



The Reconstituted Body in Law

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The fragmentation of the human body in law is a common theme in critical legal theory. Criticisms of analytical jurisprudence, for instance, argue that modern legal systems belong to a larger philosophical history in which the law has always privileged the function of the mind, and therefore, has always hierarchically undercut the value of the body (Cheah & Grosz, 1996). Modern law splits human-ness into compartmentalized legal subjects; human-ness is recognizable in law only through the latter's disaggregation of the self into public and private legal precepts. In the common law tradition, for instance, the human self has been given various legal statuses, as "citizen" (mostly in sovereignty codes), as the "person before the law" (in due process clauses), as "peoples" (e.g., in more cosmopolitan law attempting to address indigenous communal rights), and so on. And in the private law tradition, such as in tort laws, the human self is recast as property (viewed as valued entities in contractual transactions), and as object of liability (in civil disputes and criminal prosecution).

However, the law also seeks a robust imagination of the human physical body, and increasingly of body parts. Yet how do most of us know that our body is a legal entity? Prior to any form of intellectual discovery, many of us seem to instinctively accept the way our body is protected by law, through the supreme trope of the body as "the sacred." When we read any classic liberal constitution, or any modern human rights treaties, we discover an almost seamless universalist assertion of the human body as a sacred object of dignity, inalienability, and self-determination. Legal scholar Elizabeth Appel Blue's (2007) assertion is telling of this obligatory stance: "[A]ny set of legal principles for the body must encompass a sense of autonomy, liberty, and integrity, as well as a sense of altruism, reciprocity, relatedness, and moral obligations and duties" (p. 114).

Both the Left and the Right agree to this universalism of the sacred body. Moreover, both sides lament the degradation of the body by the unruly forces of science and commerce. It is to this problem of the so-called degradation of the body by biotechnology and commerce that I turn in this short essay. I am interested in finding out what happens beyond, or even against, the sacred. I would like to think afresh about how the body has been reconstituted through commodification seen not as a general theoretic, but as recognized and deliberated upon by law. Mostly, I want to echo Michele Goodwin that:

[T]he fear to speculate and even contemplate the body in any legal terms other than our late 19th century understanding, limits the potential for robust, informed, meaningful contemporary dialogue and debate on a critical topic of our times. Furthermore, this apprehension undermines scholars' ability to credibly engage in policy debates on the reach and normative positioning of biotechnology within the law. (2006, p. 323)

There is no going around the distasteful question here: How much is our body really worth? More pointedly, how much are our body parts worth, as living organs, tissues, and fluids, and what is the worth of our dead body, our corpse? Today, the twin engines that vigorously produce our body's worth — and I do mean monetary worth — are the biotechnology/pharmaceutical industries on the one hand, and the university research apparatus on the other. Together, they harvest our bodies, especially our body parts, in the name of technological innovation and therapeutic care. Liberal legal regimes turn out to be highly deferential to technological innovation, so that most legal suits claiming rights to body ownership tend to fail in the hands of judges who tend to side with biotechnology and pharmaceutical firms in the denial of property rights interests to the claimant. This is especially true in American jurisprudence.¹

Furthermore, the mundane but nonetheless powerful discourse of altruism goes hand-in-hand with the legal privileging of technological innovation that makes the “gifting” of body parts and fluids possible. Thus, the discourse of altruism attaches its own set of values to the body. The most common form of this altruistic discourse is the donation drive, which reaches deep into the community life — into schools, into popular media narratives, and of course, into some religious institutions — to harvest body parts for saving lives.

Positioned between the biotechnology/pharmaceutical industries and the “gifting culture” is the university laboratory, where it is said that innovation meets altruism, and where science intersects with the commitment to save lives, in the valuing of the human body as the object of experimentation for the social good. In this way, the university becomes both the community donation station of fresh body parts, and the linchpin of a multi-billion dollar biomedical industry. Anatomy classes routinely rely on families and private groups to donate cadavers. But universities also spend large sums of money to buy corpses and various body parts. From whom, one may ask? Well, from prisons, from coroners' offices, and sometimes even from funeral homes. There have also been cases heard of private laboratories that purchase illegal corpses from underground markets and international organ traffickers who smuggle dead bodies and spare body parts from far-flung developing countries for institutional use in the global North (Suddath & Altman, 2009; Wancata, 2003).

From a legal perspective, it is interesting to note that while the body as a stand-in for “whole personhood” is viewed as sacrosanct, body parts are seen in a much more utilitarian light. The use and distribution of body parts are seen as necessary to build and sustain a modern, scientific, and moral civilized society. In this way, body parts are not all that different from automobile parts that build

¹ A landmark case in the American court was *Moore v. Regents of the University of California* (793 P.2d 479), in which John Moore underwent treatment for hairy cell leukemia at the UCLA Medical Center under the supervision of Dr. David W. Golde. Moore subsequently found out that his spleen cells were later developed into a cell line that was commercialized. Golde and his partner successfully applied for a patent on the cell lines, in which the two were listed as “inventors.” It was estimated that they had received billions of dollars in royalties and profits. On July 9, 1990, the Supreme Court of California ruled that Moore had no right to any share of the profits realized from the commercialization of anything developed from his discarded body parts. However, the ruling in Moore does not signify that no harm has occurred. Rather, it indicates that damages might be difficult to calculate.

vehicles, or bricks and mortar that build cities and civilizations. However, this does not mean that the law is unified in its designation of body parts as property.

By and large, the property law regime as applied to disputes arising from the ownership and use of body parts is highly chaotic. Legal analysis after legal analysis has concluded that the relevant legislation is highly inconsistent; court judgments lack a clear set of principles; and legal bioethicists are in constant disagreement. As Blue argues:

How to treat body parts . . . is far from obvious, as the case law and scholarly literature addressing body parts is considerably conflicted over the best approach to apply. Each potential framework offers something that is appealing, but each also has difficulty in meeting all of the concerns that surround the body. (2007, p. 85)

How should we understand this legal disjuncture? How has the law dismembered the body, cutting it up into different pieces?

The law disaggregates the body through three legal regimes, namely the market regime, the liability regime, and the privacy rights regime. A market legal approach, simply, ascertains the degree of flexibility with the concept of property in order to determine rightful compensation in body transactions. A liability approach, on the other hand, hears cases of wrongful treatment of the body and its parts in commercial transactions. Of the three, the privacy rights regime provokes the most complicated legal battles.

Briefly, the privacy rights regime, as the name suggests, privileges the body as property owned by the person. Autonomy and self-determination are supreme values that guide the legislature and the court in cases of dispute. Yet even within this approach, differences occur in the understanding of the body-as-possession and the body-as-property. They are not the same. The former refers mostly to privacy rights, as in abortion rights, sexual rights, and labor rights. In these instances, you are said to have the right to possess your body, so that you are free to use it in ways you determine, without threats. However, this is not to be confused with owning your body as property. Because property rights necessarily involve the marketplace, the law tends to apply fairly strict scrutiny to the buying and selling of bodies and body parts. For instance, most states in the United States prohibit financial transactions involving body parts, so that organ donation is fine, but organ trafficking is a criminal offense. Meanwhile, though, patent laws do allow the commercialization of body parts by according property rights to innovators in genetic and other therapeutic research. The property rights often translate into billions of dollars for the patent owners.

But property rights of the body do not only involve the marketplace, for the law also often accords the property rights interest of our bodies to the state. Many of us already know that our living body is a property of the state; the very foundation of state sovereignty is erected not only through territorial ownership of land, sea, and air space, but through a conceptualization that includes the literal ownership of each citizen and his or her body as state property. This is how states can claim the absolute right to collecting bodies fallen in wars and epidemics from foreign lands. Public health laws are especially

relevant here, because the core techniques of public health governmentality, such as quarantine, forced vaccination, or the criminalization of those who are said to willfully spread germs, all rest on the property rights of the state to own our bodies.

Perhaps the most acute instance of state ownership is in the very moment of our death. In the case of death by accident, it is known that the state immediately claims the dead body as a property of the state. There exists a regime of law known as "presumed consent" statutes or "routine removal" statutes, which allows the state to remove certain body parts from a corpse without any necessary consent of the now-deceased person, their next of kin, or relatives (Childress & Liverman, 2006). In that kind of law, there is an "opt-out" fecuniary procedure, whereby each of us has to declare that we opt out of the state's presumed right to remove our body parts after our death. Although this right to opt-out does exist, how many of us have been duly informed of it?

In the case of natural death, the same statutes apply, if they exist in the deceased person's country, state, or province. Yet aside from the removal of body parts, the state also legally owns the deceased body, inasmuch as the very right to collect the corpse and bury it must be consented to by the state. No one, in other words, can legally collect the body of their dead family member from the hospital for burial without the state's authorization through the coroner's office, and sometimes also through the police department (if suspicion arises as to the cause of death). In short, public health governmentality of nation states reaches deep into the accident scene, the hospital ICU, the mortuary, and the funeral home, to enact state property interests on our bodies.

To conclude, I think an analysis of the relevant laws and cases could provide fertile ground for communication and cultural research on the body. Such an analysis would nicely supplement concerns about the intersection between the human body and spatiality, institutions, ideology, and so on. Yet, I strongly suggest that a legal-discursive analysis requires a suspension on the Left of the commodification critique, not least because, on the one hand, even variations tend to universalize the political implications of our body's relation to the market (which essentializes what "property" means in a legal setting), and on the other hand, it inadvertently mirrors conservative (and often religious) construction of the body as morally sacred, a construction that ends up stripping individual autonomy. Thus, there are political implications in the unwitting convergence of Left and the Right in their shared adoration of the pre-commodified body. The commodification critique becomes an obstacle to a more nuanced materialist analysis of the human body. The legal route I have taken in this short essay reveals to us that the law is far from a universalizing or unifying understanding of the property effects of the body. Indeed, legal analysis can provide us with a prism through which to understand how unsettled we are when it comes to ascertaining our body's worth vis-à-vis the market and the state.

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