental harm that law has already recognised as having a bodily basis. However, it is not necessarily confined to this. Where transplanted organs, medical devices, prostheses and the like are sufficiently incorporated into the means by which a person experiences the world and participates in it, they should be recognised as part of the legal 'body' in order to protect the embodied person from harm. In determining what constitutes sufficient incorporation some of the factors identified by Sir Igor Judge P in *DPP v Smith* [2006] remain useful indicators of the 'body'. For example, when considering the legal bodily status of visual aids the degree of attachment could help distinguish between a corneal implant compared to a pair of glasses. Similarly, considering the importance of personal identity and autonomy could help distinguish between a prosthetic leg that is subjectively considered to be a part of a person's body and that is crucial to activities in that person's day-to-day life compared to a pair of jeans that a person considers to be, and treats like, a mere decorative adornment. Importantly, however, Sir Igor Judge P's privileging of the skin boundary of the body and his concern with the typical attributes of the human body should be given relatively less importance if not abandoned entirely. These particular factors are key contributors to the overly simplistic nature of the contemporary legal understanding of the body and need to be moved past in order to develop a more satisfactory account. Furthermore, the factors identified by Sir Igor Judge P that retain some use-value should not be regarded as a set of strict criteria all of which need to be met in order for something to classify as part of the legal 'body', but rather as a set of potential indicators that can assist in the central task of determining whether or not harm to a certain thing constitutes harm to the means by which a person experiences the world and participates in it. For example, the question of whether or not damage to frozen gametes constitutes bodily harm should not be immediately foreclosed just because the gametes are stored externally and thus lack contemporary physical attachment to a person. The importance of the gametes to that person's autonomy and the impact that any damage to those gametes would have on their ability to participate in the world in certain ways, such as through reproductive capacity, would still need to be considered.

Following this article's proposal does not mean extending legal protection from 'bodily harm' to any and every form of technological device or manipulation associated with the body. Nor does this article's proposal entail the making of sweeping legal conclusions about whether whole categories of such things should be protected, such as all subdermally-implanted chips. Instead, this is a process best left to a case-by-case analysis of how they actually function in a person's life and whether they can be said to constitute part of that person's embodied experience of and participation in the world. This article's proposal does, however, provide a strong basis for arguing in specific cases that transplanted organs, re-attached body parts, some prosthetic limbs and some forms of implanted medical devices should be considered to be part of the body in 'bodily harm' at this stage. Into the future medical science and technology will also inevitably continue to further alter the constitution and interconnections of our bodies and this will necessitate an ongoing re-evaluation of the legal body. As Wittes and Chong note, '[a]s cyborgization progresses, we will ... be faced with constant choices about whether to invest the machines with which we are integrating with some measure of the rights of humans or whether to divest humans of some rights they expected before they developed machine parts.'¹³² This article's proposal for focusing on the person connected to the body in 'bodily harm' should also serve as a useful guide for resolving these kinds of challenges into the future.

V CONCLUSION

This article has charted the boundary of the human body within criminal law by exploring what kinds of harm meet the legal definition of 'bodily harm'. Through the analysis of the case law and statutory sections in this area it has become apparent that the legal body in 'bodily harm' is currently premised on a particular conception of the human body, one that is discrete, easily identifiable and enclosed within the boundary of the skin.¹³³ It is a thoroughly biological and fleshy thing: a collection of blood, bones, skin and various organs. This conception of the legal body has, however, been placed under pressure by both the nature of human bodies and by medical and technological developments. The legal boundary between the subject and the world of objects becomes blurry when applied to actual bodies, so much so that even resolving the bodily

¹³² Wittes and Chong, above n 119, 20.

¹³³ Naffine, above n 37.

status of hair becomes a difficult legal exercise. This boundary also cannot adequately deal with the increasing malleability and interconnectivity of actual bodies in the 21st century, a time when pacemakers and electronic chips lie beneath the skin, organs and skin can be detached and transplanted, and prosthetic limbs are complex and functional.

This article has argued that a more sophisticated and appropriate legal conception of the body in 'bodily harm' is needed and it has proposed a new guiding interpretive principle based on the close connection between the body and the person. As offences 'against the person', offences involving bodily harm protect the legal person from the vulnerability and susceptibility of the means by which they experience the world and participate in it. The scope of the meaning of the body in 'bodily harm' should be interpreted through this lens. As such, the legal conception of the body here should extend beyond *in situ* flesh, blood and bones and, in certain cases, should arguably include at least transplanted organs, re-attached body parts, some prosthetic limbs and some forms of implanted medical devices.