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## Property, Privacy, and the Human Body

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RADHIKA RAO\*

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## INTRODUCTION

What kind of autonomy<sup>1</sup> do we have in our bodies? Is it the autonomy that individuals possess over a piece of property? Or is it the autonomy guaranteed under the constitutional right of privacy?<sup>2</sup> Consider, for example, a state statute authorizing the government to harvest the organs of a dead person without obtaining the consent of the decedent or his family.<sup>3</sup> Is such a statute a "taking" of private property that is constitutional so long as it serves a public

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<sup>1</sup> Autonomy itself is a complicated concept that incorporates multiple meanings. Derived from the Greek word stems for "self" and "law," "autonomy" literally means "the having or making of one's own laws." Joel Feinberg, *Autonomy, Sovereignty, and Privacy: Moral Ideals in the Constitution?*, 58 NOTRE DAME L. REV. 445, 446 (1983). It is a term that evokes images of self-rule, self-determination, and self-sovereignty. *See id.* (discussing the application of the word "autonomy" to individual persons).

<sup>2</sup> Many scholars suggest that the term "privacy" itself is a misnomer, arguing that the constitutional right of privacy is synonymous with a principle of personal autonomy. *See, e.g., id.* at 446-47 (asserting that the constitutional right of privacy embodies a philosophical principle of personal autonomy, and comparing this principle to the idea of political sovereignty); Louis Henkin, *Privacy and Autonomy*, 74 COLUM. L. REV. 1410, 1410 (1974) (stating that the denomination of the "right to privacy . . . is misleading, if not mistaken"); Daniel R. Ortiz, *Privacy, Autonomy, and Consent*, 12 HARV. J. L. & PUB. POL'Y 91, 91-92 (contending that "[t]he term 'privacy' itself is a misnomer" because "privacy addresses not secrecy, but the scope and limits of individual autonomy").

<sup>3</sup> A number of states already possess laws that effectively achieve this result. Under the fiction of presumed consent, such statutes typically authorize the coroner or medical examiner to extract corneas and other bodily tissue for immediate transplantation from bodies within their custody without prior consent from the decedent or the next of kin, so long as the official lacks actual notice of any objections. *See infra* note 76.

purpose and provides just compensation?<sup>4</sup> Or is it an invasion of the decedent's and his family members' privacy that is constitutional only if it is narrowly tailored to further a compelling state interest?<sup>5</sup> What about a law preventing the removal of an incompetent pregnant woman from life support in order to preserve the life of the fetus contained within her womb?<sup>6</sup> Such a law effectively commandeers the incompetent woman's body to be used as an incubator in the service of the state. Does it constitute a "taking" of private property,<sup>7</sup> or does it instead infringe upon the constitutional privacy interests of

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<sup>4</sup> Almost all of the cases and scholarly commentary address this issue under the rubric of property law, rather than of privacy law. *See* discussion *infra* Part II.A. (discussing cases addressing the constitutionality of presumed consent statutes). *See also* Erik S. Jaffe, *She's Got Bette Davis['s] Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528, 567-74 (1990) (contending that nonconsensual removal of organs from dead bodies constitutes a taking); Note, *Compulsory Removal of Cadaver Organs*, 69 COLUM. L. REV. 693, 697 (1969) (arguing that the removal of cadaver organs is a taking of property). *But see* Jesse Dukeminier, Jr., *Supplying Organs for Transplantation*, 68 MICH. L. REV. 811, 833-35 (1970) (arguing that dead bodies are not property subject to the takings clause); Theodore Silver, *The Case for a Post Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 712-15 (1988) (asserting that cadaveric organs do not qualify as property).

<sup>5</sup> In a provocative Danish television documentary depicting the case of *Jacobsen v. Marin General Hosp.*, 963 F. Supp. 866, *aff'd*, 168 F.3d 499 (9th Cir. 1999), and withdrawn and superseded, 192 F.3d 881 (9th Cir. 1999), Mrs. Jacobsen eloquently protests the removal of her son Martin's heart for donation to another, drawing upon both property and privacy rationales. She declares that Martin's heart should not have been removed from his body both because "it belonged to him," suggesting that he owned it as a form of property, and because it was "too personal," implying that it was an integral part of his person and hence should have been governed by the law of privacy. *See* One Man's Death, Another Man's Gain (TV2/Denmark) (videotape on file with author).

<sup>6</sup> Although this situation might appear too bizarre and exceptional for any legislator to have actually contemplated, many states have enacted provisions to deal with this precise eventuality. Thirty-three states currently prevent the withdrawal of life-prolonging medical care from an incompetent pregnant woman, regardless of her own wishes as previously expressed in a living will or the recommendations of her designated proxy decisionmaker. Many of these provisions appear in the form of pregnancy clauses that invalidate the living wills and other health care directives of competent adult women who happen to be pregnant. By suspending advance directives to terminate treatment, such statutes permit a pregnant woman's life to be prolonged even when this is contrary to her instructions. Other statutes explicitly mandate continued treatment of incompetent pregnant women, singling out this category of citizens and forcing them to be used as involuntary incubators for the state. *See* *infra* notes 249-51 and accompanying text for a discussion of the two basic categories of state statutes that prevent the removal of life-sustaining medical care from incompetent pregnant women.

<sup>7</sup> In fact, Pennsylvania implicitly acknowledges the "taking" of the incompetent pregnant woman's body by providing "just compensation" in the form of payment for the expenses associated with life-sustaining medical care. *See* 20 PA. CONS. STAT. ANN. § 5414(c)(1) (1992).

the woman and her family?<sup>8</sup> When the federal government bans the purchase and sale of human organs for transplant to others,<sup>9</sup> and when states proscribe commercial surrogacy,<sup>10</sup> do such laws implicate property rights or privacy rights? Suppose a state in the future enacts a statute requiring all persons to supply bone marrow, kidneys, and other dispensable body parts to their family members whenever the benefits are great and the risks relatively minimal.<sup>11</sup> Is

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<sup>8</sup> Courts and commentators typically invoke the right of privacy rather than the law of property to address this issue. *See* text accompanying notes 259-67. *See also* Timothy J. Burch, *Incubator or Individual?: The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes*, 54 MD. L. REV. 528, 540-52 (1995) (applying 14th Amendment principles to argue that pregnancy restrictions violate a woman's constitutional rights); Janice McAvoy-Snitzer, *Pregnancy Clauses in Living Will Statutes*, 87 COLUM. L. REV. 1280, 1290-1306 (1987) (stating that a woman's privacy interest is outweighed only by a state's interest in protecting a viable fetus); Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 102-38 (1997) (contending that pregnancy restrictions prevent competent women from exercising their interest in personal autonomy, and that pregnancy restrictions violate an incompetent woman's liberty interest); Elizabeth Carlin Benton, Note, *The Constitutionality of Pregnancy Clauses in Living Will Statutes*, 43 VAND. L. REV. 1821, 1825-36 (1990) (arguing that pregnancy restrictions implicate 14th Amendment privacy rights); Molly C. Dyke, Note, *A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes*, 70 B.U. L. REV. 867, 885-87 (1990) (noting that the right to privacy will dictate the constitutionality of pregnancy clauses). One author, however, has suggested that such laws might also implicate the right of property. *See* James M. Jordan III, Note, *Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women*, 22 GA. L. REV. 1103, 1163-64 (1988) (arguing that the state may not dictate how the body is to be used because of property rights in the body).

<sup>9</sup> *See* National Organ Transplant Act, 42 U.S.C. § 274e (1988) (banning the transfer of "human organs for valuable consideration for use in human transplantation"). The issue of commerce in the human body has become even more pressing with the rise of other forms of new technology, such as the Internet. *See, e.g.*, David Lazarus, *E-Bay Pulls Human Kidney From Internet Auction Site*, S.F. CHRON., Sept. 3, 1999, at A3 (describing internet auction of a human kidney for which the bidding began at \$25,000 and reached \$5.7 million before the auction was terminated);

<sup>10</sup> *See infra* note 188 (citing state statutes that proscribe commercial surrogacy).

<sup>11</sup> No state presently possesses such a statute, but several courts have confronted the related question of whether one individual may be compelled to donate parts of his or her body to save the life of another. *See* Curran v. Bosze, 566 N.E.2d 1319, 1332 (Ill. 1990) (upholding a mother's refusal to have her twin children tested in order to determine their compatibility to serve as bone marrow donors for their dying half-brother); McFall v. Shimp, 10 Pa. D. & C.3d 90, 91 (Ch. Ct. 1978) (declining to command Shimp to provide bone marrow to his cousin, even though the procedure posed little risk to him and his cousin would undoubtedly die without the donation). Along similar lines, Louisiana has enacted a law forbidding the intentional destruction of cryopreserved human embryos and requiring unused human embryos to be made available to other prospective parents for "adoptive implantation." *See* LA. REV. STAT. ANN. §§ 9:129, 9:130 (West 1988) (providing that "[a] viable in vitro fertilized human ovum is a juridical person which shall not be intentionally

this hypothetical statute at all different from the laws that previously prohibited abortions, thereby forcing women to donate their bodies to bring a fetus to term?<sup>12</sup> Are such statutes best analyzed under the rubric of property law or privacy law? What principles determine which claims with respect to the human body are relegated to which legal category? How do we decide which body of law should become the law of the body?

The law of the body is currently in a state of confusion and chaos. Sometimes the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights.<sup>13</sup> In almost all of these instances, however,

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destroyed by any natural or other juridical person" and requiring that "[i]f the in vitro fertilization parents renounce . . . their parental rights for in utero implantation, then the in vitro fertilized human ovum shall be available for adoptive implantation").

<sup>12</sup> Although abortion restrictions are almost always characterized as an invasion of privacy rights, a few intrepid scholars have advanced the argument that they also amount to "takings" of a pregnant woman's body requiring the payment of just compensation. See, e.g., Jeffrey D. Goldberg, *Involuntary Servitudes: A Property-Based Notion of Abortion-Choice*, 38 UCLA L. REV. 1597, 1641-48 (1991) (contending that statutes outlawing abortion are takings that require the government to pay just compensation); Susan E. Looper-Friedman, *"Keep Your Laws Off My Body": Abortion Regulation and the Takings Clause*, 29 NEW ENG. L. REV. 253, 279-83 (1995) (arguing that abortion restrictions are takings within the Fifth Amendment's meaning). See also Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 526-33 (1990) (contending that laws regulating abortion may violate the Thirteenth Amendment's prohibition against involuntary servitude); Donald H. Regan, *Rewriting Roe v. Wade*, 77 MICH. L. REV. 1569, 1571-73 (1979) (arguing that abortion restrictions impose obligations upon pregnant woman that are at odds with the law of samaritanism, which ordinarily does not require one individual to devote her body to save the life of another).

In his separate opinion in *Planned Parenthood v. Casey*, Justice Blackmun implicitly invoked this property argument as well, pointing out that abortion regulations conscript women's bodies without providing any compensation:

By restricting the right to terminate pregnancies, the State conscripts women's bodies into its service, forcing women to continue their pregnancies, suffer the pains of childbirth, and in most instances, provide years of maternal care. The State does not compensate women for their services; instead, it assumes that they owe this duty as a matter of course.

*Planned Parenthood v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in the judgment in part and dissenting in part).

<sup>13</sup> At first glance, characterization of the body as property, quasi-property, and privacy appears to correspond to the famous framework of property rules, liability rules, and inalienability. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) [hereinafter Calabresi & Melamed, *Property Rules*]. See also Guido Calabresi, *Remarks: The Simple Virtues of The Cathedral*, 106 YALE L.J. 2201, 2207 (1997) (proposing the human body as the next frontier for application of his famous framework and suggesting that "the [original] article's simple framework may be useful in surprising ways in analyzing body parts"). The analogy is not perfect, however, because the legal category of "property"

there is little analysis regarding which rubric should be employed in which context, or indeed, of whether the rhetoric we use even matters—whether it makes any difference to the ultimate result if the body is conceptualized as a species of property rather than as an interest in privacy. Instead, the choice of legal category often appears automatic and reflexive. Moreover, the lack of coherence in our concept of the body promotes an inconsistent and haphazard approach that enables different treatment of the body under essentially similar circumstances.

Regardless of the legal language that is employed, property and privacy constructions of the body converge to the extent that they secure identical interests—namely, the right to possess one's own body and the right to exclude others from it. The two diverge, however, in their concept of the relationship between the person and the body. Property envisions a person who "owns" and is thus distinct from his or her body, while privacy views the person as embodied and the body as personified. Under property theory the body is theoretically capable of separation from its "owner," whereas under privacy theory the two are indivisible and inextricably intertwined. The critical difference between these two conceptions of the body appears to turn upon the element of transfer. The law often draws a line between self-ownership and sale of the body to others, while separating the rights of intimate relatives from the interests of strangers. These subtle distinctions trace the deep divisions between privacy and property theories. Accordingly, when we seek to preserve the physical integrity of the body without necessarily permitting rights in the human body to be conveyed to others, and when we wish to shield intimate associations but not arms-length transactions, we should adopt the language of privacy rather than that of property. Conversely, when the human body is fragmented from the person and it becomes possible to disaggregate rights in the body and assign them to different parties, we should employ the property paradigm because it alone possesses the conceptual framework and the vocabulary for allocating rights and responsibilities among all of those who share an interest in a precious resource.

This Article explores the connections between privacy and property in the context of the human body,<sup>14</sup> attempting to apply the preceding insights to

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is governed by both property rules and liability rules, while the constitutional right of privacy incorporates property concepts as well as a principle of inalienability.

<sup>14</sup> Two other areas of overlap between privacy and property involve the Fourth Amendment and the right of informational privacy. Fourth Amendment analysis initially focused on the physical invasion of property rights. *See Boyd v. United States*, 116 U.S. 616, 621-22 (1886) (holding that the Fourth Amendment protects common law property rights). However, this approach ultimately evolved into a guarantee of personal privacy. *See Warden v. Hayden*, 387 U.S. 294, 304 (1967) (stating: "[w]e have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."); *Katz v. United States*, 389 U.S. 347, 353 (1967) (finding that "the Fourth Amendment protects people, not places. What a person knowingly exposes to the public,

bring some order to the confusion and to supply the missing principles that determine which claims regarding the body belong in which legal category. Part I describes the present legal status of the human body, contrasting the ways in which the body is sometimes constructed as a species of property and other times constructed as an interest in privacy. Part II focuses upon several settings where the status of the body is deeply contested, graphically illustrating the manner in which courts are currently grappling with both constructions. Part III traces the myriad parallels and divergences between privacy and property, examining the structural resemblance and the substantive relationship between the two rights as well as the critical differences that define and distinguish them. Part IV relies upon the differences between property and privacy conceptions of the body to distill three basic principles that delineate the contexts in which the body is properly conceived as the subject of a privacy interest, rather than the object of property law. Positive analysis attempts to demonstrate the extent to which these principles are embedded in existing jurisprudence, while normative analysis attempts to show how they should inform the inquiry.

### I. THE LEGAL STATUS OF THE HUMAN BODY

The status of the human body under the law is as yet unsettled, for disputes over the body deploy the rhetoric of both property and privacy.<sup>15</sup> Sometimes

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even in his own home or office, is not a subject of Fourth Amendment protection, but what he seeks to preserve as private, even in areas accessible to the public may be constitutionally protected") (citations omitted). Similarly, the right of informational privacy encompasses both a tort right to be free from unwanted publicity, *see* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 206-10 (1890) [hereinafter Warren & Brandeis, *The Right to Privacy*] (distilling principle of privacy from cases protecting nascent property rights in a person's individuality and likeness), and a property right to exploit commercially one's public personality, *see* Haelan Lab., Inc. v. Topps Chewing Gum, Inc., 202 F.2d 866, 868 (2nd Cir.) (recognizing the "right of publicity").

<sup>15</sup> The literature on the legal status of the human body is both vast and voluminous. Most of the commentary addresses the body as a form of property. *See, e.g.*, RUSSELL SCOTT, THE BODY AS PROPERTY (1981); Lori Andrews, *My Body, My Property*, 16 HASTINGS CTR. REP. 28, 37 (1986); Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBS. 193 (1983). Property constructs are typically invoked to argue for the right to transfer one's body to others, to sell it on the market, and to share in the resulting profits. *See, e.g.*, Mary Taylor Danforth, *Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits*, 6 YALE L. & POL'Y REV. 179, 182 (1988); Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207 (1986); Bonnie Steinbock, *Sperm as Property*, 6 STAN. L. POL'Y REV. 57 (1995); Danielle M. Wagner, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQ. L. REV. 931 (1995); William Boulier, Note, *Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts*, 23 HOFSTRA L. REV. 693 (1995); Hannah Horsley, Note, *Reconsidering Inalienability for Commercially Valuable Biological Materials*, 29 HARV. J. ON LEGIS. 223 (1992). However, some scholars speak in the

the body is characterized as property, sometimes it is classified as quasi-property, and sometimes it is not conceived as property at all, but rather as the subject of privacy rights. Regardless of the precise legal language employed, however, property and privacy constructions of the body overlap to the extent that both protect the same interests—specifically, the right to possess one's

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language of property but advocate inalienability of the body on the market. *See, e.g.*, RICHARD M. TITMUSS, *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY* 68-70 (1997) (arguing against blood sales on the grounds that they dilute altruism and erode community); Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, 11 SOC. PHIL. & POL'Y No.2, 259 (1994) [hereinafter Munzer, *An Uneasy Case*] (presenting a qualified case against markets in body parts that rests upon a Kantian argument regarding the incompatibility between objects with a market price and human dignity); Thomas H. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets, and the Meaning of Strangers*, 20 J. LEGAL REFORM 1055, 1056-57 (1987) (contending that body parts should be envisioned as gifts to be freely given to others rather than as property to be traded on the market, in order to foster relationships and create a wider sense of community). Prominent among these theorists is Professor Margaret Jane Radin, who first coined the term "market-inalienability" and who has developed an entire theory of Commodification that is grounded in the concept of personhood. *See* MARGARET JANE RADIN, *CONTESTED COMMODITIES* 15 (1996); MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993); Margaret Jane Radin, *Market Inalienability*, 100 HARV. L. REV. 1849 (1987); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) [hereinafter Radin, *Property and Personhood*]. *See also* Michelle Bourianoff Bray, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990) (building upon Radin's theory of property for personhood to propose the creation of a market-inalienable property right in the human body). Others reject the language of property without recommending a different mode of discourse. *See, e.g.*, LEON R. KASS, *TOWARD A MORE NATURAL SCIENCE* 283 (1985) (questioning "what kind of property . . . my body [is]," and determining that the language of property does not apply well to analysis of the body); Richard Gold, *Owning Our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167 (1995); Leon R. Kass, *Organs for Sale? Propriety, Property, and the Price of Progress*, 107 THE PUB. INT. 65, 86 (1992). Despite the appeal of privacy theory as an alternate candidate to property, only a few commentators have even considered it. *See, e.g.*, Karen L. Johnson, *The Sale of Human Organs: Implicating a Privacy Right*, 21 VAL. U. L. REV. 741, 744 (1987); Robert J. Muller, *Davis v. Davis: The Applicability of Privacy and Property Rights to the Disposition of Frozen Preembryos in Intrafamilial Disputes*, 24 U. TOL. L. REV. 763 (1993). One notable exception is Professor Alan Hyde, whose insightful comparison of various images of the body in the law includes the body as property and the body as a privacy interest, as well as the body as machine, and the body as sacred or inviolable. Hyde argues that these different visions of the body are all constructed by society, rather than representing any pre-existing reality, and that we are free to select or discard a particular construction of the body depending upon the goals we seek to achieve. *See* ALAN HYDE, *BODIES OF LAW* 6 (1997) (suggesting several alternatives to treating the body as a property or a privacy right). *See also* Linda R. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMANITIES 195, 220 (1995) (exploring the images of castle, sanctuary, and body in order to examine the relationship between the right of privacy and the inviolability of women's bodies).

own body and the right to exclude others from it. The key difference between these two conceptions of the body appears to lie in the ability to transfer rights to others.<sup>16</sup> Certain decisions draw a line between self-ownership and sale of the body to others, while separating the rights of intimate relatives from the interests of strangers. These subtle distinctions mirror the deep divisions between privacy and property theories, thus they may be employed to construct a conceptual map of the human body that allocates different claims to the realms of privacy and property.

#### A. *The Body as Property*

The image of the body as a form of property possessed by its "owner" dates back at least to John Locke, whose influential theory of property derived all ownership from the property possessed by individuals in their own persons.<sup>17</sup> In his treatise "Of Property," written around 1690, Locke asserted: "Though the Earth and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself."<sup>18</sup> According to Locke, individual ownership of the physical body entailed ownership of those external things that are the product of the body's labor.<sup>19</sup> Yet Locke apparently envisioned the body as property of a special sort, held in trust rather than as an individual owner.<sup>20</sup> As a result, he believed that a person's rights to life and liberty were inalienable because they were not his own, but belonged to another.<sup>21</sup> These limits upon bodily property followed

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<sup>16</sup> Cf. STEPHEN R. MUNZER, A THEORY OF PROPERTY 48-49 (1990) [hereinafter MUNZER, A THEORY OF PROPERTY] (dividing all rights in the body into two categories—personal rights and property rights—and arguing that "[p]ersonal rights are body rights that protect interests or choices other than the choice to transfer," whereas "[p]roperty rights are body rights that protect the choice to transfer").

<sup>17</sup> Although the political theory that all property originates in self-ownership of one's body is relatively recent, the actual practice of affording some people property rights in the bodies of others is as old as the institution of slavery, which existed even in ancient Greece.

<sup>18</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 305 (Peter Laslett ed., Cambridge University Press 1967) (1690).

<sup>19</sup> From this property in one's person, it follows that "[t]he *Labour* of his *Body*, and the *Work* of his *hands* . . . are properly his." *Id.* Thus Locke's argument appears to be that "one literally owns one's limbs and hence must own their product." Radin, *Property and Personhood*, *supra* note 15, at 965.

<sup>20</sup> One commentator compares Locke's vision of the body as property to a trust relationship, stating:

Locke's "real view" seems to be that our lives are held in trust. We function as the trustees and major beneficiaries, but not as owners. Under the deed of trust we are empowered to make certain decisions about the disposal of the trust (e.g., whether to sell our labor power to another for a limited time) but we may not trade it away for keeps even if the trade is voluntary.

Lance K. Stell, *Dueling and the Right to Life*, 90 ETHICS 16 (1979).

<sup>21</sup> See LOCKE, *supra* note 18, at 302 ("For a Man, not having the Power of his own Life,

from the fact that ultimate ownership rested with the deity.<sup>22</sup> Thus Locke apparently viewed individuals as stewards over their bodies, possessing themselves in trust rather than as outright owners. Therefore, despite his reliance upon property rhetoric, his image of the rights individuals possess in their bodies clearly does not rise to the level of complete ownership.

But what exactly does it mean for the body to be property—what are the consequences of this legal construction? Under the Constitution, "property" is protected against deprivations without due process of law<sup>23</sup> and takings for a public use without just compensation.<sup>24</sup> Accordingly, individual autonomy over the body as property consists in the right not to be deprived of bodily property without proper procedures and a rational relationship to some legitimate state interest, as well as the right not to have bodily property taken for a public use except upon payment of just compensation.<sup>25</sup> The question whether the human body amounts to property, however, cannot itself be answered by reference to the Constitution, a document that does not even define the term. As the Supreme Court has observed, "[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."<sup>26</sup>

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*cannot, by Compact, or his own Consent, enslave himself to any one, nor put himself under the Absolute, Arbitrary Power of another, to take away his Life, when he pleases. No body can give more Power than he has himself; and he that cannot take away his own Life, cannot give another power over it.").*

<sup>22</sup> See *id.* at 289 ("For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property, whose Workmanship they are, made to last during his, not one another's Pleasure.").

<sup>23</sup> Both the Fifth and Fourteenth Amendments prohibit deprivations of "life, liberty, or property, without due process of law." U.S. CONST. amend. V; U.S. CONST. amend XIV, § 1.

<sup>24</sup> See U.S. CONST. amend. V.

<sup>25</sup> Since the demise of *Lochner v. New York*, 198 U.S. 45 (1905), property receives only minimal constitutional protection under the substantive component of the Due Process Clause. Thus the Court applies the lowest level of scrutiny, and regulations of property that do not amount to "takings" are deemed constitutional if rationally related to some legitimate state interest. See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379, 396-400 (1937) (upholding minimum wage legislation). Invasions of privacy, on the other hand, may implicate a "fundamental right" that cannot be abridged except upon a showing of heightened scrutiny. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155-56 (1973) (applying strict scrutiny to abortion regulations prior to fetal viability); *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992) (invalidating abortion restrictions that impose an "undue burden" upon a woman's choice to terminate her pregnancy prior to viability).

<sup>26</sup> *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). See also *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1980) ("Nor as a general proposition is the United States, as opposed to the several States, possessed of residual authority that enables it to define

As a consequence, courts generally look to existing rules and understandings of property as embodied in federal and state statutes and the common law to determine what constitutes property for the purposes of constitutional law.<sup>27</sup> Therefore, in order to ascertain whether the human body qualifies as "property" protected by the Constitution, it is first necessary to examine the treatment of the body under these various bodies of law.

The layperson tends to identify property with tangible things, while the law traditionally conceptualizes property as a bundle of rights possessed by persons relative to objects,<sup>28</sup> including, *inter alia*, the right to possess one's property, the right to use it, the right to exclude others, the right to transfer ownership by gift or by sale, the right to dispose of one's property after death, and the right not to have one's property expropriated by the government without payment of compensation.<sup>29</sup> Under the layperson's notion of property, the human body

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'property' in the first instance."); I. J. Schiffres, Annotation, *Federal Courts: Federal or State Law as Applicable in Determining What Is Property for Which Compensation Must Be Paid Upon Its Taking by the Federal Government*, 1 A.L.R. 479, 482 (1969) (observing that courts typically refer to state law to define "property" in condemnation proceedings by the United States).

<sup>27</sup> However, the government cannot circumvent the constitutional protections afforded to property by simply labeling an interest as not property, otherwise these provisions could be rendered a nullity. Hence, courts generally look to the substance of the interest protected, rather than to the government's characterization of that interest, to determine what qualifies as property under the Constitution. In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, the Court declared that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The Court therefore struck down Florida's attempt to define the interest earned on a private fund deposited with a state court as public property because the "usual and general rule" is that the interest follows the principal, so it belongs to the owners of the principal regardless of state law to the contrary. *See id.* at 164-65 (striking down Florida's definition).

<sup>28</sup> *See* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 27 (1977) [hereinafter ACKERMAN, PRIVATE PROPERTY] (distinguishing between social property—"layman's things"—and legal property, and arguing that property should be understood not as a "thing," but as a "set of legal relations between persons governing the use of things"). *See also id.* at 26 ("Instead of defining the relationship between a person and 'his' things, property law discusses the relationships that arise *between people* with respect to things."); MUNZER, A THEORY OF PROPERTY, *supra* note 16, at 16-17 (contrasting the "popular conception of property" as tangible things with the "sophisticated conception" of property as a "bundle of 'sticks'" or a set of "legal relations . . . among persons or other entities with respect to things," and observing that both understandings of property possess merit).

<sup>29</sup> *See* MUNZER, A THEORY OF PROPERTY, *supra* note 16, at 22 (describing Honoré's incidents of ownership, which include "the claim-rights to possess, use, manage, and receive income; the powers to transfer, waive, exclude, and abandon; the liberties to consume or destroy; immunity from expropriation; the duty not to use harmfully; and liability for execution to satisfy a court judgment" and concluding that, with respect to a certain thing, a person who has all or most of these incidents, owns it).

may qualify as a tangible thing,<sup>30</sup> and if this assortment of rights defines what

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<sup>30</sup> Of course, property is not limited to the category of tangible things; individuals may also possess property rights in their ideas and other intangible assets. Indeed, a similar division between privacy and property theories also appears with respect to intangible assets in the human body. Thus the tort right of privacy shelters individuals from undesired disclosure of photographic images of their bodies, whereas the property right of publicity enables individuals to profit from their public persona by selling or otherwise exploiting commercially intangible body assets, such as their voice and appearance. *See* George M. Armstrong, Jr., *The Reification of Celebrity: Persona as Property*, 51 LA. L. REV. 443, 462-65 (1991) (describing development of right of publicity into a full-fledged property right that is alienable on the market and descends to one's heirs at death); Joseph R. Grodin, *The Right of Publicity: A Doctrinal Innovation*, 62 YALE L. J. 1123, 1124, 1127-28 (1953) (distinguishing between the right of privacy, which is a personal and non-assignable right that protects individuals from unwanted publicity, and the right of publicity, which is a right that can be alienated to others or passed on to one's heirs after death, protecting the commercial value of popularity).

A related question arises regarding whether and to what extent information derived from the human body should be governed by the right of privacy rather than the law of intellectual property. *Cf.* *Diamond v. Chakrabarty*, 447 U.S. 303, 317-18 (1980) (allowing the patenting of a living, man-made micro-organism, specifically, a genetically-engineered bacterium capable of breaking down crude oil); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 492-93 (Cal. 1990) (granting a patent protecting a scientist's ownership interests in a cell-line created from a human spleen). *See* Catherine M. Valerio Barrad, *Genetic Information and Property Theory*, 87 NW. U. L. REV. 1037, 1061-84 (1993) (arguing for property rights in genetic information); Rebecca S. Eisenberg, *Patenting the Human Genome*, 39 EMORY L.J. 721, 744-45 (1990) (promoting the allowance of patent protection for DNA sequencing). Iceland, for example, recently sold the genetic records of its entire population to one private company—an event that critics contend may lead to the formation of genetic monopolies. *See* Eliot Marshall, *Mother Jones*, May 15, 1998 (stating that "[s]ome critics charge that the patenting of genes amount to robbing the public commons and is an immoral attempt to turn life into property"); Mary W. Walsh, *A Big Fish in a Small Gene Pool*, L.A. TIMES, June 5, 1998, at B3 (recounting criticisms "alleging that DNA prospectors like Stefansson are committing a new offense . . . call[ed] 'bio-piracy,' exploiting remote peoples for their precious DNA, which could lead to big-money drug patents or even a Nobel prize"). In a unique arrangement, former Harvard Medical School professor Kari Stefansson has secured the exclusive right to create a genetic database from the health records of Iceland's entire population. Stefansson has already founded his own company, deCODE Genetics, in order to mine this genetic database and isolate the genes believed to cause 12 diseases. He has also entered into a \$200-\$300 million contract with the Swiss pharmaceutical company Hoffman-LaRoche to develop and market any drugs that may result from this research. All that Icelanders are to receive in exchange are the rights to obtain any drugs developed from this research for free during the patent period. *See* Martin Enserink, *Physicians Wary of Scheme to Pool Icelanders' Genetic Data*, 281 SCIENCE 890 (Aug. 14, 1998) (describing the arrangement).

Although these recent developments raise many interesting and important questions, I will confine myself to claims regarding the corporeal body in this article, leaving for another day the many issues regarding ownership of genetic information and other intangible human assets.

is and is not legal property, then individuals may also "own" their bodies to the extent that they possess many of these rights over them under prevailing law.<sup>31</sup>

By this definition, human bodies and body parts are currently treated as property in many contexts. Blood and sperm are regarded as products that may be purchased and sold on the market. Individuals possess the right to donate their bodies and body parts to others when they are alive or to devise them by means of a will. If they do not exercise these rights, their bodies—like any other property—descend to their heirs, who are entitled to direct their disposal after death. In fact, the state may literally seize human bodies and body parts under certain circumstances. In many states, for instance, the coroner is authorized to "take" corneas and other organs from corpses for immediate transplant without obtaining consent from the decedent or his family.<sup>32</sup> Such laws apparently consider the bodies of the dead to be a communal resource that may be confiscated by the state for the benefit of the living. Even the federal and state statutes that proscribe trade in human organs perversely reaffirm this vision of the body as property by intimating that body parts would be subject to sale in the absence of such statutory prohibitions. Similarly, the California Supreme Court's opinion rejecting a cause of action for conversion of spleen cells paradoxically conjures up the very image of the body as property that it strives to repudiate. Whether the label of property is accepted or rejected, in all of these situations the pervasive norms of property law reinforce the construction of the body as property.

### 1. Blood

Blood was not always regarded as property. In *Perlmutter v. Beth David Hospital*,<sup>33</sup> for example, the court held that a blood transfusion performed by a hospital in the course of medical treatment was not a sale within the meaning of warranty law, even though the patient paid the separate sum of sixty dollars for the blood that she received.<sup>34</sup> Instead, the transfer of blood was considered

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<sup>31</sup> See JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 225 (1990) (reasoning that "ownership really is no more than a cluster of claims, privileges, and powers; and if the cluster of rights that a person X has in respect of his or her body is sufficiently like the clusters of rights people have in respect of their houses, typewriters, and shoes, then there is no objection in theory to saying that X does own his or her own body"). C.f. MUNZER, A THEORY OF PROPERTY, *supra* note 16, at 41-43 (arguing that people do not "own" their bodies, but rather have limited property rights in them, because although there are "a great many things that the law permits or enables people to do with their bodies," certain "[r]estrictions on transfer and the absence of a liberty to consume or destroy . . . indicate that persons do not own their bodies in the way that they own automobiles or desks.").

<sup>32</sup> See *infra* notes 75-76 and accompanying text.

<sup>33</sup> 123 N.E.2d 792 (N.Y. 1954).

<sup>34</sup> *Id.* at 793. Of course, the fact that the transfer of blood for payment was not deemed a "sale" is not necessarily determinative on the question whether blood constitutes property. Yet it is relevant to the extent that it suggests that blood may not be subject to the same rules that govern other types of commodities.

part of the hospital's provision of a service, rather than the sale of a good, such that the implied warranties that the blood be "reasonably fit for [the] purpose" for which it was transferred and that the blood be of "merchantable quality" did not apply.<sup>35</sup>

Over time, however, courts have increasingly come to view blood as a full-fledged commodity.<sup>36</sup> In *Green v. Commissioner*,<sup>37</sup> Margaret Green earned her living by repeatedly selling her rare, type AB-negative blood, which the tax court found to be a "tangible product" akin to eggs, milk, and honey:

The rarity of petitioner's blood made the processing and packaging of her blood plasma a profitable undertaking, just as it is profitable for other entrepreneurs to purchase hen's eggs, bee's honey, cow's milk, or sheep's wool for processing and distribution. Although we recognize the traditional sanctity of the human body, we can find no reason to legally distinguish the sale of these raw products of nature from the sale of petitioner's blood plasma.<sup>38</sup>

Consequently, the court determined that the payments Green received for the sale of her blood were taxable as "income," subject to ordinary business expenses.<sup>39</sup> Although Green's blood was considered property, the tax court notably refused to extend this line of reasoning to her entire body—the court denied Green a deduction for her health insurance premiums, reasoning that, "[a]lthough petitioner attempts to justify the deduction by comparing her body to some insured manufacturing machinery, the instant set of facts prevents such a comparison; her body is not a replaceable, or easily repairable, machine maintained solely for the production of blood plasma."<sup>40</sup>

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<sup>35</sup> See *id.* at 796 ("In this case, it is plain that what the complaint alleges and truly describes is not a purchase and sale of a given quantity of blood, but a furnishing of blood to plaintiff for transfusion at a stated sum, as part of, and incidental to, her medical treatment.").

<sup>36</sup> Fifteen years after *Perlmutter*, in *Carter v. Interfaith Hosp. of Queens*, another New York court distinguished blood banks from hospitals, dismissing an action against the hospital while sustaining a claim against the blood bank for breach of implied warranties on the grounds that the transfer of blood for money did constitute the "sale" of a commodity. See 304 N.Y.S.2d 97, 101 (N.Y. Sup. Ct. 1969). See also *Community Blood Bank of the Kansas City Area, Inc.*, 70 F.T.C. 728, 902-04 (1966), *rev'd on other grounds*, 405 F.2d 1011 (8th Cir. 1969) (finding blood to be a "commodity" or "article of commerce," the trade in which may not be restrained under the antitrust laws).

<sup>37</sup> 74 T.C. 1229 (1980).

<sup>38</sup> *Id.* at 1234.

<sup>39</sup> See *id.* at 1235 (finding that Green's selling of blood plasma was a trade or business). The court permitted her to deduct the costs of commuting to and from the laboratory where the blood was withdrawn on the ground that she "was the container in which her product was transported to market. Had she been able to extract the plasma at home and transport it to the lab without her being present, such shipping expenses would have been deductible as selling expenses." See *id.* at 1238.

<sup>40</sup> *Id.*

Thus, blood is currently deemed to be full-fledged property—a "product" whose sale constitutes "income" under the tax code, while the "business expenses" incurred by the seller in creating this "product" are deductible for the purposes of the tax laws.<sup>41</sup> To the extent that blood is regarded as a commodity produced by its owner, who may place it on the market for sale to others, it serves as the paradigm example of the body as property.

## 2. Spleen Cells

Unlike blood, spleen cells are not considered to be the property of the person from whose body they were withdrawn. Spleen cells, however, may become the property of the scientists who harvest them and transform them into a valuable cell-line once the government issues a patent, thereby conferring proprietary rights over such material. The California Supreme Court reached this peculiar result in *Moore v. Regents of the University of California*,<sup>42</sup> permitting John Moore's tort claims for breach of fiduciary duty and lack of informed consent for removal of his spleen, but denying Moore's claim for conversion of his personal property.<sup>43</sup> In so doing, the court granted Moore a personal right to recover damages from the doctors who wrongfully removed his diseased spleen without revealing their financial interest in the operation, yet the court denied Moore a property right to recoup his share of the profit reaped from the valuable cell line derived from his own spleen.

Despite its apparent rejection of the property label, however, *Moore*

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<sup>41</sup> See *id.* at 1234-35 (holding that payment received from the sale of blood constitutes income and that expenses incurred in producing plasma are deductible under the tax code). See also *United States v. Garber*, 607 F.2d 92, 97 (5th Cir. 1979) (stating that "blood plasma . . . like any salable part of the human body, is tangible property . . ."). But see *Lary v. United States*, 787 F.2d 1538, 1540 (11th Cir. 1986) (denying charitable deduction for blood donation).

<sup>42</sup> 793 P.2d 479, 479-97 (Cal. 1990). In a similar case, *Cornelio v. Stamford Hosp.*, 717 A.2d 140 (Conn. 1998), the court held that the plaintiff possessed no property right to her cells, contained in pap smear specimen slides, to support an action for replevin. See *id.* at 148. Affirming the lower court's decision, the Connecticut Supreme Court stated that under Connecticut law, which restricts the disposition of pathological waste, a patient possesses little or no interest in such waste removed from her body. Further, as the lower court observed, the plaintiff herself did not expect to retain possession of her cells after their removal since she signed a consent form which explicitly "include[ed] the right to dispose of all tissue." *Cornelio v. Stamford Hosp.*, 1997 WL 430619, \*7 (Conn. Super. 1997). The supreme court also reasoned that pathology slides form part of a patient's medical records, which are owned by the physician in furtherance of public policy. See 717 A.2d. at 146-48.

<sup>43</sup> As the lower court explained, "conversion is 'a distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or rights therein . . . without the owner's consent and without lawful justification.'" *Moore v. Regents of the Univ. of Cal.*, 249 Cal. Rptr. 494, 503 (Cal. Ct. App. 1988). Therefore, to succeed in his claim of conversion, Moore had to demonstrate that he had a "property" interest in his spleen cells.

advances no alternative paradigm. On the contrary, Moore affirms the individual's right to exclude others from taking a spleen from his or her own body, while it simultaneously protects researchers' property rights in the resulting cell lines.<sup>44</sup> The case does not stand for the proposition that spleens can *never* become property, for surely theft of Moore's spleen cells from the scientists' laboratory would have been actionable,<sup>45</sup> as one dissenting justice pointed out.<sup>46</sup> Instead, it simply holds that Moore's spleen was not *his* property.<sup>47</sup> As a result, the case paradoxically reinforces the image of the body as property in its partial and inconsistent invocation of property analysis.<sup>48</sup>

*Moore* is capable of at least three different constructions, all of which can be reconciled with the idea that spleens might sometimes constitute property. First, it is possible that the court's refusal to recognize Moore's conversion claim stems from the intuition that body parts cannot be property so long as they are contained within a living human being. If so, the court could have recognized Moore's ownership of his spleen at the point that it was detached from his body without thereby rendering his whole person a form of property. A second possible reading is that, even if the spleen was initially Moore's

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<sup>44</sup> See *Moore*, 793 P.2d at 479-97.

<sup>45</sup> Indeed, the same scientists who contested Moore's property claim apparently viewed themselves as the owners of his spleen, heedless of the irony inherent in their position. In a parallel case that was subsequently settled out of court, these scientists brought suit against several other researchers who used the spleen cells without obtaining *their* consent. See *id.*

<sup>46</sup> Justice Broussard's argument was as follows:

Although the majority opinion . . . appears to suggest that a removed body part, by its nature, may never constitute "property" for purposes of a conversion action, there is no reason to think that the majority opinion actually intends to embrace such a broad or dubious proposition. If, for example, another medical center or drug company had stolen all of the cells in question from the UCLA Medical Center laboratory and had used them for its own benefit, there would be no question but that a cause of action for conversion would properly lie against the thief, and the majority opinion does not suggest otherwise.

*Id.* at 501 (Broussard, J., dissenting).

<sup>47</sup> As Justice Broussard insightfully observed: "the majority's analysis cannot rest on the broad proposition that a removed body part is not property, but rather rests on the proposition that a *patient* retains no ownership interest in a body part once the body part has been removed from his or her body." *Id.* at 501.

<sup>48</sup> Justice Broussard pointed out that rejection of the conversion theory does not prevent commercialization of the human body: "The majority's rejection of plaintiff's conversion cause of action does *not* mean that body parts may not be bought or sold for research or commercial purposes or that *no* private individual or entity may benefit economically from the fortuitous value of plaintiff's diseased cells." *Id.* at 506. To the contrary, rather than "elevating these biological materials above the marketplace, the majority's holding simply bars *plaintiff*, the source of the cells, from obtaining the benefit of the cells' value, but permits *defendants*, who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion." *Id.*

property, it had been essentially abandoned by its "owner" for whom the diseased organ bore little value and hence became capable of appropriation by another.<sup>49</sup> Finally, the court implicitly may have held that body parts once removed from a person return to the public commons available to all and become a form of communal property. Perhaps severed body parts—much like oil, water, wild animals, and other migratory resources—become free for "capture" by the first person who recognizes their commercial potential and puts them to productive use.<sup>50</sup> These three readings of the case provide possible grounds to explain how a spleen may be regarded as not the property of its donor, and yet become the property of the scientists who mixed their labor with it to create a valuable product.<sup>51</sup> The alternative is to hold that spleens can *never* become property, whether inside or outside a living human body, as the California Supreme Court purported to do. Such a theory, however, fails to account for the important fact that others are able to acquire property rights in a severed spleen.

### 3. Organs and Other Body Parts

Other organs and parts of the human body, such as kidneys, livers, hearts, lungs, corneas, bone marrow, and skin, currently lie in a legal limbo because their precise status under the law is unclear.<sup>52</sup> Although these parts of the body

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<sup>49</sup> Such was the approach adopted by the court in *Venner v. Maryland*, 354 A.2d 483, 493-99 (Md. Ct. Spec. App. 1976), which ruled that it was lawful for the police to retrieve excrement from a hospital patient in order to obtain evidence of criminal activity. The *Venner* court suggested that persons may possess a property right in their bodily wastes and other materials:

It could not be said that a person has no property right in wastes or other materials which were once a part of or contained within his body, but which normally are discarded after their separation from the body. It is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, fingernails, toenails, blood, and organs or other parts of the body, whether their separation from the body is intentional, accidental, or merely the result of normal body functions.

*Id.* at 498. The court held, however, that such bodily property may be discarded or abandoned "when a person does nothing and says nothing to indicate an intent to assert his right of ownership, possession, or control over such material." *Id.* at 499. Under such circumstances, the police may appropriate the abandoned "property" and use it as evidence in a criminal action.

<sup>50</sup> See, e.g., *Elliff v. Texon Drilling Co.*, 210 S.W.2d 558, 561-62 (Tex. 1948) (applying the "law of capture" to oil and gas); *Houston & T.C. Ry. Co. v. East*, 81 S.W. 279, 280-82 (Tex. 1904) (applying the "law of capture" to groundwater); *Pierson v. Post*, 2 Am. Dec. 264, 264-67 (N.Y. 1805) (holding that wild animals become the property of the first person who captures them or brings them under certain control).

<sup>51</sup> The California Supreme Court ruled that the patented cell line was the "product of invention," owned by those who labored to create it and not by Moore, who merely supplied the "naturally occurring raw materials." *Moore*, 793 P.2d at 492-93.

<sup>52</sup> *Moore* involved a diseased spleen removed from the body under rather unusual

cannot be bought or sold for transplant, they may be given away by their "owner" for transplant or, perhaps, sold for other purposes.<sup>53</sup> Moreover, after death such body parts may be donated by the "owner" himself or his family members and, under certain circumstances, may even be confiscated by the government.<sup>54</sup>

#### *a. Federal Law*

The National Organ Transplant Act (the "NOTA") makes it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce,"<sup>55</sup> authorizing criminal fines of as much as \$50,000, or imprisonment for up to five years for any violation.<sup>56</sup> This federal law prohibits the purchase or sale for transplant of human organs, broadly defined as "the human (including fetal) kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof."<sup>57</sup> By its terms, however, the statute seems to permit both the donation of organs for transplant and their sale for other purposes, such as research or education. Moreover, the very existence of a law forbidding commercial alienation of organs paradoxically portrays the human body as an "article of commerce" that lies within the purview of congressional power and would otherwise be subject to sale on the market.<sup>58</sup>

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circumstances indicating that the spleen may have been abandoned by its original owner. Hence, even in California, it is not clear that the holding of *Moore* would apply to other parts of the human body removed under different circumstances. *See id.* at 481. In other states, moreover, the status of excised organs is even more uncertain, for there exists little or no law on the subject.

<sup>53</sup> *See infra* notes 60-62 and accompanying text.

<sup>54</sup> *See infra* notes 63-79 and accompanying text.

<sup>55</sup> 42 U.S.C. § 274e(a) (1991).

<sup>56</sup> *See id.* § 274e(b).

<sup>57</sup> *See id.* § 274e (c)(1).

<sup>58</sup> An interesting, albeit tangential, question arises as to whether the NOTA remains a valid exercise of Congress' power to regulate interstate commerce after the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 549-68 (1995) (striking down Gun-Free School Zones Act of 1990 on grounds that the Act exceeded the authority of Congress to regulate interstate commerce because it neither regulated a commercial activity nor contained a requirement that gun possession be connected in any way to interstate commerce). Even if the NOTA is ultimately declared unconstitutional, the purchase and sale of human organs would nevertheless be proscribed in the many states that already possess laws roughly modeled upon the NOTA, prohibiting commerce in the human body. *See, e.g.*, CAL. PENAL CODE § 367 (West 1999) (prohibiting the acquisition or transfer for valuable consideration of any human organ for purposes of transplantation); CONN. GEN. STAT. ANN. § 19a-280a (West 1997) (prohibiting the acquisition or transfer for valuable consideration of any human organ for purposes of transplantation); D.C. CODE ANN. § 6-2601 (1995) (prohibiting the purchase or sale of human body parts for medical uses); FLA.

*b. The Uniform Anatomical Gift Act*

Under the Uniform Anatomical Gift Act (the "UAGA"), adopted in some form in all fifty states,<sup>59</sup> individuals possess the right to donate their bodies and body parts after death<sup>60</sup> for the purposes of transplantation, therapy, research,

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STAT. ANN. § 873.01 (West 1994) (prohibiting the purchase or sale of any human organ or tissue for valuable consideration); GA. CODE ANN. § 16-12-160 (1999) (prohibiting the purchase or sale of human bodies or any part of a human body); 720 ILL. COMP. STAT. ANN. 5/12-20 (West 1992) (prohibiting the sale or purchase of a human body or part of a human body); IND. CODE ANN. § 35-46-5-1 (West, WESTLAW through End of 1999 1st Reg. Sess.) (prohibiting the acquisition, sale, or transfer of human organs or fetal tissue); KY. REV. STAT. ANN. §§ 311.165, 311.171; 311.990(27) to (31) (Michie 1995) (prohibiting the sale or purchase of any transplantable organ); LA. REV. STAT. ANN. § 14:101.1(West, WESTLAW through 1999 Regular Session Acts)(prohibiting the transfer of any human organ for anything of value ); MICH. COMP. LAWS ANN. § 333.10204 (West 1992) (prohibiting the acquisition or transfer of human organs for valuable consideration); Mont. Code Ann. §§ 72-17-102, 72-17-302 (1999) (prohibiting, for valuable consideration, the purchase or sale of a "part" for transplantation or therapy); NEV. REV. STAT. ANN. § 201.460 (Michie, WESTLAW through 1997 Reg. Sess., and July, 1997) (prohibiting the acquisition or transfer for valuable consideration of any human organ for purposes of transplantation); N.Y. PUB. HEALTH LAW § 4307 (McKinney 1997) (prohibiting the acquisition or transfer for valuable consideration of any human organ for use in transplantation); OHIO REV. CODE ANN. §§ 2108.11, 2108.12 (Anderson 1999) (prohibiting the acquisition or transfer for valuable consideration of human organs, tissues, or eyes for purposes of transplantation); PA. STAT. ANN. tit. 35 § 10025 (West, WESTLAW through Act 1999-47) (prohibiting the acquisition or transfer of any human organ or nonregenerative tissue for valuable consideration); S.D. CODIFIED LAWS § 34-26-44 (Michie 1994) (prohibiting the acquisition or transfer for valuable consideration of any human organ for use in transplantation); TENN. CODE ANN. §§ 68-30-102, 68-30-401 (1996) (prohibiting the acquisition or transfer for valuable consideration of any human organ for use in transplantation if the transfer affects commerce); TEX. PENAL CODE ANN. § 48.02 (West, WESTLAW through End of 1999 Reg. Sess.) (prohibiting the purchase or sale of human organs); VT. STAT. ANN. tit. 18 §§ 5238, 5246 (1999) (prohibiting the purchase or sale for valuable consideration of a "part" for transplantation or therapy); VA. CODE ANN. § 32.1-289.1 (Michie 1997) (prohibiting the purchase or sale of natural body parts for medical and scientific uses); W.VA. CODE §16-19-7a (1998) (prohibiting the acquisition or transfer for valuable consideration of any human organ for use in transplantation); WIS. STAT. ANN. § 146.345 (West, WESTLAW through 1999 Act 7) (prohibiting the acquisition or transfer for valuable consideration of any human organ for use in transplantation). *But see* MISS. CODE ANN. § 41-39-9 (West, WESTLAW through End of 1999 Reg. Sess.) (expressly permitting contracts for the sale of body parts after death and requiring repayment of any consideration received, plus six percent interest in the event of revocation).

<sup>59</sup> See UNIF. ANATOMICAL GIFT ACT *Table of Jurisdictions Wherein Act Has Been Adopted* (1968), 8A U.L.A. 63 (1993) (indicating jurisdictions where the UAGA has been adopted).

<sup>60</sup> See UNIF. ANATOMICAL GIFT ACT (UAGA) § 2(a) (1968), 8A U.L.A. 99 (1993) ("Any individual of sound mind and 18 years of age or more may give all or any part of his body for any purpose specified in section 3, the gift to take effect upon death.").

or education.<sup>61</sup> The original statute, approved by the National Conference of Commissioners on Uniform State Laws in 1968 (the "1968 UAGA"), authorizes a living person to make a gift of all or part of his own body after death by means of a will or the execution of a document signed by the donor in the presence of two witnesses.<sup>62</sup> In the absence of a will or other document manifesting the decedent's intent, the 1968 UAGA grants close relatives the power to donate their loved one's body after death so long as there is no actual notice of contrary indications by the decedent.<sup>63</sup>

The 1968 UAGA appears to regard the bodies and body parts of the deceased as property by concentrating control in the hands of their "owners."<sup>64</sup> Specifically, individuals possess the right to consent to post-mortem donation of their bodies and body parts while they are alive or to devise them by means

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<sup>61</sup> The 1968 UAGA enumerates the persons or entities to whom such anatomical gifts may be made, and the uses to which they may be put:

The following persons may become donees of gifts of bodies or parts thereof for the purposes stated:

- (1) any hospital, surgeon, or physician, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or
- (2) any accredited medical or dental school, college or university for education, research, advancement of medical or dental science, or therapy; or
- (3) any bank or storage facility, for medical or dental education, research, advancement of medical or dental science, therapy, or transplantation; or
- (4) any specified individual for therapy or transplantation needed by him.

*Id.* § 3, 8A U.L.A. 106-07.

<sup>62</sup> See *id.* §§ 4(a)-(b) (stating that an anatomical gift may be made by will or other document).

<sup>63</sup> If there is no will or other document evidencing the decedent's intent, the 1968 UAGA allows family members to donate all or part of the decedent's body in the following order of priority:

Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body for any purpose specified in section 3:

- (1) the spouse,
- (2) an adult son or daughter,
- (3) either parent,
- (4) an adult brother or sister,
- (5) a guardian of the person of the decedent at the time of his death,
- (6) any other person authorized or under obligation to dispose of the body.

*Id.* § 2(b), 8A U.L.A. 99.

<sup>64</sup> That the decedent's intentions alone control the ultimate disposition of his body parts is made even more explicit in the 1987 version of the UAGA, which provides that "[a]n anatomical gift that is not revoked by the donor before death is irrevocable and does not require the consent or concurrence of any person after the donor's death." UAGA § 2(h) (1987), 8A U.L.A. 34 (1993).

of a will.<sup>65</sup> If the decedent fails to exercise these rights, his body—along with his other property—passes to his heirs after death, who may donate the body so long as the decedent did not register any sort of objection.<sup>66</sup> Thus, the statute treats the dead body as the private property of its owner, who has the sole right to dispose of it without regard for others, as the Comments accompanying the 1968 UAGA observe: the UAGA "recognizes and gives legal effect to the right of the individual to dispose of his own body without subsequent veto by others."<sup>67</sup> Once an anatomical gift has been made, moreover, the body or body part becomes the property of the donee, since the Act provides that "[t]he donee may accept or reject the gift"<sup>68</sup> and "[t]he rights of the donee created by the gift are paramount to the rights of others."<sup>69</sup> Further, the Comments emphasize the power to transfer ownership to others, stating that "if the donee accepts the gift, absolute ownership vests in him. He may, if he so desires, transfer his ownership to another person, whether the gift be of the whole body or merely a part . . . . The only restrictions are that the part must be removed without mutilation and the remainder of the body vests in the next of kin."<sup>70</sup>

In 1987, the National Conference of Commissioners on Uniform State Laws approved an amended version of the UAGA (the "1987 UAGA"), subsequently adopted in whole or in part by 15 states.<sup>71</sup> The 1987 UAGA differs from the original statute in two important respects. First, under the 1968 UAGA, it was assumed that organs could not be taken for transplant absent explicit authorization.<sup>72</sup> The 1987 UAGA, however, reverses this presumption and allows the removal *without express consent* of body parts from a body within the authority of the coroner as long as "reasonable efforts" have been made to notify the appropriate persons and obtain their consent to donation, and the coroner is not aware of a refusal or contrary indication by the decedent or his family.<sup>73</sup> Second, the 1968 UAGA remained silent on the issue of organ sales,

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<sup>65</sup> See UAGA § 4 (1968), 8A U.L.A.109 (1993).

<sup>66</sup> *Id.* § 2(b), 8 U.L.A. 99.

<sup>67</sup> *Id.* § 2 cmts., 8 U.L.A. 100. *See also* 8 U.L.A. 36 (stating that the 1987 Act retains the intent of the 1968 Act).

<sup>68</sup> UAGA § 7(a) (1968), 8A U.L.A. 124 (1993).

<sup>69</sup> *Id.* § 2(e), 8 U.L.A. 100.

<sup>70</sup> *See id.* § 7 cmts., 8 U.L.A. 124-25.

<sup>71</sup> *See* UAGA *Table of Jurisdictions Wherein Act Has Been Adopted* (1987), 8A U.L.A. 19 (1993) (indicating jurisdictions where the 1987 Act has been adopted).

<sup>72</sup> *See* UAGA §§ 2, 4 (1968), 8 U.L.A. 99-100, 109 (1993) (describing how organs can be given for transplant with *authority* from the decedent or certain other parties).

<sup>73</sup> The 1987 UAGA provides that the coroner or medical examiner "may release and permit the removal of a part from a body within that official's custody, for transplantation or therapy" under the following circumstances:

(1) the official has received a request for the part from a hospital, physician, surgeon, or procurement organization;

(2) the official has made a reasonable effort, taking into account the useful life of the part, to locate and examine the decedent's medical records and inform [family

whereas the 1987 UAGA tracks the NOTA by expressly proscribing trade in body parts for transplant or therapy if removal of the part is intended to occur after the death of the "owner." Like the NOTA, the 1987 UAGA also authorizes fines of up to \$50,000 or imprisonment for up to five years for any violation.<sup>74</sup>

### *c. Presumed Consent Statutes*

A number of states have enacted laws that permit the extraction of particular organs from a dead person's body without providing notice or obtaining consent from the decedent or his family members under certain circumstances, such as during an autopsy to determine the cause of death.<sup>75</sup> Under the legal fiction of presumed consent, the coroner or medical examiner in these states is typically authorized to harvest corneas or pituitary glands from the bodies of those within their custody for transplant to others, so long as the official lacks knowledge of any objections by the decedent or his family.<sup>76</sup> Such statutes

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members] . . . of their option to make, or object to making, an anatomical gift;

(3) the official does not know of a refusal or contrary indication by the decedent or objection by a person having priority to act.

UAGA § 4(a)(1987), 8A U.L.A. 43 (1993). However, the Comments to this section make clear that the "reasonable effort" requirement is often equivalent to a presumption of consent, stating: "[i]n the case of organs, the need, availability, and efficacy of life support systems must be considered. If removal must be immediate and there is no medical or other record and no [family member] . . . is present, the [reasonable effort] requirement . . . is satisfied." *Id.* § 4 cmts., 8A U.L.A. 45.

<sup>74</sup> See *id.* § 10, 8A U.L.A. 58 (prohibiting the purchase or sale of body parts and stating penalties for such violations).

<sup>75</sup> Several states go even further, abandoning the requirement of consent altogether under very limited circumstances. Hawaii, for example, makes consent irrelevant for use of tissues removed during an autopsy. See HAW. REV. STAT. ANN. § 841-14 (Bender, WESTLAW through 1999 Regular Session of the Twentieth Legislature) (making consent irrelevant for scientific use of tissues removed during an autopsy). Similarly, Ohio and Vermont permit the pituitary gland to be removed despite stated objections unless the objections derive from the decedent's religious beliefs. See OHIO REV. CODE ANN. § 2108.53 (Anderson 1999) (allowing removal of pituitary gland unless next of kin objects based on religious beliefs); VT. STAT. ANN. tit.18 § 510 (WESTLAW through End of 1999 Sess.) (allowing removal of pituitary gland unless person controlling disposition of the decedent's remains objects based on religious beliefs or personal convictions of such person or the decedent).

<sup>76</sup> Fifteen states have enacted presumed consent laws for the removal of pituitary glands or corneas. See, e.g., ARK. CODE ANN. §12-12-320 (Michie, WESTLAW through End of 1999 Reg. Sess.) (presuming consent to remove deceased's pituitary gland for donation); CAL. GOV'T CODE §§ 27941.46, 27941.47 (West 1988) (presuming consent to remove pituitary gland and corneas); COLO. REV. STAT. ANN. § 30-10-621 (West, WESTLAW through End of 1999 1st Reg. Sess.) (presuming consent to remove pituitary gland); DEL. CODE ANN. tit. 29, § 4712 (WESTLAW, through End of 1999 First Spec. Sess.) (presuming consent to remove corneas); FLA. STAT. ANN. § 732.9185 (West 1995) (presuming consent

effectively treat these organs as a communal form of property that escheats to the state upon the individual's death, for the benefit of the living.<sup>77</sup>

As a matter of theory, most states require at least "reasonable efforts" to obtain consent from the next of kin before organs may be harvested.<sup>78</sup> In actual practice, however, the "reasonable efforts" requirement may be equivalent to a presumption of consent. For instance, in *Jacobsen v. Marin*

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to remove corneas); GA. CODE ANN. § 31-23-6 (1996) (presuming consent for the removal of eyes and corneas); KY. REV. STAT. ANN. §311.187 (Michie 1995) (presuming consent for the removal of corneas); MD. CODE ANN., EST. & TRUSTS § 4-509.1 (Lexis, WESTLAW through the Regular Session of the 1999 General Assembly) (presuming consent to remove corneas); MICH. COMP. LAWS ANN. §333.10202 (West 1992) (presuming consent for removal of corneas); MO. ANN. STAT. § 58.770 (West, WESTLAW through End of 1999 1st Extra. Sess.) (presuming consent to remove pituitary); N.C. GEN. STAT. §130A-391 (Lexis, WESTLAW through 1998 Cum. Supp.) (presuming consent for removal of corneas); OHIO REV. CODE ANN §§ 2108.53, 2108.60 (Anderson 1999) (presuming consent for removal of pituitary gland and corneas); TENN. CODE ANN. § 68-30-204 (1996) (presuming consent for removal of corneas); TEX. HEALTH & SAFETY CODE ANN § 693.012 (West, WESTLAW through End of 1999 Reg. Sess.) (presuming consent to remove corneas); W. VA. CODE § 16-19-3a (1998) (presuming consent for removal of corneas).

<sup>77</sup> In the United States, such laws are limited to bodies under the authority of the coroner or medical examiner. Many European countries, however, adopt a more comprehensive approach, presuming that *all* dead bodies are a public resource and generally permitting the harvesting of organs unless the decedent expressly opted out by registering his or her refusal. *See J. SWERDLOW, MATCHING NEEDS, SAVING LIVES: BUILDING A COMPREHENSIVE NETWORK FOR TRANSPLANTATION AND BIOMEDICAL RESEARCH* 19 (1989).

<sup>78</sup> *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-841 to 36-850 (West 1993) (describing the various processes of making an anatomical gift and stating who may give consent); ARK. CODE ANN. §§ 20-17-601 to 20-17-617 (Michie, WESTLAW through End of 1999 Reg. Sess.) (same); CAL. HEALTH & SAFETY CODE §§ 7150 to 7156 (West 1997)(same); CONN. GEN. STAT. ANN. §§ 19a-279a to 19a-280a (West 1997) (same); HAW. REV. STAT. ANN. §§ 327-1 to 327-14 (Bender, WESTLAW through 1999 Reg. Sess. of the 20th Leg.) (same); IDAHO CODE §§ 39-3401 to 39-3417(Lexis, WESTLAW through End of 1999 Reg. Sess.) (same); IND. CODE ANN. §29-2-16-1 to 29-2-16-12 (West 1994) (same); IOWA CODE ANN. §§ 142C.1 to 142C.16 (West, WESTLAW through End of 1998 Reg. Sess.) (same); MINN. STAT. ANN. §§ 525.921 to 525.9224 (West, WESTLAW through End of 1999 Reg. Sess.) (same); MONT. CODE ANN. § 72-17-101 to 72-17-312 (1999) (same); NEV. REV. STAT. ANN. §§ 491.500 to 491.590 (Bender, WESTLAW through 1999 Reg. Sess. Of the 70th Legislature) (same); N.H. REV. STAT. ANN. §§ 291-A:1 to 291-A:16 (Lexis, WESTLAW through End of 1999 Reg. Sess.) (same); N.M. STAT. ANN. §§ 24-6A-1 to 24-6A-15 (Michie, WESTLAW through First Regular Sess. and First Special Sess. of the 44th Legislature) (same); N.D. CENT. CODE §§ 23-06.2-01 to 23-06.2-12 (Lexis, WESTLAW through End of 1999 Reg. Sess.) (same); PA. STAT. ANN. tit.20 §§ 8601, 8611 to 8624 (West, WESTLAW through Act 1999-47) (same); TEX. HEALTH & SAFETY CODE ANN §§ 692.001 to 692.016 (West 1998) (same); UTAH CODE ANN. §§26-28-1 to 26-28-12 (Lexis, WESTLAW through End of 1999 General Sess.) (same); VT. STAT. ANN. tit. 18, §§ 5238 to 5247 (WESTLAW through End of 1999 Sess.) (same); VA. CODE ANN. §§ 32.1-289 to 32.1-297.1 (Lexis, WESTLAW through End of 1999 Regular Sess.) (same).

*General Hospital*,<sup>79</sup> when a Danish tourist later identified as Martin Jacobson was brought to the hospital as a John Doe, his body was completely emptied of all organs for donation to others without any attempt to notify or obtain consent from his family. The family filed suit to register their objections, but the court held that the removal of organs was "reasonable" under California law.<sup>80</sup> Thus, the difference between laws requiring reasonable efforts and those presuming consent may be largely one of semantics.

#### 4. Cadavers

Under the UAGA, dead bodies cannot be traded on the market,<sup>81</sup> but they may be donated for a variety of purposes by consent of the decedent during his lifetime, by devise in the decedent's will, or by the decedent's family members after death.<sup>82</sup> By affording individuals what amounts to a future interest in their own bodies after death, and by allowing this future interest to be transferred to others or descend to the decedent's heirs, the UAGA appears to treat the bodies of the dead as a form of private property. In so doing, it displays an ownership philosophy that departs from the common law tradition, which rejected the idea that corpses constitute "property." Instead, at common law, corpses were characterized as a form of "quasi-property" that could not be bought or sold,<sup>83</sup> but over which individuals retained a limited array of rights,<sup>84</sup>

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<sup>79</sup> 963 F. Supp. 866, 866-874 (N.D. Cal 1997), *aff'd*, 168 F.3d 499 (9th Cir. 1999), *withdrawn*, 192 F.3d 881 (9th Cir. 1999) (finding a 48-hour search for next of kin to be "reasonable").

<sup>80</sup> In a Danish television documentary on this case, Martin's mother protested the removal of his organs—particularly his heart—on the grounds that "it belonged to him" and was "too personal." Paradoxically, her statements draw upon both property and privacy rationales. The argument that Martin's heart "belonged to him" suggests that he owned it as a form of property, whereas the idea that it was "too personal" implies that it was not his property at all, but a part of his person that should have been governed by the right of privacy. *See One Man's Death, Another Man's Gain* (TV2/Denmark) (videotape on file with author).

<sup>81</sup> The National Organ Transplant Act ("NOTA") applies only to the transfer of organs for consideration, whether obtained from living persons or from dead bodies. *See* 42 U.S.C. § 247 (e) (1991). The 1987 UAGA, however, expressly bans trade in corpses. *See* UNIF. ANATOMICAL GIFT ACT § 10 (1987), 8A U.L.A. 58 (1993) (prohibiting purchase or sale of body parts and entire corpses).

<sup>82</sup> *See* UAGA § 2 (1987), 8A U.L.A. 33-34 (1993) (setting forth various methods for making an anatomical gift).

<sup>83</sup> *See, e.g.*, *Culpepper v. Pearl St. Bldg., Inc.*, 877 P.2d 877, 880 (Colo. 1994) (denying plaintiffs' claim for conversion of their "property" when their son's body was inadvertently cremated before an autopsy could be performed to determine the cause of death, on the grounds that "there can be no property right in a dead body in a commercial sense, since a dead body cannot be bartered or sold"); *Long v. Chicago, R.I. & P. Ry. Co.*, 86 P. 289, 291 (Okla. 1905) (denying parents damages pursuant to a property theory for the mental distress they suffered due to the mutilation of their dead baby's body because "the dead body of a near relative . . . may not be sold for personal gain or disposed of in any manner except to

including the right to possess the body for the purposes of burial, the right to control the body's use in certain ways, the right to exclude others,<sup>85</sup> and the right to direct the body's ultimate disposal.<sup>86</sup> In *Snyder v. Holy Cross*

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bury it decently and respectfully"). *Cf. Perry v. St. Francis Hosp.*, 886 F. Supp. 1551, 1563-64 (D. Kan. 1995) (denying plaintiff damages for breach of contract when, contrary to her specific instructions, the hospital exceeded the scope of her donation by removing not just the corneas but the entire eyes and not just the bone marrow but the actual bones from the body of her deceased husband, because "society presently rejects the commercialization of human organs and tissues and tolerates only an altruistic system of voluntary donation," so that "courts should be reluctant to recognize a cause of action that contravenes this fundamental public philosophy").

<sup>84</sup> In *Larson v. Chase*, 50 N.W. 238, 238-40 (Minn. 1891), a much-cited early opinion, the Minnesota Supreme Court explained that although corpses are not property in the commercial sense, they may be considered a form of property to the extent that the law recognizes and protects limited rights in them:

But whatever may have been the rule in England under the ecclesiastical law, and while it may be true still that a dead body is not property in the common commercial sense of that term, yet in this country it is, so far as we know, universally held that those who are entitled to the possession and custody of it for purposes of decent burial have certain legal rights to and in it which the law recognizes and will protect. Indeed, the mere fact that a person has exclusive rights over a body for the purposes of burial leads necessarily to the conclusion that it is his property in the broadest and most general sense of that term, viz., something over which the law accords him exclusive control. But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it has any value as an article of traffic. The important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right by mutilating or otherwise disturbing the body is an actionable wrong.

*Id.* at 239; *see also In re Donn*, 14 N.Y.S. 189, 190 (1891) ("While it cannot be said that a corpse is property in the sense that it is a subject of barter and sale, the courts of this country have recognized the right and authority of the next of kin . . . to control and possess it . . . If the heirs and next of kin of a deceased person have no right to the possession or authority to control . . . the body of their deceased relative, it might be left unprotected; and, in case a corpse should be found in the possession of one who had invaded the grave and disinterred it, they would be powerless to reclaim it."); *Renihan v. Wright*, 25 N.E. 822, 824-25 (Ind. 1890) ("It will be seen that much of the apparent difficulty of this subject arises from a false and needless assumption, in holding that nothing is property that has not a pecuniary value. The real question is not of the disposable, marketable value of a corpse, or its remains, as an article of traffic; but it is of the sacred and inherent right to its custody, in order to bury it, and secure its undisturbed repose. . . . The world does not contain a tribunal that would punish a son who would resist, even unto death, any attempt to mutilate his father's corpse, or tear it from the grave for sale or dissection; but where would he find the legal right to resist, except in his peculiar and exclusive interest in the body?") (citations omitted).

<sup>85</sup> See *Larson*, 50 N.W. at 238-40 (upholding widow's claim to recover damages for the mental distress she suffered due to the unlawful mutilation and dissection of her deceased husband's body).

<sup>86</sup> See *Moyer v. Moyer*, 577 P.2d 108, 110 (Utah 1978) ("[A] person has some interest in

*Hospital*,<sup>87</sup> for example, the court refused to hold that a corpse constitutes property in the ordinary commercial or material sense, stating:

[I]t is not part of the assets of the estate (though its disposition may be affected by the provision of the will); it is not subject to replevin; it is not property in a sense that will support discovery proceedings; it may not be held as security for funeral costs; it cannot be withheld by an express company, or returned to the sender, where shipped under a contract calling for cash on delivery; it may not be the subject of a gift cause mortis; it is not common law larceny to steal a corpse. Rights in a dead body exist ordinarily only for purposes of burial and, except with statutory authorization, for no other purpose.<sup>88</sup>

The court recognized, however, that the next of kin's "right to possession of a dead body for purposes of burial has been described as a 'quasi-property' right in the nature of a 'sacred trust' that a court will uphold as a result of natural sentiment, affection, and reverence," explaining that "[i]t would be more accurate to say that the law recognizes property in a corpse but property subject to a trust and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise."<sup>89</sup>

What exactly is the difference between property and quasi-property rights in a corpse? In *Pierce v. Swan Point Cemetery*,<sup>90</sup> the Rhode Island Supreme Court explained the difference between quasi-property rights and complete ownership of a corpse in the following manner:

Although . . . the body is not property in the usually recognized sense of the word . . . we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.<sup>91</sup>

In *Pettigrew v. Pettigrew*,<sup>92</sup> however, the Pennsylvania Supreme Court suggested that this distinction is more a matter of rhetoric than of substantive

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his body, and the organs thereof, of such a nature that he should be able to make a disposition thereof, which should be recognized and held to be binding after his death, so long as that is done within the limits of reason and decency as related to the accepted customs of mankind.").

<sup>87</sup> 352 A.2d 334, 341 (Md. Ct. Spec. App. 1976) (finding that, despite the religious objections of his father, the state has a compelling interest in performing an autopsy on the body of an Orthodox Jewish boy who died without ostensible cause).

<sup>88</sup> *Id.* at 341 n.12 (citations omitted).

<sup>89</sup> *Id.* at 340-41 (citations omitted).

<sup>90</sup> 10 R.I. 227 (1872).

<sup>91</sup> *Id.* at 242-43.

<sup>92</sup> 56 A. 878 (Pa. 1904).

rights:

It is commonly said . . . that there can be no property in a corpse. But, inasmuch as there is a legally recognized right of custody, control and disposition, the essential attribute of ownership, . . . it would be more accurate to say that the law recognizes property in a corpse, but property subject to a trust, and limited in its rights to such exercise as shall be in conformity with the duty out of which the rights arise. Whether, however, the rights be called "property" or not is manifestly a question of words, rather than of substance.<sup>93</sup>

Several courts<sup>94</sup> and commentators<sup>95</sup> have suggested that the concept of a quasi-property right in a corpse is actually a legal fiction created to enable relatives to recover for the tort of mental distress. In *Carney v. Knollwood Cemetery Ass'n*,<sup>96</sup> for example, the court stated:

'Quasi property' seems to be . . . simply another convenient hook upon which liability is hung, —merely a phrase covering up and concealing the real basis for damages, which is mental anguish. The plaintiff, in these actions, does not seek to vindicate any 'quasi property' right. He sues simply because of the mental suffering and anguish that he has undergone from the realization that disrespect and indignities have been heaped upon the body of one who was close to him in life.<sup>97</sup>

In *Culpepper v. Pearl Street Building, Inc.*,<sup>98</sup> the Colorado Supreme Court elaborated upon this idea, reasoning that a quasi-property theory does not

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<sup>93</sup> *Id.* at 879.

<sup>94</sup> See, e.g., *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 433-35 (Ohio Ct. App. 1986) (determining that plaintiffs stated a valid claim for negligent infliction of emotional distress for the mistreatment of their grandmother's remains); *Scarpaci v. Milwaukee Cty.*, 292 N.W.2d 816, 820-22 (Wis. 1980) (finding that plaintiffs stated a valid tort claim for interference with the parents' right to bury their child with integrity).

<sup>95</sup> Professor Prosser, for example, explains:

In most of these cases the courts have talked of a somewhat dubious "property right" to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.

W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (5th ed. 1984). See also Harry R. Bigelow, Jr., Note, *Damages: Pleading: Property: Who May Recover for Wrongful Disturbance of a Dead Body*, 19 CORNELL L.Q. 108, 110 (1934) ("Quasi property' seems to be . . . simply another convenient hook upon which liability is hung,—merely a phrase covering up and concealing the real basis for damages, which is mental anguish.").

<sup>96</sup> 514 N.E.2d 430 (Ohio Ct. App. 1986).

<sup>97</sup> *Id.* at 434-35 (quoting Bigelow, *supra* note 95, at 110).

<sup>98</sup> 877 P.2d 877 (Colo. 1994).

protect a true ownership interest because it redresses emotional harm rather than pecuniary injury: "In reality . . . the primary concern of the right is not the injury to the dead body itself, but whether the improper actions caused emotional or physical pain or suffering to surviving family members. The injury is seldom pecuniary; rather, damages are grounded in the mental and physical injuries of survivors."<sup>99</sup> Accordingly, although such claims employ the language of property law, the court declared that they do not "fit very well into the category of property, since the body ordinarily cannot be sold or transferred, has no utility and can be used only for the one purpose of interment or cremation."<sup>100</sup>

In recognition of this insight, courts have moved towards abandoning the quasi-property theory in favor of a tort theory. More recent cases thus allow a cause of action for interference with a relative's right to possess a corpse and prevent its disturbance under the rubric of personal rather than property rights in the body,<sup>101</sup> intimating that the right runs to a person rather than attaching to an object and that the remedy flows from corrective rather than compensatory justice.<sup>102</sup> Under this tort theory, damages rectify the wrong suffered by

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<sup>99</sup> *Id.* at 880.

<sup>100</sup> *Id.* (citations omitted).

<sup>101</sup> As Justice Shirley Abrahamson explained in *Scarpaci v. Milwaukee County*:

The law is clear in this state that the family of the deceased has a legally recognized right to entomb the remains of the deceased family member in their integrity and without mutilation. Thus the next of kin have a claim against one who wrongfully mutilates or otherwise disturbs the corpse. . . . The basis for recovery of damages is found not in a *property* right in a dead body, but in the *personal* right of the family of the deceased to bury the body. The mutilating or disturbing of the corpse is held to be an interference with this right and an actionable wrong. . . . The law is not primarily concerned with the extent of physical injury to the bodily remains but with whether there were any improper actions and whether such actions caused emotional or physical suffering to the living kin. The tort rarely involves pecuniary injury; the generally recognized basis of damages is mental suffering.

*Scarpaci v. Milwaukee Cty*, 292 N.W.2d 816, 820-21 (Wisc. 1980) (emphasis added). *See also* *Deeg v. City of Detroit*, 76 N.W.2d 16, 20 (Mich. 1956) (holding that widow's cause of action for removal and destruction of organs from her dead husband's body did not survive her own death because "a cause of action of this nature is not based on the theory of an injury to property rights" but rather "rests on the theory that a personal right of the plaintiff . . . has been deliberately and wrongfully invaded"); *Keyes v. Konkel*, 78 N.W. 649, 649 (Mich. 1899) ("Recovery for the refusal of the right to bury or for mutilation of the body is rather based upon an infringement of a right than upon the notion that the property of plaintiff has been interfered with. The recovery in such cases is not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation."); *Biro v. Hartman Funeral Home*, 669 N.E.2d 65, (Ohio Ct. App. 1995) (finding that son had standing to maintain action in tort for desecration of father's remains); *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434-35 (Ohio Ct. App. 1986) (finding that plaintiffs stated a valid claim for negligent infliction of emotional distress for the mistreatment of their grandmother's remains).

<sup>102</sup> See UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW, 5-6 (1997) (distinguishing

relatives instead of serving as belated compensation for a forced transfer of their ownership interests in the body.<sup>103</sup>

Taken together, the cadaver cases imply that if individuals own the bodies of the dead, it is only as quasi-property—a category that encompasses the right to possession and the right to exclude, but *not* the right to transfer to others. Similar interests receive shelter under the umbrella of privacy, which also protects the right to possess one's own body and exclude others from it.<sup>104</sup> Hence, the common law right of quasi-property could be characterized as the private law analogue of the constitutional right of privacy, for both rights provide security from interference without conferring power to transfer control over the body.<sup>105</sup> The ultimate question remains whether there is any real difference between the legal categories of quasi-property and privacy.

### B. *The Body as a Privacy Interest*

In other contexts, individuals are afforded autonomy over their bodies under the umbrella of constitutional privacy rather than the rules of property. Laws prohibiting contraception and abortion, for example, are not addressed as "deprivations" of a woman's bodily property or "takings" that require the payment of just compensation, but instead as invasions of her constitutional privacy interests.<sup>106</sup> These cases construct the body as the subject of a privacy

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between personal rights which run against particular individuals and property rights which are enforceable against the entire world).

<sup>103</sup> See Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335 1342-43 (1986) (suggesting that the economic interpretation of liability rules as necessary to promote efficient transfers in the presence of high transaction costs is incomplete because liability rules also serve to rectify invasions of legal rights).

<sup>104</sup> See, e.g., *Cruzan v. Missouri*, 497 U.S. 261 (1990) (recognizing a constitutional right to remove life-sustaining medical treatment, but upholding Missouri statute requiring clear and convincing evidence of patient's intent before authorizing such a course of action); *Roe v. Wade*, 410 U.S. 113 (1973) (affording constitutional right to abortion, which protects the woman's right to expel the fetus from her body); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (conferring constitutional right to use contraception, thereby protecting a woman's right to prevent conception).

<sup>105</sup> Professor Bruce Ackerman reaches a similar conclusion regarding the connection between privacy and property, arguing that Brandeis and Warren, in their famous article, *The Right to Privacy*, "split the right of property . . . into two components: they kept the name of 'property' to mark the market-based conception that nineteenth century lawyers used at common law and equity, and they applied the new label 'privacy' to mark the legitimate exclusion of outsiders in non-market contexts." See Bruce Ackerman, *Liberating Abstraction*, 59 U. CHI. L. REV. 317, 343-44 (1992) (contending that property was divided into two concepts—market property and privacy—and suggesting that the constitutional right to privacy is essentially identical to a post-Lochnerian right of property, protecting intimate relationships rather than market relationships from governmental interference); see also Warren & Brandeis, *supra* note 14, at 211.

<sup>106</sup> See, e.g., *Griswold*, 381 U.S. at 479; *Roe*, 410 U.S. at 113. But cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 928 (1992) (Blackmun, J., concurring in the judgment

interest, and not the object of property law.

The constitutional right of privacy consists of two principal components: the right of personal privacy, which is sometimes characterized as a right to bodily integrity or a garden-variety liberty interest,<sup>107</sup> and the right of relational privacy.<sup>108</sup> Claims regarding the human body often implicate both strands of

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in part and dissenting in part) (suggesting that laws prohibiting abortion amount to state conscription of a woman's body and labor without payment of compensation).

<sup>107</sup> The Supreme Court currently appears to be designating as "liberty interests" claims regarding individual autonomy in the body that were previously addressed under the rubric of constitutional privacy. *See, e.g.*, *Casey*, 505 U.S. at 833; *Cruzan*, 497 U.S. at 261 (1990). However, the early decisions protecting a right to abortion and a right to refuse life-sustaining treatment were generally grounded in the constitutional right of privacy. *See, e.g.*, *Roe*, 410 U.S. at 153 (concluding that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy"); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (stating that "the right of privacy . . . is the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"); *Bouvia v. Superior Ct.*, 225 Cal. Rptr. 297, 301 (Cal. Ct. App. 1986) (holding that "the right to refuse medical treatment . . . is recognized as a part of the right of privacy protected by both the state and federal constitutions"); *Superintendent of Belchertown v. Saikewisc*, 370 N.E.2d 417, 424 (Mass. 1976) (finding that "the unwritten constitutional right of privacy . . . encompasses the right of a patient to preserve his or her . . . privacy against unwanted infringements of bodily integrity"); *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976) (determining that "the unwritten constitutional right of privacy . . . is broad enough to encompass a patient's decision to decline medical treatment"). The Supreme Court continues to rely upon privacy precedents and to apply privacy methodology in determining whether and to what extent such "liberty interests" are infringed. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Casey*, 505 U.S. at 833; *Cruzan*, 497 U.S. at 261. Moreover, many courts and commentators still identify rights in the body with the law of privacy, recognizing the historical relationship and close affinity between these two legal categories. *See RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 26-28, 194-95, 216-17 (1993) (asserting connections between abortion and euthanasia); Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe, Casey, and the Right to Die*, 44 AMER. U. L. REV. 803, 806 (1995) (observing that "[e]ach of the judges who has voted to permit assisted suicide has based his or her decision in part on an inference from the abortion cases"); Tom Stacy, *Death, Privacy and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 496 (1992) (stating that "deep profound symmetry" underlies *Roe* and *Cruzan*). Regardless of its legal label, this "liberty interest" in the body thus bears a close resemblance to the right previously protected under the expansive umbrella of privacy.

<sup>108</sup> In a previous article, I characterized privacy as a purely relational right and distinguished the constitutional protections afforded the body as flowing from a right of bodily autonomy. *See Radhika Rao, Reconceiving Privacy: Relationships and Reproductive Technology*, 45 UCLA L. REV. 1077, 1112 (1998). I now believe that I overlooked the importance of individual privacy and overstated the case for relational privacy. This article attempts to remedy those deficiencies by embracing a more expansive understanding of privacy as a right that shields both individuals and relationships. In so doing, it follows an

privacy. The right of personal privacy preserves the integrity of the body, safeguarding its inviolability. It includes the right to resist forced invasions of one's body and the right to prevent its physical alteration, but it does not necessarily encompass the affirmative exercise of power over the body. The right of relational privacy "casts a mantle of immunity from state interference around certain intimate and consensual relationships."<sup>109</sup> It provides the freedom to create and maintain intimate associations apart from the state, but it does not shield commercial transactions between strangers. Both aspects of privacy circumscribe the exercise of governmental power; they do not bestow power upon individuals.<sup>110</sup>

Accordingly, if property consists of a "bundle of rights" possessed by persons relative to objects, privacy may similarly be characterized as a cluster of personal interests that encompasses the right to possess one's own body and exclude others. Unlike property, however, privacy omits the right to use and the right to transfer; in their stead, privacy substitutes a "right to include" some individuals by joining with them in close personal relationships. As a result, under the rubric of privacy individuals possess the right to prevent conception by means of contraception,<sup>111</sup> to terminate pregnancy by means of abortion,<sup>112</sup> and to resist compulsory sterilization,<sup>113</sup> yet they lack the power to put their bodies to affirmative use in whatever manner they please. By the same reasoning, individuals retain a constitutional right to refuse or withdraw life-

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eminent tradition set by scholars willing to refine and reconsider the ideas embodied in their own earlier writings, especially on the difficult topics of property, privacy, and the human body. *Compare, e.g.*, Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964) (distinguishing between government acting as enterprise and government acting as arbiter and contending that only in the former case does the takings clause require compensation), *with* Joseph L. Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149 (1971) (substantially modifying his earlier theory to argue that "[m]uch of what was formerly deemed a taking is better seen as an exercise of the police power in vindication of what shall be called 'public rights'"); Laurence Tribe, *The Supreme Court, 1972 Term – Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 24-5 (1973) (suggesting that the interest in fetal life is intrinsically religious and that the inescapable involvement of religious groups in the debate over abortion renders the subject inappropriate for political resolution), *with* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 1349-50 (2d ed. 1987) (abandoning the view that abortion restrictions violate religious freedom); MUNZER, A THEORY OF PROPERTY, *supra* note 16, at 55-56 (1990) (arguing that individuals possess limited property rights in their bodies), *with* Munzer, *An Uneasy Case Against Property Rights in Body Parts*, *supra* note 15, at 260 (presenting an uneasy case against property in body parts).

<sup>109</sup> Rao, *supra* note 108, at 1078.

<sup>110</sup> See *id.* at 1079.

<sup>111</sup> See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Poe v. Ullman*, 367 U.S. 497 (1961).

<sup>112</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

<sup>113</sup> See *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

sustaining medical care,<sup>114</sup> although they have no corollary right to commit physician-assisted suicide or euthanasia.<sup>115</sup> Privacy also includes the right to prevent significant intrusions into a person's body for the purpose of extracting evidence, such as stomach-pumping or the surgical removal of a bullet,<sup>116</sup> while the government's power to compel a pregnant woman to undergo a blood transfusion or caesarian surgery in order to preserve her own life or the life of the fetus is likewise bounded by the constitutional right of privacy. In addition, privacy safeguards the freedom to create and maintain intimate and consensual relationships apart from the state. Consequently, it shelters the right to marry, the right of extended family members to reside together, and the right of parents to maintain relationships with their children and rear them free from governmental interference. It does not, however, empower individuals to sell sexual services, enter into and enforce commercial surrogacy contracts, or offer their children for trade on the market.

### 1. Contraception

The constitutional right of privacy first surfaced in *Poe v. Ullman*,<sup>117</sup> which involved a challenge by a married couple and their physician to the constitutionality of a Connecticut law criminalizing the use of contraceptives. Because the law had not been enforced in over eighty years, the Supreme Court dismissed the case for lack of a justiciable controversy.<sup>118</sup> Dissenting from the Court's decision, Justice Harlan would have struck down the statute as "an intolerable and unjustifiable invasion of privacy in the conduct of the most intimate concerns of an individual's personal life."<sup>119</sup> He grounded his dissent in previous decisions protecting a "private realm of family life which the state cannot enter," arguing that "it is difficult to imagine what is more private or more intimate than a husband and wife's marital relations."<sup>120</sup>

But it was not until 1965 that the constitutional right of privacy achieved explicit recognition. In *Griswold v. Connecticut*,<sup>121</sup> a majority of the Court employed privacy to strike down the very statute that had been challenged a few years earlier in *Poe*. Justice Douglas, writing for the Court, found the right of privacy lurking in the penumbras formed by emanations from several

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<sup>114</sup> See *Cruzan v. Missouri*, 497 U.S. 261 (1990).

<sup>115</sup> See *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>116</sup> See *Winston v. Lee*, 470 U.S. 753 (1985).

<sup>117</sup> 367 U.S. 497 (1961).

<sup>118</sup> See *id.* at 509 (observing that the factors relevant to determining justiciability "justify withholding adjudication of the constitutional issue raised under the circumstances and in the manner in which they are now before the Court.").

<sup>119</sup> *Id.* at 539 (Harlan, J., dissenting).

<sup>120</sup> See *id.* at 552 (Harlan, J., dissenting) (relying on previous interpretations of the Fourth Amendment).

<sup>121</sup> 381 U.S. 479 (1965).

specific provisions of the Bill of Rights.<sup>122</sup> He concluded that marriage is a "relationship lying within the zone of privacy created by several constitutional guarantees."<sup>123</sup> By penalizing a married couple's use of contraception, the Connecticut law unconstitutionally invaded their privacy. Subsequent cases extended the right to use contraception to single persons as well.<sup>124</sup> In *Eisenstadt v. Baird*,<sup>125</sup> for example, the Court determined that a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons was unconstitutional. Although this ruling ostensibly rested upon the Equal Protection Clause, it also appears rooted in the constitutional right of privacy. Indeed, the Court expressly declared: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."<sup>126</sup>

The constitutional protection afforded the use of contraception flows from both personal and relational privacy. The former protects a woman's right to prevent the bodily invasions and alterations that are the inevitable consequence of conception, pregnancy, and child birth, while the latter shelters her choice to enter into or extricate herself from such an intimate and personal relationship.

## 2. Abortion

In *Roe v. Wade*,<sup>127</sup> the Court invoked privacy once again to strike down a Texas statute criminalizing abortion. The Court traced the genealogy of privacy to "a line of decisions . . . going back perhaps as far as *Union Pacific Ry. Co. v. Botsford*,"<sup>128</sup> an ancient case that affirmed "the right of every individual to the possession and control of his own person, free from all restraint or interference by others."<sup>129</sup> Relying upon this long line of precedent, the Court recognized that "a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution" and inferred that this right "has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education."<sup>130</sup> The Court concluded that "[t]his right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate

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<sup>122</sup> See *id.* at 484.

<sup>123</sup> *Id.* at 485.

<sup>124</sup> See *Carey v. Population Servs., Int'l*, 431 U.S. 678 (1977) (extending the right to minors); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (extending the right to unmarried persons).

<sup>125</sup> 405 U.S. at 438.

<sup>126</sup> *Id.* at 453.

<sup>127</sup> 410 U.S. 113 (1973).

<sup>128</sup> *Roe*, 410 U.S. at 152 (citing *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891)).

<sup>129</sup> *Union Pacific*, 141 U.S. at 251.

<sup>130</sup> See *Roe*, 410 U.S. at 152-53.

her pregnancy."<sup>131</sup> At the same time, the Court emphatically rejected the argument that privacy consists of "an unlimited right to do with one's body as one pleases," stating:

The privacy right . . . cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.<sup>132</sup>

In so doing, the Court refused to equate privacy with complete ownership of one's body.<sup>133</sup> Instead, the Court in *Roe* drew the critical line at viability—the point at which "the fetus . . . has the capability of meaningful life outside the mother's womb."<sup>134</sup> Consequently, the Court protected the woman's right to terminate her pregnancy only prior to fetal viability, permitting the state to proscribe abortions after that time unless necessary to preserve the life or health of the mother.<sup>135</sup>

Like contraception, the right to abortion is also grounded in both personal and relational privacy. Indeed, the Court clearly articulated both rationales in its most recent abortion decision. In *Planned Parenthood v. Casey*,<sup>136</sup> the Court candidly recognized that the abortion right "stands at [the] intersection of two lines of decisions."<sup>137</sup> First, constitutional protection for abortion flows from the set of cases exemplified by *Griswold*, which are rooted in the right of relational privacy—that is, "the liberty relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."<sup>138</sup> But the

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<sup>131</sup> *Id.* at 153.

<sup>132</sup> *Id.* (citing precedent authorizing privacy invasions in the form of compulsory vaccination and sterilization).

<sup>133</sup> In contrast, many commentators advocate recognition of the concept of self-ownership. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 171-72 (1974) (employing the idea of "self-ownership" to argue that the individual possesses the sole right to dispose of himself and to direct his actions, free from interference by others); Jan Narveson, *Libertarianism, Poslibertarianism, and the Welfare State*, 6 CRITICAL REV. 73 (1992) ("Calling for property in oneself is simply calling for being allowed to do as one pleases").

This conventional image of property ownership as individual and absolute is vividly captured by Blackstone's talismanic statement that "There is nothing which so generally strikes the imagination as the right of property, or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of every other individual in the universe." 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765).

<sup>134</sup> See *Roe v. Wade*, 410 U.S. 113, 163 (1973).

<sup>135</sup> See *id.* at 164-65 (summarizing the trimester scheme created by the Court).

<sup>136</sup> 505 U.S. 833 (1992).

<sup>137</sup> *Id.* at 857.

<sup>138</sup> *Id.*

Court also emphasized the right to personal privacy, noting that "*Roe* . . . may be seen not only as an exemplar of *Griswold* liberty but as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to [a second line of] cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection."<sup>139</sup>

Whether abortion continues to remain a fundamental right that can be abridged only upon a showing of strict scrutiny, however, is no longer clear after the Supreme Court's decision in *Casey*. In *Casey*, the Court retained and reaffirmed "the essential holding of *Roe*" —namely, the line drawn at fetal viability—but simultaneously rejected *Roe*'s trimester framework.<sup>140</sup> In its stead, the Court substituted the new "undue burden standard," under which only those laws whose "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability" are deemed constitutionally invalid.<sup>141</sup>

### 3. Compulsory Sterilization

In addition to protecting contraception and abortion, the Constitution also prevents compulsory sterilization, at least when it is conducted in a discriminatory fashion. In *Skinner v. Oklahoma*,<sup>142</sup> a decision handed down before development of the constitutional right of privacy, the Court struck down an Oklahoma statute that authorized the sterilization of persons thrice convicted of a felony involving moral turpitude. Although the Court ruled that the statute contravened the equal protection clause because it permitted the sterilization of chicken thieves but not embezzlers, it also opined that "marriage and procreation are fundamental to the very existence and survival of the race," thereby demonstrating the decision's affinity with privacy principles.<sup>143</sup>

### 4. Forced Medical Treatment of Pregnant Women

The government's power to invade the body of a pregnant woman and compel her to undergo a blood transfusion or caesarian surgery in order to preserve her own life or the life of the fetus is likewise bounded by the constitutional right of privacy.<sup>144</sup> In the early cases, courts often allowed

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<sup>139</sup> *Id.*

<sup>140</sup> See *id.* at 873.

<sup>141</sup> *Id.* at 877

<sup>142</sup> 316 U.S. 535 (1942).

<sup>143</sup> *Id.* at 541.

<sup>144</sup> The topic of forced medical treatment of pregnant women has generated a large literature. See generally George J. Annas, *Forced Caesareans, The Most Unkindest Cut of All*, HASTINGS CTR. REP. 16 (June 1982); Nancy Ehrenreich, *The Colonization of the Womb*, 43 DUKE L.J. 492 (1993); Joel Jay Finer, *Toward Guidelines for Compelling Caesarian Surgery: Of Rights, Responsibility, and Decisional Authenticity*, 76 MINN. L. REV. 239 (1991); Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong with Fetal*

forced blood transfusions and even authorized major surgery over a woman's objections in order to save the life of the fetus.<sup>145</sup> More recent cases, however, suggest that such court orders may violate a pregnant woman's right to bodily privacy.<sup>146</sup>

*In re A.C.*,<sup>147</sup> for example, vacated a trial court order compelling caesarian surgery to be performed upon a woman dying from cancer who was 26 weeks pregnant with a viable fetus, when the surgery posed substantial risks to the woman's health but was necessary for fetal survival.<sup>148</sup> The D.C. Court of Appeals recognized that "the right to accept or forego medical treatment is of constitutional magnitude"<sup>149</sup> and ruled that "in virtually all cases the question of what is to be done is to be decided by the patient—the pregnant woman—on behalf of herself and the fetus."<sup>150</sup> In the event that a patient is incompetent or otherwise unable to give her informed consent to a proposed course of medical

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*Rights*, 10 HARV. WOMEN'S L.J. 9 (1987); Lisa C. Ikemoto, *Furthering the Inquiry: Race, Class, and Culture in the Forced Medical Treatment of Pregnant Women*, 59 TENN. L. REV. 487 (1992); Dawn Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Lawrence J. Nelson et al., *Forced Medical Treatment of Pregnant Women: 'Compelling Each to Live as Seems Good to the Rest'*, 37 HASTINGS L.J. 703 (1986); Nancy K. Rhoden, *The Judge in the Delivery Room: The Emergence of Court-Ordered Caesareans*, 74 CAL. L. REV. 1951 (1986); John Robertson, *Procreative Liberty and the Control of Conception, Pregnancy, and Childbirth*, 69 VA. L. REV. 405 (1983).

<sup>145</sup> See, e.g., *In re Jefferson v. Griffin Spalding Cty. Hosp.*, 274 S.E.2d 457 (Ga. 1981) (per curiam) (affirming a court order compelling caesarian section when physicians testified that vaginal delivery posed a 50% chance of the mother's death and a 99% chance of fetal death, as compared to an almost 100% chance that both would survive with surgery); *Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson*, 201 A.2d 537 (D.C. 1964) (ordering pregnant woman to undergo blood transfusion over her religious objections to preserve the fetus' life); *Jamaica Hospital*, 491 N.Y.S. 2d 898 (Sup. Ct. 1985) (same); *In re Madyun*, 114 Daily Wash. L. Rptr. 2233 (D.C. Super. Ct. 1986) (requiring caesarian surgery to be performed for the benefit of the fetus).

<sup>146</sup> See, e.g., *In re A.C.*, 573 A.2d 1235 (D.C. Ct. App. 1990); *In re Dubreuil*, 629 So. 2d 819 (Fla. 1993) (requiring state to prove compelling interest in overriding pregnant woman's constitutional right to refuse treatment and reversing trial court's decision to order blood transfusion when state failed to meet this "heavy burden"); *In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. Ct. 1997) (holding that pregnant woman could not be compelled to undergo blood transfusion for benefit of her viable fetus); *In re Doe*, 632 N.E.2d 326 (Ill. App. Ct. 1994).

<sup>147</sup> 573 A.2d at 1235.

<sup>148</sup> The caesarian surgery was performed and a baby girl was delivered. The child died within a few hours of her birth, while the mother died just two days later.

<sup>149</sup> *Id.* at 1244.

<sup>150</sup> *Id.* at 1237. The court further declared that "every person has the right, under the common law and the Constitution, to accept or refuse medical treatment" and that "[t]his right of bodily integrity belongs equally to persons who are competent and persons who are not." *Id.* at 1247.

treatment, the court instructed that her decision must be ascertained through the procedure of substituted judgment.<sup>151</sup> The court did not completely foreclose the possibility of a state interest so compelling that the patient's wishes must yield, but emphasized that "it would be an extraordinary case indeed in which a court might ever be justified in overriding the patient's wishes and authorizing a major surgical procedure" and suggested that "some may doubt that there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a caesarian section, against that person's will."<sup>152</sup>

*In re Doe*<sup>153</sup> similarly refused to "balance" a competent woman's right to refuse medical treatment against the rights of the fetus. Instead, the Illinois Court of Appeals determined that "a woman's competent choice to refuse medical treatment as invasive as a cesarean section during pregnancy must be honored, even in circumstances where the choice may be harmful to her fetus."<sup>154</sup> The court grounded its ruling in the common law right to refuse treatment, as well as the constitutional rights of privacy and bodily integrity. Indeed, the opinion pointed out that other courts have "consistently refused to force one person to undergo medical procedures for the purpose of benefiting another person—even where the two persons share a blood relationship, and even where the risk to the first person is perceived to be minimal and the benefit to the second person may be great."<sup>155</sup> Based upon these decisions, the court concluded that "[i]f a sibling cannot be forced to donate bone marrow to save a sibling's life, if an incompetent brother cannot be forced to donate a kidney to save the life of his dying sister, then surely a mother cannot be forced to undergo a cesarean section to benefit her viable fetus."<sup>156</sup> In addition, the court distinguished the state's power to proscribe abortions post-viability, reasoning that "the fact that the state may prohibit post-viability pregnancy terminations does not translate into the proposition that the state may intrude upon the woman's right to remain free from unwanted physical invasion of her person when she chooses to carry her pregnancy to term."<sup>157</sup>

## 5. Invasions of the Body

Regardless of its precise source,<sup>158</sup> it is by now clear that the Constitution guarantees a right to be free from significant physical invasions of the body,

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<sup>151</sup> *See id.* at 1249-51.

<sup>152</sup> *Id.* at 1252.

<sup>153</sup> 632 N.E.2d 326 (Ill. App. Ct. 1994).

<sup>154</sup> *Id.* at 326.

<sup>155</sup> *Id.* at 333.

<sup>156</sup> *Id.* at 333-34.

<sup>157</sup> *Id.* at 334.

<sup>158</sup> The physical integrity of the body receives shelter under a variety of legal doctrines, including the common law right to refuse treatment, as well as the constitutional right of privacy and the liberty protected by the Due Process Clause. *See* discussion *infra* Part I.B.

and that this right possesses an ancient pedigree.<sup>159</sup> In *Rochin v. California*,<sup>160</sup> for example, the Court held that stomach-pumping a suspect in order to extract evidence from his body violates the Due Process Clause. The *Rochin* Court attached the label "privacy" to this right to preserve the physical integrity of one's body, avowing that "[i]llegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities."<sup>161</sup> The Court in *Winston v. Lee*<sup>162</sup> likewise found that surgical removal of a bullet from an accused person's body over his objections "would be an 'extensive' intrusion on [his] personal privacy and bodily integrity."<sup>163</sup> Minor encroachments into the body, however, do not necessarily violate this right. Hence *Schmerber v. California*<sup>164</sup> upheld administration of a compulsory blood test for drunk driving while continuing to affirm that "[t]he integrity of an individual's person is a cherished value of our society."<sup>165</sup>

Although the state may require individuals to undergo relatively minor intrusions into their bodies for the sake of the general public welfare,<sup>166</sup> it may not require one citizen to donate his body to preserve the life of another, even when removal of a body part would pose little risk to the prospective donor and a family member would suffer serious harm or die without the donation. In *McFall v. Shimp*,<sup>167</sup> the only case to directly confront this issue, a Pennsylvania court addressed the question whether "in order to save the life of

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<sup>159</sup> See *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference by others, unless by clear and unquestionable authority of law.").

<sup>160</sup> 342 U.S. 165 (1952).

<sup>161</sup> *Id.* at 172.

<sup>162</sup> 470 U.S. 753 (1985).

<sup>163</sup> *Id.* at 764 (1985); *see also id.* at 759 ("A compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' even if likely to produce evidence of a crime.' .

<sup>164</sup> 384 U.S. 757 (1966).

<sup>165</sup> *Id.* at 772 (upholding compulsory administration of blood tests for drunk driving); *see also Washington v. Harper*, 494 U.S. 210, 229 (1990) (stating that "[t]he forcible injection of medication into a nonconsenting person's body represents a substantial interference with that person's liberty" but nevertheless upholding administration of psychotropic medication to prisoner); *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (balancing an individual's liberty interest in resisting compulsory vaccination against the state's interest in preventing smallpox and upholding compulsory immunization law).

<sup>166</sup> *See Schmerber*, 384 U.S. at 757 (upholding administration of compulsory blood tests for drunk driving); *Jacobson*, 197 U.S. at 11 (upholding law requiring smallpox vaccination to preserve the health of the community).

<sup>167</sup> 10 Pa. D. & C.3d 90 (Pa. Ch. 1978) (dismissing an action brought to compel a relative to serve as a donor for a bone marrow transplant, despite the patient's critical need).

one of its members by the only means available, . . . society may infringe upon [another person's] absolute right to his 'bodily security'?"<sup>168</sup> The court answered this question with a resounding no, declaring:

For a society which respects the rights of one individual, to sink its teeth into the jugular vein or neck of one of its members and suck from it sustenance for another member, is revolting to our hard-wrought concepts of jurisprudence. Forceable extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectre of the swastika and the Inquisition, reminiscent of the horrors this portends.<sup>169</sup>

As a result, the court refused "to force one member of society to undergo a medical procedure which would provide that part of that individual's body would be removed from him and given to another so that the other could live."<sup>170</sup> Hence, living persons cannot have their organs or other body parts taken from them without their consent or against their will, even to save the life of another. However, individuals may voluntarily permit their organs or body parts to be extracted from their body for donation to others, and the same holds true for incompetent adults and minor children, who may also "consent" to give their organs or other body parts to a loved one by means of the substituted judgment or best interests standard.<sup>171</sup>

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<sup>168</sup> *Id.* at 90-91.

<sup>169</sup> *Id.* at 92.

<sup>170</sup> *Id.* at 91. *See also Curran v. Bosze*, 566 N.W.2d 1319, 1326 (Ill. 1990) (upholding parent's refusal to allow bone marrow transplant from her child to a half-sibling and characterizing the human body as "the foundation of self-determination and inviolability of the person").

<sup>171</sup> *See, e.g.*, *Hart v. Brown*, 289 A.2d 386 (Conn. 1972) (allowing kidney transplant from healthy 7-year-old child to her identical twin when both parents consented to the operation and the child herself indicated her desire to donate her kidney in order to enable her sister to survive); *Strunk v. Strunk*, 445 S.W.2d 145 (Ky. 1969) (authorizing kidney transplant from mentally incompetent 27-year-old man to his brother under substituted judgment rule when the two possessed an intimate relationship); *Curran*, 566 N.W.2d at 1331 (holding that "a parent or guardian may give consent on behalf of a minor daughter or son for the child to donate bone marrow to a sibling, only when to do so would be in the minor's best interest" but upholding mother's refusal to allow bone marrow transplant from her 3-year-old twins to their dying half brother with whom they shared no relationship); *In re Richardson*, 284 So. 2d 185 (La. Ct. App. 1973) (refusing to permit kidney transplant from incompetent 17-year-old to his adult sister when to do so would be contrary to his best interests); *In re Doe*, 481 N.Y.S.2d 932 (App. Div. 1984) (allowing bone marrow donation from 43-year-old incompetent adult to his brother when the transplant would be in the incompetent's best interests because of the benefits to him from his brother's future company). *But see In re Guardianship of Pescinski*, 226 N.W.2d 180 (Wis. 1975) (refusing to apply the doctrine of substituted judgment and holding that court lacks authority to authorize a kidney transplant from an incompetent adult to a sibling in the absence of true consent).

## 6. The Right to Die

In *Cruzan v. Director, Missouri Dept. of Health*,<sup>172</sup> the Court declared that "[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from our prior decisions."<sup>173</sup> The Court proceeded to address the question "whether the United States Constitution grants what is in common parlance referred to as a 'right to die'."<sup>174</sup> The Court's answer to this question was qualified: it "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition," but nevertheless upheld a Missouri statute preventing withdrawal of life-sustaining medical treatment unless the individual's intentions were proved by clear and convincing evidence.<sup>175</sup>

Subsequent cases confirm that the Constitution does not confer an expansive and all-encompassing right to die, but only a limited right to disconnect the body from the invasive medical apparatus keeping it alive. *Vacco v. Quill*<sup>176</sup> reasoned that the constitutional protection afforded to the right to refuse life-sustaining medical treatment in *Cruzan* "was grounded not . . . on the proposition that patients have a general and abstract 'right to hasten death,' . . . but on well established, traditional rights to bodily integrity and freedom from unwanted touching."<sup>177</sup> *Washington v. Glucksberg*<sup>178</sup> set forth several examples of "the 'liberty' specially protected by the Due Process Clause," including "the rights to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion."<sup>179</sup> The Court reaffirmed the standard of review

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<sup>172</sup> 497 U.S. 261 (1990).

<sup>173</sup> *Id.* at 278. The Court referred to this interest under the label of "liberty" rather than as an aspect of "privacy," stating: "Although many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest." *Id.* at 279 n. 7. Yet the only support adduced for the Court's cryptic preference for liberty over privacy was a single citation to *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986) – a case that refused to extend the right of privacy to shelter homosexual activity on the grounds that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other" had been demonstrated. Specifically, the Court cited the passage of Justice White's opinion in *Hardwick* declaring a reluctance "to discover new fundamental rights imbedded in the Due Process Clause," *id.* at 194-95, suggesting that perhaps the substitution of the term "liberty" for "privacy" stems from the Court's unwillingness to afford the stringent protection due to fundamental rights to any additional interests.

<sup>174</sup> *Cruzan*, 497 U.S. at 277.

<sup>175</sup> *Id.* at 279.

<sup>176</sup> 521 U.S. 793 (1997).

<sup>177</sup> *Id.* at 807.

<sup>178</sup> 521 U.S. 702 (1997).

<sup>179</sup> *Id.* at 719-20 (citations omitted).

applicable to interference with such fundamental liberties, stating that "the Fourteenth Amendment 'forbids the government to infringe . . . 'fundamental' liberty interests at all, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."<sup>180</sup> Yet the Court proceeded to conclude that the "asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."<sup>181</sup> Accordingly, it upheld a Washington law prohibiting assisted suicide pursuant to low-level rational basis review.

## 7. Personal Relationships

Privacy not only guarantees individuals a certain degree of autonomy over their bodies, but it also safeguards the freedom to create and maintain intimate and consensual relationships apart from the state. Consequently, it protects the right to marry,<sup>182</sup> the right of extended family members to reside together,<sup>183</sup> and the right of parents to maintain relationships with their children and rear them free from governmental interference.<sup>184</sup> However, it does not necessarily empower individuals to sell sexual services, enter into and enforce commercial surrogacy contracts, or offer their children for trade on the market.

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<sup>180</sup> *Id.* at 721.

<sup>181</sup> *Id.* at 702.

<sup>182</sup> See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (categorizing "the decision to marry as among the personal decisions protected by the right of privacy").

<sup>183</sup> See *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (applying careful scrutiny to a zoning ordinance preventing two cousins from living with their grandmother on grounds that "when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation").

<sup>184</sup> Although children may once have been considered the "property" of their parents, see MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 25 (1985) (describing how nineteenth-century law treated children "as assets of estates in which fathers had a vested right," so that "[t]heir services, earnings, and the like became the property of their paternal masters in exchange for life and maintenance"); VIVIANA ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING VALUE OF CHILDREN 113-19 (1985); Barbara Bennett Woodhouse, *Who Owns the Child?: Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 1045 (1992) (arguing that many of the sticks in the bundle of rights called property "were functional features of paternal power with respect to the child in Colonial and even nineteenth-century America"), parent-child relationships are currently protected under the constitutional umbrella of privacy rather than the rubric of property, see *Stanley v. Illinois*, 405 U.S. 645, 658-59 (1972) (invalidating a statute that automatically deprived unwed fathers of custody of their children upon the mother's death); *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (requiring clear and convincing evidence of abuse or neglect before the state can constitutionally terminate parental rights); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that the Free Exercise Clause of the First Amendment and the right of privacy protected by the Fourteenth Amendment prevent the state from compelling Amish parents to send their children to public schools until age sixteen).

In *Lutz v. United States*,<sup>185</sup> for example, the D.C. Court of Appeals rejected appellant's claim that the constitutional right of privacy shelters commercial sex between consenting adults in a private hotel room based upon the following reasoning:

We conclude that there is no fundamental right to privacy for commercial sexual solicitation. . . . Commercial sex does not concern an intimate relationship of the sort heretofore deemed worthy of constitutional protection. Nor has the Court in the least suggested that an individual's right to make the fundamental personal "decision whether or not to bear or beget a child" should extend to a constitutionally protected right to sell the use of one's body for sexual purposes.<sup>186</sup>

As a result, state laws proscribing prostitution warrant only rational basis review.<sup>187</sup> Several state courts have upheld statutes that prohibit commercial surrogacy, basing their decisions upon a similar rationale.<sup>188</sup> In *Doe v. Kelley*,<sup>189</sup> for example, a Michigan court considered the constitutionality of a statute prohibiting the exchange of money in connection with adoption. A married couple challenged the statute on the grounds that it interfered with their right to reproduce by means of surrogacy, but the court found the statute to be constitutional because it did not forbid conception of a child, but merely precluded the payment of consideration to transfer parental rights over the child.<sup>190</sup>

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<sup>185</sup> 434 A.2d 442, (D.C. App. 1981).

<sup>186</sup> *Id.* at 445-46 (citations omitted). *See also* *Nevada v. Pavlikowski*, 668 P.2d 282 (1983) (declaring that "[t]he right to privacy simply does not extend to commercial sexual activities, even when such activities take place in a private area"); *In the Matter of Dora P.*, 68 A.D.2d 719, 731 (1979) (stating that "public solicitation of a sex act for a fee is hardly to be equated with and accorded the same privacy as an act committed under the domestic blanket, whether marital, nonmarital or extramarital").

<sup>187</sup> *See, e.g.*, *Hawaii v. Mueller*, 671 P.2d 1351 (1983) (subjecting statute criminalizing prostitution to rational basis review).

<sup>188</sup> A number of states have enacted laws proscribing commercial surrogacy. *See, e.g.*, KY. REV. STAT. ANN. § 199.590(4) (Michie 1999). (proscribing surrogacy contracts for compensation); LA. REV. STAT. ANN. § 9:2713 (West 1999). (rendering paid surrogacy contracts null, void, and unenforceable); MICH. COMP. LAWS ANN. § 722.859 (1999). (prohibiting commercial surrogacy contracts and prescribing criminal fines and/or imprisonment for participation in or procurement of such agreements); NEB. REV. STAT. § 25-21,200 (1999) (declaring surrogacy contracts for compensation to be unenforceable); N.Y. DOM. REL. LAW § 123 (McKinney 1999). (forbidding commercial surrogacy and imposing civil and/or criminal penalties for violations); UTAH CODE ANN. § 76-7-204(1) (1999). (prohibiting surrogacy contracts for profit and providing that violations constitute a misdemeanor); WASH. REV. CODE ANN. § 26.26.230 (1999). (barring surrogacy contracts for compensation).

<sup>189</sup> 307 N.W.2d 438 (Mich. Ct. App. 1981).

<sup>190</sup> The court's reasoning was as follows:

While the decision to bear or beget a child [is] a fundamental interest protected by the

## II. "CONTESTED COMMODITIES":<sup>191</sup> COMPETING CONSTRUCTIONS OF THE BODY

Both the property and privacy paradigms possess substantial power and are deeply entrenched in our ideology of the body. Yet the accessibility of these different constructions of the body often generates confusion as to which to apply, while their pervasiveness blocks alternate images of the body.<sup>192</sup> The battle between these competing conceptions takes place on the territory of the human body, in constitutional challenges to laws that permit the government to confiscate organs from corpses without prior consent or that prevent the removal of incompetent pregnant women from life support, as well as disputes regarding the legal status of sperm and embryos.

### A. *Expropriated Organs*

The constitutionality of laws that authorize the removal of organs from a dead body without prior consent has often been called into question. Almost all of the cases<sup>193</sup> and scholarly commentary address this issue under the rubric of property law, rather than of privacy law.<sup>194</sup> Even when the right to privacy is considered, its application to this context is generally rejected on the grounds that dead persons retain no privacy interests in their own bodies<sup>195</sup> and family members possess privacy interests only in their ongoing relationships with the living.<sup>196</sup> These decisions display a curious reluctance to apply the

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right of privacy, we do not view this right as a valid prohibition to state interference in the [parties'] contractual arrangement. The statute . . . does not directly prohibit John Doe and Mary Roe from having the child as planned. It acts instead to preclude plaintiffs from paying consideration . . . to change the legal status of the child . . . . [W]e do not perceive this goal as within the realm of fundamental interests protected by the right to privacy from reasonable governmental regulation.

*Id.* at 441; *see also In re Paul*, 550 N.Y.S.2d 815, 817-18 (Fam. Ct. 1990) (following *Doe v. Kelley*'s constitutional analysis).

<sup>191</sup> This phrase is borrowed from the title of a book by Professor Radin. *See RADIN, CONTESTED COMMODITIES*, *supra* note 15, at 15 (analyzing markets in contested commodities, such as sexual services, children, free speech, and compensation for pain and suffering).

<sup>192</sup> *See HYDE, supra* note 15, at 6. Hyde suggests:

[W]hat we need is not a new right, but a bringing into consciousness of the multiple constructions already immanent in law, including alternatives to the body as property or privacy right or machine, alternatives that always treat people as embodied, that do not shy away from pain, sex, or other embodied experiences, that replace the metaphors of property, machine, or privacy right with a language of bodily presence or embrace.

*Id.*

<sup>193</sup> For a detailed description of these cases, *see infra* text accompanying notes 219-48.

<sup>194</sup> *See supra* note 4 and accompanying text.

<sup>195</sup> *See, e.g., Tillman v. Detroit Receiving Hospital*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984).

<sup>196</sup> *See, e.g., Florida v. Powell*, 497 So. 2d 1188, 1193 (Fla. 1986) (finding that cited authorities only recognize "freedom of choice concerning personal matters involved in

constitutional right of privacy to the human body in this context, perhaps because of the fear that privacy analysis might render such laws unconstitutional. Instead, most of the cases resort to property discourse to uphold these statutes under the most minimal standard of constitutional review, finding no violation of constitutionally protected property rights either because the bodies of the dead are not deemed property<sup>197</sup> or because the public need for organs is found to outweigh any insignificant property interests that might be involved.<sup>198</sup>

### 1. Rejection of Privacy

Several of the cases address the issues in the language of privacy, either the personal privacy right of the decedent to control disposal of his or her own body or the relational privacy right of family members to make such intimate decisions free from state interference. In *Florida v. Powell*,<sup>199</sup> for example, the Florida Supreme Court upheld such a statute against constitutional challenges brought under both the Due Process and Takings Clauses. The court determined that the Florida statute did not constitute a "taking" of plaintiffs' private property because close relatives possess no property rights in a corpse.<sup>200</sup> To the contrary, the court affirmed that "the next of kin's right in a decedent's remains is based upon 'the personal right . . . to bury the body rather than any property right in the body itself,'" and loss of such a common law tort action does not necessarily trigger constitutional protection.<sup>201</sup> The court also considered the plaintiffs' claim that the statute invaded their right to privacy, specifically that "because the statute permits the removal of a decedent's corneas without reference to his family's preferences, it infringes upon a right, characterized as one of religion, family, or privacy, which is fundamental and must be subjected to strict scrutiny."<sup>202</sup> Pointing to the line of cases involving contraception, abortion, sterilization, and parental rights,<sup>203</sup> the plaintiffs

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existing, ongoing relationships among living persons"); *Mansaw v. Midwest Organ Bank*, No. 9700271 CV-W-6, 1998 U.S. Dist. Lexis 10307, at \*28, n.15 (W.D. Mo. July 8, 1998) (stating that the only constitutionally protected interest that a person may have in a deceased relative's body is a property interest).

<sup>197</sup> See, e.g., *Georgia Lions Eye Bank v. Lavant*, 335 S.E.2d 127, 128 (Georgia 1985) (concluding that dead bodies are not property and that relatives have a quasi-property right in the dead body); *Powell*, 497 So. 2d at 1191.

<sup>198</sup> See, e.g., *Mansaw*, 1998 U.S. Dist. Lexis 10307, at \*28.

<sup>199</sup> *Powell*, 497 So. 2d at 1188.

<sup>200</sup> See *id.* at 1191 (disposing of the contention that the Florida statute "deprives [plaintiffs] of a fundamental property right" with the declaration that "[a]ll authorities generally agree that the next of kin have no property right in the remains of a decedent").

<sup>201</sup> *Id.* at 1192.

<sup>202</sup> *Id.* at 1193.

<sup>203</sup> See *id.* The cases invoked included *Roe v. Wade*, 410 U.S. 113 (1973) (striking down Texas criminal abortion statute prohibiting abortion at any stage of the pregnancy except to save life of mother); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (finding Wisconsin

contended that "the theme which runs through these cases, and which compels the invalidation of [the Florida statute], is the protection from governmental interference of the right of free choice in decisions of fundamental importance to the family."<sup>204</sup> But the court rejected this argument as well,<sup>205</sup> reasoning:

The cases cited recognize only freedom of choice concerning personal matters involved in *existing, ongoing relationships among living persons* as fundamental or essential to the pursuit of happiness by free persons. We find that the right of the next of kin to a tort claim for interference with burial . . . does not rise to the constitutional dimension of a fundamental right traditionally protected under either the United States or Florida Constitution. Neither federal nor state privacy provisions protect an individual from every governmental intrusion into one's private life, . . . especially when a statute addresses public health interests.<sup>206</sup>

Instead, applying only low-level rational basis review, the court found the Florida statute to be constitutional "because it rationally promotes the permissible state objective of restoring sight to the blind."<sup>207</sup> The court concluded its opinion with the suggestion that such issues present delicate questions of policy better left to the legislature, rather than resolved by courts under the rubric of constitutional principle.<sup>208</sup>

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compulsory education law violative of parental rights); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (finding Connecticut law forbidding use of contraceptives unconstitutionally intrudes upon right of marital privacy); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (reversing judgment directing vasectomy to be performed on defendant); and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Oregon Compulsory Education Act held violative of parental rights).

<sup>204</sup> *Powell*, 497 So.2d at 1193.

<sup>205</sup> In a vigorous dissent, Judge Shaw criticized the majority opinion, stating that "[t]he thrust of the majority opinion appears to be that the state and its agents have an unqualified right to the body of a decedent provided at some point the remains of the remains are turned over to the next of kin." *Id.* at 1195 (Shaw, J., dissenting). Judge Shaw disagreed with the majority's finding that there was no violation of plaintiffs' constitutional right to privacy and intimated that the common law right to control the body of a deceased loved one falls within the compass of the constitutional right to privacy:

The right to privacy under [the Florida Constitution] is particularly pertinent in my view because the right to be let alone and to be free from government intrusion into private life is, in large part, simply a constitutional affirmation of common law rights and customs surrounding the exercise of private, as contrasted to public, liberties. The right to possess and control the body of a deceased loved one and to honor and celebrate the decedent's life and death through appropriate commemoration is a quintessential privacy right.

*Id.* at 1196 (Shaw, J., dissenting). Judge Shaw's opinion thus couples common law and constitutional privacy rights.

<sup>206</sup> *Id.* at 1193 (emphasis added) (citation omitted).

<sup>207</sup> *Id.* at 1193-94.

<sup>208</sup> See *id.* at 1194. Cf. GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW (1985) (arguing that issues involving a clash between competing constitutional interests

Similarly, in *Tillman v. Detroit Receiving Hospital*,<sup>209</sup> a state appellate court upheld an almost identical Michigan statute.<sup>210</sup> The court denied a mother's claim that the statute unconstitutionally invaded her right of privacy by permitting her dead daughter's corneas to be harvested without obtaining the mother's consent,<sup>211</sup> ruling that

[t]he privacy right encompasses the right to make decisions concerning the integrity of one's body. This right is, however, a personal one. It ends with the death of the person to whom it is of value. It may not be claimed by his estate or his next of kin.<sup>212</sup>

And although "there is no property right in the next of kin to a dead body," the court acknowledged that "Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body for the tort of interference with the right of burial of a deceased person without mutilation" but affirmed that "[w]e do not find this common law right to be of constitutional dimension."<sup>213</sup>

In a slightly different context, a federal court of appeals also declined to extend the mantle of constitutional privacy over a corpse. In *Arnaud v. Odom*,<sup>214</sup> several parents brought suit contending that the Deputy Coroner had performed experiments on the bodies of their dead babies by dropping them onto a concrete floor in violation of their constitutional privacy and property rights.<sup>215</sup> The Fifth Circuit framed the issue as "whether, from the express

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must be resolved in a manner that accommodates both sides and acknowledges the importance of all the values at stake).

<sup>209</sup> 360 N.W.2d 275 (Mich. Ct. App. 1984).

<sup>210</sup> See *id.* at 277 (citing MICH. COMP. LAWS §333.10202 (1999)); see also FLA. STAT. ch. 732-9185 (1983).

<sup>211</sup> See *Tillman*, 360 N.W.2d at 277 ("Plaintiff claims that as next of kin she has an inherent, fundamental right to bury her decedent's body without mutilation.").

<sup>212</sup> *Id.* at 277. See also *Ravellette v. Smith*, 300 F.2d 854, 857 (7th Cir. 1962) (holding that extraction of blood from decedent's body without obtaining his widow's consent in order to obtain evidence of his blood alcohol content did not constitute a violation of decedent's privacy rights because such rights are personal and do not survive death).

<sup>213</sup> *Tillman*, 360 N.W.2d at 277.

<sup>214</sup> 870 F.2d 304 (5th Cir. 1989).

<sup>215</sup> See *id.* at 305 (declining "to create from the substantive parameters of the due process clause a liberty interest in next of kin to be free from state-occasioned mutilation of the body of a deceased relative and to possess the body for burial in the same condition in which death left the body"). As for the property claim, the court agreed that plaintiffs possessed a constitutionally protected property interest in their dead babies' bodies. The court determined, however, that plaintiffs were not deprived of this property interest without due process in violation of section 1983 because state tort law provided them with an adequate post-deprivation remedy. See *id.* at 308-09. See also *Fuller v. Marx*, 724 F.2d 717, 719 (8th Cir. 1984) (finding no deprivation of widow's quasi-property right in her dead husband's body without due process when the coroner failed to return all of his organs following an autopsy because "any quasi-property rights [the widow] had in her husband's internal

rights enumerated in the Constitution, a liberty or privacy interest devolves upon an individual to be free from state-occasioned mutilation to the body of a deceased relative.<sup>216</sup> The court refused to invoke the right to privacy, however, declaring: "[W]e decline to accept the [plaintiffs'] invitation to embrace a new liberty interest in the instant case. As intimate as the right is of next of kin to possess the body of a loved one in the same condition as the body was at death, we are unable to extend over that right the constitutional umbrella of substantive due process on the facts of the instant case."<sup>217</sup> Instead, the court suggested that state tort law suffices to protect parents' privacy interests in their child's corpse, explaining that "by creating a quasi-property right of survivors in the body of a deceased relative and providing state tort claims to protect that right, the [state] . . . has recognized the intimacy and sanctity of that right."<sup>218</sup> In so doing, the court acknowledged the kinship between the common law tort of privacy and constitutional privacy rights.

## 2. Invocation of Property

Most courts have viewed the cornea removal statutes through the lens of property rather than privacy, concluding that such statutes implicate constitutionally protected property interests in the human body.<sup>219</sup> In *Brotherton v. Cleveland*,<sup>220</sup> for example, a wife brought suit alleging that the coroner allowed her dead husband's corneas to be taken from his body and donated to others during the course of an autopsy, even though she had earlier registered her aversion to such an anatomical gift with the hospital.<sup>221</sup> The

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organs, if protected by the Constitution, were also protected by [state law]"').

<sup>216</sup> Arnaud 870 F.2d at 310.

<sup>217</sup> *Id.* at 311.

<sup>218</sup> *Id.*

<sup>219</sup> *But see Florida v. Powell*, 497 So. 2d 1188, 1191 (Fla. 1986) (finding that Florida statute authorizing medical examiner to extract corneas from decedents during autopsies did not constitute a taking of the relatives' private property because the next of kin possess no property in the decedent's body). *Cf. Ravellette v. Smith*, 300 F.2d 854, 858 (7th Cir. 1962) (holding that removal of blood from decedent's body without his widow's consent was not a violation of the widow's right to be secure in her "effects" from unreasonable searches because the body did not constitute her property: "The fallacy of plaintiff's contention lies in the assumption that decedent's body was plaintiff's property . . . and consequently an effect protected from unauthorized search [under the Indiana Constitution]"); *Everman v. Davis*, 561 N.E.2d 547 (Ohio Ct. App. 1989). The *Everman* court noted that:

The argument that a dead body is an 'effect' within the meaning of 'houses, papers and effects' stretches the imagination and the language of the [fourth] amendment. . . . The word 'effects' in legal and common usage includes real or personal property and as used in the Constitution does not necessarily include the right of immediate possession of the dead body of a human being.

*Id.* at 550.

<sup>220</sup> 923 F.2d 477 (6th Cir. 1991).

<sup>221</sup> *See id.* at 482 (stating that "the aggregate of rights granted by the state of Ohio to

district court dismissed her suit for failure to state a claim, but the United States Court of Appeals for the Sixth Circuit reversed, holding that "the aggregate of rights" granted by the state to the wife in the body of her dead husband, which included the right to possess the body, to control disposal of the body, and to file suit for disturbance to the body, rose to the level of a property interest protected by the Constitution.<sup>222</sup> The court determined that "the only governmental interest enhanced by the removal of the corneas is the interest in implementing the organ/tissue donation program," and concluded that "this interest is not substantial enough to allow the state to consciously disregard those property rights which it has granted."<sup>223</sup> The court analyzed the basic idea of property, declaring: "The concept of 'property' in the law is extremely broad and abstract. The legal definition of 'property' most often refers not to a particular physical object, but rather to the legal bundle of rights recognized in that object. Thus, 'property' is often conceptualized as a 'bundle of rights.' . . . The 'bundle of rights' which has been associated with property includes the rights to possess, to use, to exclude, to profit, and to dispose."<sup>224</sup> The court connected the increased willingness to envision the body as property with the rise in the commercial importance of such rights, stating that "[t]he tendency to classify the bundle of rights granted by states as a property interest of some type was a direct function of the increased significance of those underlying rights."<sup>225</sup> In the wake of scientific advances that further enhance the market value of the human body, the court suggested that this trend will only intensify:

The importance of establishing rights in a dead body has been, and will continue to be, magnified by scientific advancements. . . The recent explosion of research and information concerning biotechnology has created a market place in which human tissues are routinely sold to and by scientists, physicians and others. . . . The human body is a valuable resource. . . . As biotechnology continues to develop, so will the capacity to cultivate the resources in a dead body. A future in which hearts, kidneys, and other valuable organs could be maintained for expanded

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Deborah Brotherton rises to the level of a 'legitimate claim of entitlement' in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment" and holding that the wife had a constitutionally protected property right in the body of her dead husband because she retained the rights to possess the body, to prevent disturbance of the body, and to control disposal of the body under state law). The wife had filed suit pursuant to section 1983 alleging a deprivation of her "property" without due process because the incident occurred under the aegis of a state law authorizing the coroner to remove corneas of autopsy subjects without providing notice or obtaining the consent of relatives. *See id.* at 477-79.

<sup>222</sup> *See id.* at 482.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 481.

<sup>225</sup> *Id.*

periods outside a live body is far from inconceivable."<sup>226</sup>

In a dissenting opinion, however, Judge Joiner disputed the majority's conclusion that the actions of the coroner in removing the corneas from decedent's eyes in accordance with Ohio law amounted to a deprivation of constitutionally protected property under section 1983.<sup>227</sup> Judge Joiner reasoned that the only right that exists with respect to a corpse is the right of control, and that this right is not sufficient to render the body property.<sup>228</sup> Instead, he would have allowed "the taking of corneas from a dead body, in which no one has a property right, to help the living."<sup>229</sup>

Similarly, *Whaley v. County of Tuscola*<sup>230</sup> declined to dismiss a section 1983 suit alleging that extraction of the corneas and eyeballs of deceased persons without obtaining their close relatives' consent deprived the relatives of constitutionally protected property without due process in violation of the Fourteenth Amendment.<sup>231</sup> The court asked the question "[w]hat relief the Constitution might provide when a state actor steals the eyes of a dead man" and rendered the response that such conduct may violate the constitutionally protected property rights of close relatives.<sup>232</sup> Observing that "traditionally, 'property' is conceptualized as a bundle of rights which includes 'the right to possess, to use, to exclude, to profit, and to dispose,'"<sup>233</sup> the court found that Michigan law provides next of kin with a constitutionally protected property interest in a deceased relative's body by protecting the right to possess the body for burial, to prevent its mutilation, and to dispose of it by gift.<sup>234</sup> Explaining that "the existence of a constitutionally protected property interest [does] 'not rest on the label attached to a right granted by the state but rather on the substance of the right,'"<sup>235</sup> the court disregarded the fact that Michigan courts remedy violations of such rights under the category of tort law rather than property law.<sup>236</sup> Instead, the court concluded that these rights over the body

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<sup>226</sup> *Id.*

<sup>227</sup> *See id.* at 483.

<sup>228</sup> *See id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995), *cert. denied*, 516 U.S. 975 (1995).

<sup>231</sup> *See id.* at 1112-13.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 1114.

<sup>234</sup> *See id.* at 1116.

<sup>235</sup> *Id.* at 1114 (quoting *Brotherton v. Cleveland*, 923 F.2d 477, 482 (6th Cir. 1991)).

<sup>236</sup> The court perceptively observed:

The way in which damages are measured does not necessarily define the substantive interest at stake. Michigan undoubtedly provides the next of kin with the right to possess and prevent the mutilation of a dead relative's body. How Michigan chooses to measure damages when that right is infringed is not determinative. . . . [I]f a woman's husband dies in a neighbor's yard, the neighbor cannot simply keep the body. In Michigan, he must either turn it over, or be liable. Just because the woman cannot

rise to the level of constitutionally protected property because they closely correspond to the bundle of rights by which property traditionally has been defined: "Regardless of the legal label the State places on the rights in a dead body it chooses to create, these rights nevertheless exist . . . [and] closely correspond with the 'bundle of rights' by which property has been traditionally defined. For this reason, . . . we conclude that Michigan . . . provides the next of kin with . . . a property interest in a dead relative's body, including the eyes. Accordingly, the next of kin may bring a constitutional claim under the Due Process Clause."<sup>237</sup>

Most recently, in *Mansaw v. Midwest Organ Bank*,<sup>238</sup> a federal district court drew upon the reasoning of *Brotherton*, holding that both parents shared a constitutionally protected property interest in the body of their dead child.<sup>239</sup> In *Mansaw*, a father filed a lawsuit challenging the constitutionality of a Missouri statute that allowed his dead son's organs to be harvested without securing his consent, based solely upon the assent of the boy's mother.<sup>240</sup> Although the court acknowledged that relatives retain "strong sentimental interests" in their loved ones' bodies, the court refused to invoke the right of

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technically "replevin" her husband's body does not mean she has no legitimate claim of entitlement to it. . . . We are puzzled by the district court's statement . . . that "Michigan has specifically addressed this right to possess or control the disposition of a deceased person's body as one which carries redress in tort, and not in property, if violated." We say this because tort law covers damage to both persons (e.g., battery) and property (e.g., trespass to land).

*Id.* at 1116, n.4.(citations omitted).

<sup>237</sup> *Id.* at 1117. *See also id.* at 1115 (referring to "the right to dispose of the body by making a gift of it, to prevent others from damaging the body, and to possess the body for purposes of burial" and suggesting that "[s]uch rights in an object are the heart and soul of the common law understanding of 'property'").

Upon remand, the district court dismissed the claims brought by the siblings of the deceased persons whose corneas were extracted on the grounds that they lacked standing to sue because only the nearest kin, in this case the parents, possessed a property right in the body. The court concluded that concentrating ownership in the hands of the nearest kin is good policy, because it would be unwieldy to require the consent of all close relatives in order to donate a decedent's body parts. *See Whaley v. Saginaw County*, 941 F. Supp. 1483, 1491 (E.D. Mich. 1996).

<sup>238</sup> No. 9700271 CV-W-6, 1998 U.S. Dist. LEXIS 10307 (W.D. Mo. July 8, 1998).

<sup>239</sup> *See id.* at \*28 (discussing the interests that parents have in their dead children).

<sup>240</sup> *See id.* at \*2-\*3 (reciting the facts and procedural history of the case). The relevant portion of the Missouri statute, which in essence enacted the Uniform Anatomical Gift Act, provides:

Any of the following persons, in order of priority stated, when persons in prior classes are not available at the time of death, and in the absence of actual notice of contrary indications by the decedent or actual notice of opposition by a member of the same or a prior class, may give all or any part of the decedent's body . . . (1) The spouse, (2) An adult son or daughter, (3) Either parent, (4) An adult brother or sister, (5) A guardian of the person of the decedent at the time of his death.

MO. ANN. STAT. § 194.220(2) (West 1996).

privacy to protect such interests, ruling that "it would be inappropriate to recognize that a relative of a deceased has a liberty, privacy, or other constitutional interest in the deceased's body."<sup>241</sup> On the contrary, the court declared that "the only constitutionally protectible interest that a person may have in a deceased relative's body should be characterized as a property interest."<sup>242</sup> The court found this property right to be "extremely minimal," labeling it a "low right on the constitutional totem pole" when compared to other rights, such as the right of privacy.<sup>243</sup> The court determined that the father's minimal property right in his son's body was diminished even further because it was a joint interest shared equally with the child's mother.<sup>244</sup> Balancing this modest property right in the dead against the state's weighty interest in providing organs to the living, the court concluded that "[p]laintiff's interest must yield to the greater rights of the State—and our society—in carrying out its public policy, when the co-owner has consented and the hospital is unaware of plaintiff's objections."<sup>245</sup>

In *Georgia Lions Eye Bank, Inc. v. Lavant*,<sup>246</sup> on the other hand, a state court decided that another cornea removal statute was constitutional on the grounds that dead bodies are *not* constitutionally protected property.<sup>247</sup> Although the trial court had determined that the statute deprived relatives of their property rights in their loved one's corpse without providing notice and an opportunity to object, the Georgia Supreme Court disagreed, declaring:

[I]n Georgia, there is no *constitutionally* protected right in a decedent's body. Rather, the courts have evolved the concept of quasi property in recognition of the interests of surviving relatives in the possession and control of decedents' bodies. We do not find this common law concept to be of constitutional dimension.<sup>248</sup>

#### B. Incompetent Pregnant Women

Thirty-three states currently prevent the removal of life-sustaining medical care from an incompetent pregnant woman, regardless of her own wishes previously expressed in a living will or the recommendations of her designated proxy decision-maker.<sup>249</sup> These states deny incompetent pregnant women the

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<sup>241</sup> *Mansaw*, 1998 U.S. Dist. LEXIS 10307, at \*28 n.15.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at \*28.

<sup>244</sup> See *id.* (commenting on the weight of one parent's property rights in a deceased child in light of the other parent's property rights).

<sup>245</sup> *Id.* at \*32.

<sup>246</sup> 335 S.E.2d 127 (Ga. 1985).

<sup>247</sup> See *id.* at 128 (summarizing English and Georgia common law to conclude that Georgia does not recognize a constitutional right in a decedent's body).

<sup>248</sup> *Id.* at 128.

<sup>249</sup> Fourteen of the thirty-three states that prevent withdrawal of life-sustaining medical

bodily autonomy afforded to competent pregnant woman and incompetent persons under the right of privacy. Instead, their laws literally "take" the bodies of incompetent pregnant women, treating them as chattel that may be drafted into service as fetal incubators for the state. In fact, Pennsylvania implicitly acknowledges its "taking" of the incompetent pregnant woman's body by providing "just compensation" in the form of payment for the expenses associated with continued medical care.<sup>250</sup>

The statutes fall into two basic categories. The first category adopts an indirect approach, simply stating that a living will or health care directive shall have no force or effect during the course of a woman's pregnancy.<sup>251</sup>

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care from an incompetent pregnant woman impose pregnancy restrictions that apply to both the individual's own decision as embodied in her living will and her healthcare proxy decisionmaker. *See* ALA. CODE § 22-8A-4(e) (1997); CONN. GEN. STAT. ANN. § 19A-574 (West 1997); DEL. CODE ANN. tit. 16, § 2503(j) (Supp. 1998); IDAHO CODE §§ 39-4504(4), 39-4505 (1998); IOWA CODE ANN. §§ 144A.6(2), 144B.5 (West 1997); KY REV. STAT. ANN. §§ 311.625(1), 3111.629(4) (Michie 1995); NEB. REV. STAT. §§ 20-408(3), 30-3417(1)(b) (1995); N.H. REV. STAT. ANN. §§ 137H:14(I), 137-J:2(V)(c) (1999); OHIO REV. CODE ANN. §§ 1337.13, 2133.06(B), 2133.08(G) (Anderson 1998); P.A. CONS. STAT. ANN. § 5414(a) (Supp. 1999); R.I. GEN. LAWS §§ 23-4.10-5(c), 23-4.11-6(c) (1998); S.C. CODE ANN. §§ 44-77-70, 62-5-504(G) (1999); S.D. CODIFIED LAWS § 34-12D-10 (Michie 1994); S.D. CODIFIED LAWS § 59-7-2.8 (Michie 1993); TEX. HEALTH & SAFETY CODE ANN. § 672.019 (West 1992). Eighteen states possess only living will restrictions. *See* ALASKA STAT. § 18.12.040(c) (Michie 1998); ARK. CODE ANN. § 20-17-206(c) (Michie 1991); CAL. HEALTH & SAFETY CODE § 7189.5(c) (Supp. 2000); COLO. REV. STAT. § 15-18-104(2) (1999); GA. CODE ANN. § 31-32-8(a)(1) (1996); 755 ILL. COMP. STAT. ANN. 35/3(c) (West 1992); IND. CODE ANN. 16-36-4-8(d) (West 1997); KAN. STAT. ANN. § 65-28,103(a) (1998); MINN. STAT. ANN. § 145B.13(3) (West 1998); MO. ANN. STAT. § 459.025 (West 1996); MONT. CODE ANN. §§ 50-9-106(6), 50-9-202(3) (1999); NEV. REV. STAT. §§ 449.624(4), 449.626(6) (1999); N.D. CENT. CODE § 23-06.4-07(3) (Supp. 1999); OKLA. STAT. ANN. tit. 63, § 3101.8(C) (West 1999); UTAH CODE ANN. § 75-2-1109 (1993); WASH. REV. CODE ANN. § 70.122.030(d) (1999); WIS. STAT. ANN. § 154.07(2) (West 1997); WYO. STAT. ANN. § 35-22-102(b) (Michie 1999). One state possesses only a proxy restriction, prohibiting the woman's designated proxy from deciding to cease treatment if she is pregnant. *See* FLA. STAT. ANN. § 765.113(2) (West 1997).

<sup>250</sup> See 20 PA. CONS. STAT. § 5414(c)(1) (Supp. 1999), which notes that:

In the event that treatment, nutrition and hydration are provided to a pregnant woman who is incompetent and has a terminal condition or who is permanently unconscious, notwithstanding the existence of a declaration or direction to the contrary, the Commonwealth shall pay for all usual, customary and reasonable expenses directly and indirectly incurred by the pregnant woman to whom such treatment, nutrition and hydration are provided.

*Id.*

<sup>251</sup> *See* ALA. CODE § 22-8A-4(e) (1997) (declaring that a living will is not in effect during a woman's pregnancy); ALASKA STAT. § 18.12.040(c) (Michie 1998) (same); ARK. CODE ANN. § 20-17-206(c) (Michie 1991) (same); CAL. HEALTH & SAFETY CODE § 7189.5(c) (Supp. 2000) (same); COLO. REV. STAT. § 15-18-104(2) (1999) (same); CONN. GEN. STAT. ANN. § 19A-574 (West 1997) (same); GA. CODE ANN. § 31-32-8(a)(1) (1996)

California's pregnancy clause, for example, provides: "If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive shall have no force or effect during the course of my pregnancy."<sup>252</sup> By suspending advance directives to terminate treatment, these laws permit a pregnant woman's life to be prolonged contrary to her express instructions, although they do not necessarily compel this result.

The second category of statutes explicitly mandates continuing treatment for incompetent pregnant women despite their objections, singling out this class of citizens and forcing them to serve as involuntary incubators for the state.<sup>253</sup> The Uniform Rights of the Terminally Ill Act of 1989 (URTIA) illustrates the latter type of restriction, requiring that "[l]ife-sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment."<sup>254</sup> A substantial number of these statutes are silent

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(requiring a physician to determine that a woman's fetus is not viable before enforcing a living will); HAW. REV. STAT. ANN. § 327D-6 (Supp. 1999); IDAHO CODE § 39-4504(4) (1998) (stating that a living will has no force during a woman's pregnancy); 755 ILL. COMP. STAT. ANN. 35/3(c) (West 1992) (same); IND. CODE ANN. § 16-36-4-8(d) (West 1997) (same); IOWA CODE ANN. §§ 144A.6(2), 144A.7(3) (West 1997) (same); KAN. STAT. ANN. § 65-28,103(a) (1998) (same); KY. REV. STAT. ANN. § 311.625(1) (Michie 1995) (same); MICH. COMP. LAWS ANN. § 700.8012 (Supp. 1999); MINN. STAT. ANN. § 145B.13(3) (West 1998) (same); MO. ANN. STAT. § 459.025 (West 1996) (holding a living will to be of no effect during pregnancy); NEB. REV. STAT. § 30-3417(1)(b) (1995) (describing proxy restrictions); N.H. REV. STAT. ANN. §§ 137-H:14(I), 137-J:2(V)(c) (1999) (describing living will and proxy restrictions respectively); OHIO REV. CODE ANN. § 1337.13(D) (Anderson 1993) (proxy restriction); OKLA. STAT. ANN. tit. 63, § 3101.8(C) (West 1999) (holding a living will inoperable during pregnancy); R.I. GEN. LAWS §§ 23-4.11-6(c), 23-4.10-5(c) (1998) (describing proxy restrictions); S.C. CODE ANN. § 44-77-70 (1999) (stating that a living will is of no effect during pregnancy); UTAH CODE ANN. § 75-2-1109 (1993) (same); WASH. REV. CODE ANN. § 70.122.030(d) (1999) (same); WIS. STAT ANN. § 154.07(2) (West 1997) (same); WYO. STAT. ANN. § 35-22-102(b) (Michie 1999) (same).

<sup>252</sup> CAL. HEALTH & SAFETY CODE § 7186.5 (Supp. 2000).

<sup>253</sup> See, e.g., DEL. CODE ANN. tit. 16, § 2503(j) (Supp. 1998) (prohibiting life saving treatment from being withdrawn from a pregnant woman); FLA. STAT. ANN. § 765.113 (West 1997) (same); KY. REV. STAT. ANN. § 311.629(4) (Michie 1995) (describing the powers of a health care surrogate); MONT. CODE ANN. §§ 50-09-106(6), 50-9-202(3) (1999) (stating that life saving treatment cannot be withdrawn from a pregnant woman); NEB. REV. STAT. § 20-408(3) (1997) (same); NEV. REV. STAT. § 449.624(4), 449.626(6) (1999) (same); N.D. CENT. CODE § 23-06.4-07(3) (Supp. 1999) (same); OHIO REV. CODE ANN. §§ 2133.06(B), 2133.08(G) (Anderson 1998) (same); 20 PA. CONS. STAT. ANN. § 5414(a) (Supp. 1999) (same); S.C. CODE ANN. § 62-5-504(G) (1999) (describing durable power of attorney); S.D. CODIFIED LAWS § 34-12D-10 (Michie 1994), S.D. CODIFIED LAWS § 59-7-2.8 (Michie 1993) (describing proxy restrictions); TEX. HEALTH & SAFETY CODE ANN. § 672.019 (West 1992).

<sup>254</sup> See Unif. Rights Of The Terminally Ill Act of 1989, 6(c) (Supp. 1999).

regarding the viability of the fetus or its prognosis for survival, in effect allowing a pregnant woman to be kept alive to sustain the fetus even when it is not viable and the prospect of a live birth is slight.<sup>255</sup> Two states compel continued treatment only when the fetus is viable,<sup>256</sup> while another five states allow consideration of physical harm or severe pain suffered by the pregnant woman.<sup>257</sup> Only two states protect a woman's right to choose whether to prolong her life for the sake of the fetus under all circumstances.<sup>258</sup>

Although these statutes implicitly construct the incompetent pregnant

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<sup>255</sup> Fifteen states possess statutes that fall into this category. *See* ALA. CODE § 22-8A-4(e) (1997) (omitting any mention of a viable fetus); CAL. HEALTH & SAFETY CODE § 7189.5(c) (Supp. 2000) (same); CONN. GEN. STAT. ANN. § 19a-574 (West 1997) (same); HAW. REV. STAT. ANN. § 327D-6 (Supp. 1999); IDAHO CODE § 39-4504(4) (1998) (same); IND. CODE ANN. Stat. § 16-36-4-8(d) (West 1997) (same); KAN. STAT. ANN. § 65-28,103(a) (1998) (same); KY. REV. STAT ANN. § 311.625(1) (Michie 1995) (same); MO. ANN. STAT. § 459.025 (West 1996) (same); OKLA. STAT. ANN. tit. 63, § 3101.4(V)(a), 3101.8(c) (West 1999) (same); S.C. CODE ANN. §§ 44-77-70, 62-5-504(G) (1999) (same); TEX. HEALTH & SAFETY CODE ANN. § 672.019 (West 1992) (same); UTAH CODE ANN. § 75-2-1109 (1993) (same); WIS. STAT. ANN. § 154.07(2) (West 1997) (same); WYO. STAT ANN. §§ 35-22-102(b) (Michie 1999) (same).

Another sixteen states restrict an incompetent pregnant woman's choice to terminate life-sustaining treatment only when live birth of the fetus is probable or at least possible. *See* ALASKA STAT. § 18.12.040(c) (Michie 1998) (prohibiting withdrawal of life sustaining treatment if live birth is a possibility); ARK. CODE ANN. § 20-17-206(c) (Michie 1991) (same); DEL. CODE ANN. tit. 16, § 2503(j) (Supp. 1998) (same); 755 ILL. COMP. STAT. ANN. 35/3(c) (West 1992) (same); IOWA CODE ANN. §§ 144A.6(2), 144A.7(3) (West 1997) (same); KY. REV. STAT. ANN. § 311.629(4) (Michie 1995) (same); MINN. STAT. ANN. § 145B.13(3) (West 1998) (same); MONT. CODE ANN. §§ 50-09-106(6), 50-9-202(3) (1999) (same); NEB. REV. STAT. § 20-408(3), 30-3417(1)(b) (1995) (same); NEV. REV. STAT. §§ 449.624(4), 449.626(6) (1999) (same); N.H. REV. STAT. ANN. § 137-J:2(V)(c) (1999) (same); N.D. CENT. CODE § 23-06.4-07(3) (Supp. 1999) (same); OHIO REV. CODE ANN. §§ 1337.13(D), 2133.06(B), 2133.08(G) (Anderson 1998) (same); 20 PA. CONS. .STAT. ANN. § 5414(a) (Supp. 1999) (same); R.I. GEN. LAWS §§ 23-4.11-6(c), 23-4.10-5(c) (1998) (same); S.D. CODIFIED LAWS §§ 34-12D-10 (Michie 1994); S.D. CODIFIED LAWS § 59-7-2.8 (Michie 1993) (same).

<sup>256</sup> Colorado and Georgia both require that the fetus not be viable in order to enforce a pregnant woman's living will, while Georgia imposes the additional requirement that the woman declare that her living will is to be carried out even if she is pregnant with a pre-viable fetus. *See* COLO. REV. STAT. 15-18-104(2) (1999) (requiring a viability test); GA. CODE ANN. § 31-32-8(a)(1) (1996) (same).

<sup>257</sup> *See* KY. REV. STAT. ANN. § 311.629(4) (Michie 1995) (providing a pain exception to its living will nullification rules); N.H. REV. STAT. § 137-J:2(V)(c) (1996) (same); N.D. CENT. CODE § 23-06.4-07(3) (Supp. 1999) (same); 20 PA. CONS. STAT. ANN. § 5414(a) (Supp. 1999) (same); S.D. CODIFIED LAWS § 34-12D-10 (Michie 1994) (same); S.D. CODIFIED LAWS § 59-7-2.8 (Michie 1993) (same).

<sup>258</sup> The two states are Arizona and New Jersey. *See* ARIZ. REV. STAT. ANN. § 36-3262 (West 1993) (allowing a woman to choose to refuse life-sustaining treatment regardless of pregnancy status); N.J. STAT. ANN. §§ 26:2H-56, 26:2H-58(a)(5) (West 1996) (same).

woman's body as an object and convey a property ideology, courts and commentators typically invoke the right of privacy rather than the law of property to analyze the issue.<sup>259</sup> Only two published cases obliquely address the constitutional questions posed by state laws preventing the removal of life-sustaining medical care from an incompetent pregnant woman, and both cases consider only privacy claims. In *University Health Services v. Piazz*,<sup>260</sup> a Georgia court granted a hospital's petition to keep a brain-dead pregnant woman on life support until the birth of her fetus, over the objections of her husband and family. The court could have avoided addressing the constitutionality of pregnancy provisions and rendered a decision based upon the specific facts of the case. Donna Piazz herself had not drafted a living will or other health care directive embodying her intentions in such a situation, and the biological father of the fetus (who was not her husband) favored continuing medical care to save the fetus' life. Nevertheless, relying upon the pregnancy restriction in the Georgia Natural Death Act, the court determined that Donna Piazz lacked the power to terminate life-sustaining medical treatment during her pregnancy under state law even if she had executed a living will.<sup>261</sup> The court further rejected the argument that Piazz possessed a constitutional right to refuse treatment and to terminate her pregnancy, concluding that these privacy rights were extinguished when she became brain-dead.<sup>262</sup>

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<sup>259</sup> Several commentators suggest that these statutes objectify incompetent pregnant women, but they do not apply property analysis; instead, they typically argue that such statutes are unconstitutional based upon the right of privacy and/or the guarantee of equal protection. See *supra* note 8, and accompanying text (citing articles invoking right to privacy in analyzing statutes). Only one author suggests that such laws might also implicate the right of property. See James M. Jordan III, Note, *Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women*, 22 GA. L. REV. 1103, 1163 (1988) (arguing that although privacy rights are extinguished upon death, a decedent's family retains certain property rights over the dead body recognized under the Uniform Anatomical Gift Act and common law).

<sup>260</sup> No. CV86-RCCV-464 (Richmond County Super. Ct., Ga., Aug. 4, 1986).

<sup>261</sup> The court reasoned:

The legislature specifically restricted the [living will] statute so that the living will would have no effect if the adult were pregnant. Accordingly, even though the law permits a patient to choose whether or not life support systems will be maintained for that patient, the legislature has specifically provided that the patient cannot make the decision if it will affect an unborn child.

*Id.* at 6.

<sup>262</sup> The court stated:

[T]he privacy rights of the mother are not a factor in this case because the mother is dead as defined by [Georgia law]. . . . [And] the United States Supreme Court decisions upholding the rights of women to abort non-viable fetuses are inapplicable because those decisions are based on the mother's right of privacy, which right was extinguished upon the brain death of Donna Piazz.

*Id.* at 7.

In *DiNino v. State ex rel. Gorton*,<sup>263</sup> JoAnn DiNino sued the state of Washington, seeking a declaratory judgment that her living will was valid and enforceable even if she were pregnant and arguing that the state law suspending a living will or health care directive during the course of a woman's pregnancy was unconstitutional.<sup>264</sup> The trial court held that Washington's pregnancy provision violated DiNino's constitutional right to privacy to the extent that it interfered with her right to exercise control over her reproductive decisions prior to viability.<sup>265</sup> However, the Washington Supreme Court reversed, holding that the case did not present a justiciable controversy because DiNino was neither terminally ill nor pregnant.<sup>266</sup> Accordingly, the court refused to address DiNino's claims that the state pregnancy provision violated her right to privacy by restricting her right to terminate pregnancy and her right to refuse medical treatment, concluding that neither claim was ripe for review.<sup>267</sup>

### C. Reproductive Material: the Status of Sperm and Embryos

The uncertainty regarding the scope of property and privacy rights in the body is most evident in the reproductive context, in disputes involving stored sperm and frozen embryos. Courts appear utterly confused as to how to classify these objects, characterizing sperm and embryos variously as property, quasi-property, or not the subject of property rights at all but governed instead by precepts of privacy.

#### 1. Stored Sperm

*Hecht v. Superior Court (Kane)*<sup>268</sup> posed the question of whether a dead man's sperm should be allocated according to principles of property or privacy law.<sup>269</sup> William Kane committed suicide after writing a will bequeathing the fifteen vials of semen he had earlier deposited at the California Cryobank to his girlfriend, Deborah Hecht, who contended that they belonged to her as both property subject to the provisions of the will and as part of her constitutional right to privacy.<sup>270</sup> Yet Kane's two adult children also advanced arguments grounded in property and privacy rights in opposing any decision to award the sperm to Hecht in accordance with the will. In the property context, they maintained that at least eighty percent of the sperm belonged to them under a

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<sup>263</sup> 684 P.2d 1297 (Wash. 1984) (en banc).

<sup>264</sup> See *id.* at 1299 (reciting stipulated facts in the case and outlining DiNino's arguments).

<sup>265</sup> See *id.* (reviewing procedural history of the case).

<sup>266</sup> See *id.* at 1300.

<sup>267</sup> See *id.* at 1300-01.

<sup>268</sup> 20 Cal. Rptr. 2d 275 (Cal. Dist. Ct. App. 1993).

<sup>269</sup> See *id.* at 276.

<sup>270</sup> See *id.* at 276, 279.

settlement agreement dividing all of the residual assets of the estate.<sup>271</sup> Alternatively, they recommended that their dead father's semen be destroyed to safeguard their family privacy, pointing out that destruction of the sperm would "prevent the disruption of existing families by after-born children,' and . . . 'prevent additional emotional, psychological and financial stress on those family members already in existence."<sup>272</sup>

In its first decision, the California Court of Appeals chose to address the issues under the rubric of property rather than privacy. The California Court of Appeals observed that "[t]he present legal position toward property rights in the human body is unsettled and reflects no consistent philosophy or approach."<sup>273</sup> The court noted, however, that "at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the use of his sperm for reproduction," concluding that "[s]uch interest is sufficient to constitute 'property' within the meaning of [the] Probate Code."<sup>274</sup> Accordingly, the court held that the sperm was part of decedent's estate and hence subject to the jurisdiction of the probate court.<sup>275</sup>

Three years later, however, the California Court of Appeals reversed track and rejected the idea that sperm amounts to property, ruling that it is not an "asset" of the estate to be allocated among the beneficiaries of the will in any manner contrary to the decedent's manifest intent.<sup>276</sup> "[T]o the extent this sperm is 'property' it is only 'property' for . . . one person," the court declared, observing that Hecht alone possessed the power to use the sperm and lacked the authority to give, sell, or otherwise consent to its use by others.<sup>277</sup> Accordingly, the court disregarded the property settlement between Kane's girlfriend and his adult children, reasoning that "the law should not permit anyone . . . to treat the decedent's 'fundamental interest' in procreation as an item for negotiation and trade among the claimants for decedent's estate."<sup>278</sup>

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<sup>271</sup> See *id.* at 278-79.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 281 (quoting Bray, Note, *Personalizing Personality*, *supra* note 15, at 220).

<sup>274</sup> *Hecht*, 20 Cal. Rptr. 2d at 283.

<sup>275</sup> *Id.* On remand, the probate court released only 20% of the stored sperm – 3 vials in all – to Hecht pursuant to a "catch-all provision [in the settlement agreement] which stated: '[t]he balance of all assets over which the decedent had dominion or control or ownership, whether in the possession of Miss Hecht, the children or any third party shall be subject to administration in the decedent's estate,' [with such residual assets to be distributed 20% to Hecht and 40% to each of Kane's adult children]." *Id.* at 580.

<sup>276</sup> See *Hecht v. Superior Court (Kane)*, 59 Cal. Rptr. 2d 222, 226 (Cal. Dist. App. Ct. 1996) (opinion not officially published) (finding that "the genetic material involved here is a unique form of 'property' . . . not subject to division through an agreement among the decedent's potential beneficiaries which is inconsistent with decedent's manifest intent about its disposition").

<sup>277</sup> *Id.* at 226.

<sup>278</sup> *Id.*

Instead, the court ordered immediate release of the remaining twelve vials of sperm to Hecht, concluding that the constitutional right to privacy requires a donor's intent to control the ultimate disposition of his sperm.<sup>279</sup>

## 2. Frozen Embryos

A similar split is apparent in embryo cases, which categorize cryogenically preserved embryos as everything from property, to quasi-property, to not property at all, but rather the subject of conflicting privacy rights. In *York v. Jones*,<sup>280</sup> for example, a husband and wife undergoing in vitro fertilization requested that the fertility clinic transfer their only remaining embryo to another clinic; when the clinic refused, the couple brought suit to retrieve the frozen embryo.<sup>281</sup> A federal district court applied property law to adjudicate this dispute, holding that the cryopreservation agreement created a bailment relationship between the fertility clinic and the couple, obligating the clinic to return the subject of the bailment—one frozen embryo—to its owners once the purpose of the bailment had terminated.<sup>282</sup>

On the other hand, in *Del Zio v. Columbia Presbyterian Hospital*,<sup>283</sup> another federal court employed essentially a quasi-property theory when a couple brought suit alleging the deliberate destruction of their sole embryo and seeking damages for conversion of their property and intentional infliction of emotional distress.<sup>284</sup> The court approved the same distinction between property rights and personal rights derived from the cadaver cases and endorsed in *Moore* by upholding a divided jury verdict that denied plaintiffs any damages for conversion of their property, yet awarded them \$50,000 for the mental distress they suffered due to loss of their embryo.<sup>285</sup>

Finally, in *Davis v. Davis*,<sup>286</sup> a state court invoked the constitutional right of privacy to resolve a divorced couple's dispute over the disposition of seven cryogenically preserved embryos remaining from the in vitro fertilization process.<sup>287</sup> In that case, the Tennessee Supreme Court disavowed property terminology, declaring that "preembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life" so that "any interest

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<sup>279</sup> See *id.* at 227.

<sup>280</sup> 717 F. Supp. 421 (E.D. Va. 1989).

<sup>281</sup> See *id.* at 422.

<sup>282</sup> See *id.* at 425; see also *Davis v. Davis* No. 180, 1990 WL 130807, at \*3 (Tenn. Ct. App. Sept. 13, 1990) (implying that preembryos constitute property by observing that progenitors "share an interest" in them and citing *York v. Jones* without defining the precise nature of that interest).

<sup>283</sup> No. 74-3558, 1978 U.S. Dist. LEXIS 14450 (S.D.N.Y Nov. 14, 1978).

<sup>284</sup> See *Del Zio*, 1978 U.S. Dist. LEXIS 14450, at \*1.

<sup>285</sup> See *id.* at \*18-\*19.

<sup>286</sup> 842 S.W.2d 588 (Tenn. 1992).

<sup>287</sup> See *id.* at 600.

that [the couple has] in the preembryos in this case is not a true property interest."<sup>288</sup> To the contrary, the court balanced conflicting privacy interests, ruling that the husband's right not to procreate—to avoid genetic parenthood—outweighed his former wife's right to procreate by donating the extra embryos to others to gestate and rear.<sup>289</sup> Nevertheless, by resorting to property concepts and recognizing that the gamete providers did possess "an interest in the nature of ownership, to the extent they have decision-making authority concerning disposition of the preembryos, within the scope of policy set by law,"<sup>290</sup> the court implicitly revealed the inadequacy of the privacy perspective.

Yet more recently, in *Kass v. Kass*,<sup>291</sup> New York's highest court declined to apply the right of privacy to a similar dispute between a divorced couple over five frozen embryos, declaring that "disposition of these pre-zygotes does not implicate a woman's right of privacy or bodily integrity in the area of reproductive choice; nor are the pre-zygotes recognized as 'persons' for constitutional purposes."<sup>292</sup> Instead, the court focused upon the issue of control over the embryos, stating that "[t]he relevant inquiry thus becomes who has dispositional authority over them."<sup>293</sup> The court concluded that prior "[a]greements between progenitors, or gamete donors, regarding disposition of their pre-zygotes should generally be presumed valid and binding, and enforced in any dispute between them."<sup>294</sup> Diplomatically refraining from resolving the precise status of extracorporeal embryos, the court suggested that its decision to enforce prior directives comports with both property and privacy theories.<sup>295</sup> Nevertheless, *Kass* also displays affinity with property law principles by "regard[ing] the progenitors as holding a 'bundle of rights' in relation to the pre-zygote that can be exercised through joint disposition agreements"<sup>296</sup> and by choosing to enforce such embryo contracts.

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<sup>288</sup> *Id.* at 597.

<sup>289</sup> See *id.* at 604 (citing the father's testimony of his own emotional scars caused by growing up in a single parent home to support its conclusion.).

<sup>290</sup> *Id.* at 597.

<sup>291</sup> 696 N.E.2d 174 (N.Y. 1998).

<sup>292</sup> *Id.* at 179.

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 180.

<sup>295</sup> See *id.* (stating that "[a]dvance directives, subject to mutual change of mind that must be jointly expressed, both minimize misunderstandings and maximize procreative liberty by reserving to the progenitors the authority to make what is in the first instance a quintessentially personal, private decision").

<sup>296</sup> *Id.* at 179 (citing John Robertson, *Prior Agreements for Disposition of Frozen Embryos*, 51 OHIO ST. L.J. 407 (1990); John Robertson, *In the Beginning: The Legal Status of Early Embryos*, 76 VA. L. REV. 437 (1990)).

### III. PROPERTY AND PRIVACY: PARALLEL PATHS WITH DIFFERENT DESTINATIONS

#### A. *Parallels*

Many interesting parallels may be drawn between the constitutional right of privacy and the prevailing understanding of property. Privacy, like property, carves out an area of freedom from state interference. Privacy, like property, encompasses the right to exclude others from that protected space and the corollary right to exercise control within one's own territory. And privacy, like property, preserves a sphere of decentralized decision-making as a mechanism to check excessive governmental power.<sup>297</sup> But beyond these similarities in structure, the rights are related in substance as well. The right of privacy originated in and is patterned upon property concepts, while property rights confer a certain measure of privacy.

##### 1. Substantive Connections

Despite the Supreme Court's strenuous efforts to distance privacy from property, the two rights are intimately intertwined.<sup>298</sup> Privacy and property possess common constitutional antecedents, for the same philosophy embodied in the constitutional protection afforded property also prompted the creation of the right to privacy.<sup>299</sup> Indeed, the roots of the constitutional right to privacy lie in *Lochner v. New York*<sup>300</sup> –the pinnacle of constitutional protection for property.<sup>301</sup>

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<sup>297</sup> For property, decentralized decisions occur through the market, whereas for privacy, decentralized decisions are made within the family. Cf. Ackerman, *Liberating Abstraction*, *supra* note 105, at 343 (arguing that the right of privacy is essentially equivalent to a post-Lochnerian right of property, protecting intimate relationships rather than market relationships from governmental interference); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1501 (1983) (comparing the free market to the private family and contending that "[t]he classic laissez-faire arguments against state regulation of the free market find a striking parallel in the arguments against state interference with the private family").

<sup>298</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965) (conceding that "[o]vertones of some arguments suggest that *Lochner*... should be our guide" but disclaiming any connection between the newly-minted constitutional right to privacy and the constitutional protection formerly afforded to property under *Lochner* and its progeny).

<sup>299</sup> See *id.* at 514-15 (Black, J., dissenting) (arguing that *Meyer* and *Pierce* relied upon "the same natural law due process philosophy found in *Lochner v. New York*"); see also Woodhouse, *Who Owns the Child?*, *supra* note 184, at 1112 (linking economic due process cases with family privacy cases and maintaining that "[b]oth grow from a Spencerian conviction that men should be free to deploy their properties as they wish"); Olsen, *supra* note 297.

<sup>300</sup> 198 U.S. 45 (1905) (striking down statute restricting bakers' working hours).

<sup>301</sup> In *Lochner*, the Supreme Court struck down a New York statute limiting the working hours of bakers on the grounds that the law denied them freedom of contract. At bottom,

Privacy originated with two *Lochner*-era cases that established the right of parents to teach their children foreign languages and send them to private schools.<sup>302</sup> In *Meyer v. Nebraska*,<sup>303</sup> the Supreme Court declared that the liberty guaranteed by the due process clause of the fourteenth amendment includes "not merely freedom from bodily restraint but also the right of the individual . . . to marry, establish a home and bring up children."<sup>304</sup> Two years later, *Pierce v. Society of Sisters*<sup>305</sup> reaffirmed that due process protects "the liberty of parents and guardians to direct the upbringing and education of children under their control" because "[t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."<sup>306</sup> By relying solely upon citations to *Lochner* and its progeny,<sup>307</sup> *Meyer* and *Pierce* clearly link parental rights in children with

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however, this right to contract freely with others was regarded not as a liberty right but as a corollary of the individual's property in his or her labor. *See* Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 461 (1909) (pointing out that "courts regard the right to contract, not as a phase of liberty—a sort of freedom of mental motion and locomotion—but as a phase of property, to be protected as such"); Stephen A. Siegel, *Understanding the Lochner Era: Lessons from the Controversy over Railroad and Utility Rate Regulation*, 70 VA. L. REV. 187, 260-61 n.313 (1984) (observing that "[l]iberty of contract' follows necessarily from the decision . . . to protect the free market value of property"); *see also* *Coppage v. Kansas*, 236 U.S. 1, 14 (1915) ("Included in the right of private property . . . is the right to make contracts."); *Adair v. United States*, 208 U.S. 161, 172 (1908) (finding a restriction on freedom of contract to be "an invasion of the personal liberty, as well as of the right of property, guaranteed by" the Constitution).

<sup>302</sup> This is not intended to suggest that the constitutional right to privacy is guilty simply by its association with the infamous *Lochner*. Many explanations of the errors committed in *Lochner* do not necessarily implicate the right to privacy. *See, e.g.*, Cass Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874-75 (1987) (arguing that *Lochner* was wrong not because it involved judicial activism, but rather because it rested upon a flawed understanding of the concepts of neutrality and inaction that essentially imposed a common law baseline).

Indeed, Professor Bruce Ackerman notes that "[t]he challenge is simply to grasp the way in which 'privacy' and 'freedom of intimate association' express . . . constitutional commitments to 'property' and 'contract' after the New Deal transformation has stripped market-property and market-contract of their constitutionally privileged position." Ackerman, *Liberating Abstraction*, *supra* note 105, at 345.

<sup>303</sup> 262 U.S. 390 (1923).

<sup>304</sup> *Id.* at 399.

<sup>305</sup> 268 U.S. 510 (1925).

<sup>306</sup> *Id.* at 534-35.

<sup>307</sup> In addition to *Lochner*, the cited cases include *Adkins v. Children's Hospital*, 261 U.S. 525 (1923) (striking down minimum wage laws as an infringement of the liberty to contract); *Truax v. Corrigan* 257 U.S. 312 (1921) (invalidating restrictions on injunctions in labor disputes without due process); *Adams v. Tanner*, 244 U.S. 590 (1917) (striking down regulation of employment agencies); *Truax v. Raich*, 239 U.S. 33 (1915) (invalidating

property rights in a person's labor and occupation.<sup>308</sup> The cases preserve the privacy of the family by analogizing to other cases that prevent state interference with rights of property. In so doing, these decisions reveal the deep relationship between privacy rights and property rights.<sup>309</sup> Moreover, echoes of *Lochner* continue to linger in modern constitutional privacy<sup>310</sup> and property jurisprudence.<sup>311</sup>

Hence, property gave rise to the constitutional right of privacy,<sup>312</sup> while

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prohibition of employment of aliens); *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (upholding liberty to contract for insurance); *see also Meyer*, 262 U.S. at 399; *Pierce*, 268 U.S. at 535.

<sup>308</sup> Indeed, the *Meyer* Court obviously associated privacy with property, lumping the two rights together in a list that detailed the various interests protected under the due process clause, which included "not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children." *Meyer*, 262 U.S. at 399.

<sup>309</sup> Professor Bruce Ackerman draws a similar comparison between privacy and property rights, contending that:

[Although] *Lochner* protected the right of workers, not lovers, to move their bodies around ovens, not bedrooms, for as many hours a week as they and their employers believed mutually advantageous . . . any reasonably competent lawyer can see that the same basic legal ideas are at play in *Lochner* and *Bowers v. Hardwick*: property, conceived as the right to exclude others, and contract, conceived as the right to arrange mutually advantageous terms for association.

Ackerman, *Liberating Abstraction*, *supra* note 105, at 343.

<sup>310</sup> See, e.g., Woodhouse, *supra* note 184, at 1064 (arguing that *Meyer* and *Pierce* reflect a *Lochnerian* vision of children as parental property that pervades and constrains modern privacy jurisprudence); *see also* Sunstein, *supra* note 302, at 910 (arguing that the abortion funding cases rely upon common law baselines and understandings regarding what constitutes inaction or neutrality that owe their origin to *Lochner*).

<sup>311</sup> Professor Molly McUsic depicts some of the ways in which the ghost of *Lochner* continues to haunt modern takings jurisprudence, observing that:

[A] close comparison does display parallels between the Court's new takings doctrine and the jurisprudence of the *Lochner* era. This Court, following its predecessor, has adopted greater scrutiny of the relationship between the regulatory means and the goal of the regulation, has required a connection between the harm caused by the owner and the burden of the regulation, and has broadly defined property to include not just things but legal rights.

Molly S. McUsic, *The Ghost of Lochner: Modern Takings Doctrine and its Impact on Economic Legislation*, 76 B.U. L. REV. 605, 607 (1996) (describing ways in which *Lochner* continues to haunt modern takings jurisprudence).

<sup>312</sup> In addition, Brandeis and Warren's famous article on privacy found the right to be free from unwanted publicity implicit in a wide range of cases protecting nascent property rights in an individual's likeness and personality. *See Warren & Brandeis*, *The Right to Privacy*, *supra* note 14, and accompanying text; *see also* MARY ANN GLENDON, RIGHTS TALK 51 (1990) (describing Brandeis and Warren's discovery of a latent principle of privacy in cases protecting property rights in literary and artistic creations, and declaring that "[p]rivacy was thus, quite literally, pulled from the hat of property").

privacy is in turn patterned upon principles of property law.<sup>313</sup> *Prince v. Massachusetts*,<sup>314</sup> another ruling involving parental rights, employed the physical imagery of property to describe the first privacy cases, finding that *Meyer* and *Pierce* protected a "private realm of family life which the state cannot enter."<sup>315</sup> In 1965, when privacy finally achieved explicit recognition in *Griswold v. Connecticut*,<sup>316</sup> the Supreme Court fashioned the right to privacy from property concepts, concluding that various constitutional provisions "create zones of privacy."<sup>317</sup> Most recently, in *Planned Parenthood v. Casey*,<sup>318</sup> the Court also conceived privacy in the image of property, affirming that "[o]ur cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government."<sup>319</sup> The constitutional right to privacy depicted in these decisions clearly mirrors the prevailing understanding of property, reflecting "the traditional idea of property as marking off a sphere around the individual which no one could enter without permission."<sup>320</sup>

Furthermore, property itself confers a certain measure of privacy,<sup>321</sup> for

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<sup>313</sup> Cf. Gary L. Bostwick, Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decision*, 64 CAL. L. REV. 1447, 1449 (1976) (drawing an analogy between the constitutional right to privacy and the spacing mechanisms that maintain the physical boundaries between animals).

<sup>314</sup> 321 U.S. 158 (1944).

<sup>315</sup> *Id.* at 166 (upholding child labor laws as not a violation of family's right to privacy).

<sup>316</sup> 381 U.S. 479 (1965).

<sup>317</sup> *Id.* at 484. The *Griswold* Court struck down a Connecticut statute criminalizing the use of contraceptives on the grounds that it unconstitutionally invaded the right to privacy of married couples. *See id.* at 485-86.

<sup>318</sup> 505 U.S. 833 (1992).

<sup>319</sup> *Id.* at 833.

<sup>320</sup> GLENDON, *supra* note 312, at 52; see also UGO MATTEI, COMPARATIVE LAW AND ECONOMICS 32 (1997) (explaining that "a zone of individual sovereignty over property was considered as the most effective barrier against the unrestricted power of the state"); JENNIFER NEDELSKY, LAW, BOUNDARIES, AND THE BOUNDED SELF, IN LAW AND ORDER OF CULTURE 162 (Robert Post ed., 1991) [hereinafter NEDELSKY, THE BOUNDED SELF]. (declaring that "one of the basic purposes of property is to provide a shield for the individual against the intrusions of the collective . . . [Property] defines a sphere in which we can act largely unconstrained by collective preferences"); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 295 (1988) (arguing that property ownership is necessary in order to provide "a realm of private freedom somewhere for each individual—an area where he can make decisions about what to do and how to do it, justifying these decisions if at all only to himself"); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964) (arguing that property "creates[s] zones within which the majority has to yield to the owner").

<sup>321</sup> Indeed, one scholar suggests that privacy initially arose to fill the gap left by property due to the decline of the physical frontier: "Without the . . . geographic isolation of frontier life, the creation of social distance required the legal conceptualization of privacy." Robert F. Copple, *Privacy and the Frontier Thesis: An American Intersection of Self and Society*, AM. J. JURIS. 87, 123 (1989) (contending that the closing of the American frontier prompted

intimate acts that take place on one's property often receive constitutional shelter. The home, for example, serves as the locus of both privacy and property rights. In *Griswold*, the Supreme Court invoked the image of intruders invading the home—the paradigmatic symbol of property rights—to fortify the privacy afforded intimate relationships, asking: "Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship."<sup>322</sup> Similarly, the Court connected privacy with the ownership of property in *Stanley v. Georgia*,<sup>323</sup> finding that "prosecution for mere possession of [obscene] printed or filmed matter in the privacy of a person's own home" implicates "the right to be free . . . from unwanted governmental intrusions into one's privacy."<sup>324</sup> In that case, the Court shielded the private possession of obscene material in the home, even though it conceded that the same conduct could constitute a crime elsewhere.<sup>325</sup> Justice Blackmun's eloquent dissent in *Bowers v. Hardwick*<sup>326</sup> also relied upon property rights in the home to provide a realm of privacy. Blackmun affirmed that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the

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the rise of the right to privacy). According to Copple, physical distance originally assured a degree of privacy. *See id.* at 93. But as the population expanded and open space dwindled, the right of privacy was required to contain the threat to individual autonomy posed by the absence of property. *See id.* at 102. Accordingly, privacy rights serve to protect frontier values when the physical frontier is vanishing. The author supports his thesis with evidence that the geographical spread of privacy rights mimicked the advance of the frontier, beginning on the East Coast, progressing through the Midwest, jumping to the West Coast, and then going back and encompassing the Great Plains, the Mountain States and the Southwest. *See id.* at 104.

<sup>322</sup> *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965). A few years earlier, in his dissenting opinion in *Poe v. Ullman*, 367 U.S. 497, 548 (1961), Justice Harlan likewise contended that the Connecticut statute prohibiting the use of contraception should receive strict scrutiny because it involved "the privacy of the home in its most basic sense." Justice Harlan acknowledged that the law did not infringe upon property rights "since the invasion involved here may . . . be accomplished without any physical intrusion whatever into the home." *Id.* at 549. He suggested, however, that the fundamental purpose of property is to safeguard privacy, stating:

[H]ere we have not an intrusion into the home so much as on the life which characteristically has its place in the home. But to my mind such a distinction is so insubstantial as to be captious: if the physical curtilage of the home is protected, it is surely as a result of solicitude to protect the privacies of the life within.

*Id.* at 551 (Harlan, J., dissenting).

<sup>323</sup> 394 U.S. 557 (1969).

<sup>324</sup> *Id.* at 564.

<sup>325</sup> *See id.* at 559 (holding that "the mere private possession of obscene matter cannot constitutionally be made a crime").

<sup>326</sup> 478 U.S. 186 (1986).

heart of the Constitution's protection of privacy.<sup>327</sup> Finally, Justice Stevens' concurrence in *Moore v. City of East Cleveland*<sup>328</sup> explicitly derived privacy from the right to property by contending that ownership of property must encompass the right to choose who is to reside there.<sup>329</sup>

## 2. Structural Similarities

As the preceding section reveals, privacy and property possess common constitutional origins and serve similar values. Yet the constitutional right to privacy resembles property in form as well as in substance: the two rights display a comparable structure, incorporate many of the same interests, and perform parallel functions.

Under the rubric of constitutional privacy, the Supreme Court has carved out areas of freedom from state intrusion.<sup>330</sup> Within these "zones of privacy"<sup>331</sup> the individual holds sway, possessing the right to exclude outsiders<sup>332</sup> and the right to conduct intimate relationships inside the protected domain.<sup>333</sup> This vision of privacy resonates with the customary idea of property, which also "creat[es] zones within which the majority has to yield to the owner."<sup>334</sup> Both property and privacy revolve around such images of bounded space, of protected sanctuaries or spheres of decentralized decision-making.<sup>335</sup> Property and

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<sup>327</sup> *Id.* at 208 (Blackmun, J., dissenting).

<sup>328</sup> 431 U.S. 494 (1977).

<sup>329</sup> *See id.* at 520-21. Justice Stevens would have struck down the zoning ordinance preventing a grandmother from living with both of her grandsons on the grounds that it "cuts so deeply into a fundamental right normally associated with the ownership of residential property" –the owner's right "to decide who may reside on his or her property" –that it "constitutes a taking of property without due process and without just compensation."

<sup>330</sup> *See supra* text accompanying notes 313-20 (explaining ways in which right to privacy is patterned upon property, maintaining a sphere insulated from state invasion).

<sup>331</sup> *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (concluding that various constitutional provisions "create zones of privacy"); *Carey v. Population Servs., Int'l*, 431 U.S. 678, 684 (1977) (declaring that "one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is 'a right of personal privacy, or a guarantee of certain areas or zones of privacy'").

<sup>332</sup> *See Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (observing that privacy protects "a private realm of family life which the state may not enter").

<sup>333</sup> *See Griswold*, 381 U.S. at 485 (holding that marriage is a "relationship lying within the zone of privacy created by several fundamental constitutional guarantees").

<sup>334</sup> *Reich, supra* note 320, at 733.

<sup>335</sup> *See id.* (noting that "[t]he institution called property guards the troubled boundary between individual man and the state"); Kenneth Vandervelde, *The New Property of the Nineteenth Century: the Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328 (1980) (stating that "the concept of property has marked the boundaries of individual freedom and the limits of state power. Thus, the choice between state power and individual freedom in particular cases repeatedly has been stated in legal terms as the decision whether property exists").

privacy both draw upon these territorial metaphors, constructing boundaries that define a realm of physical or social immunity from state interference. The image of a protective sphere surrounding the individual—whether physical or social—is thus central to both rights.<sup>336</sup>

Both property and privacy also encompass the right to exclude others from that physical or social space, the right to keep one's territory inviolate. The Supreme Court has repeatedly affirmed that "one of the most essential sticks in the bundle of rights that are commonly characterized as property" is "the right to exclude others."<sup>337</sup> The same holds true for privacy. The constitutional right to privacy is generally invoked when individuals allege governmental

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In an insightful essay, Professor Jennifer Nedelsky similarly argues that "the importance of property in American constitutionalism both reflects and exacerbates the problems of boundary as a central metaphor in the legal rhetoric of freedom." *NEDELSKY, THE BOUNDED SELF*, *supra* note 320, at 162. Nedelsky observes that "property is itself conceived in boundary terms," *Id.* at 177, and links this conception with "a picture of human beings that envisions their freedom and security in terms of bounded spheres." *Id.* at 162. She argues that this vision of property "rests on a flawed conception of the individual" because "[t]he boundaries central to American constitutionalism are those necessary to protect a bounded or separative self." *Id.* at 167. Thus Nedelsky suggests that "we need a new conception of the tension between the collective and the individual, for which boundary is not an apt metaphor." *Id.* at 162. Nedelsky criticizes the boundary metaphor, contending that "it invites us to imagine that the self to be protected is in some crucial sense insular, and that what is most important to the preservation of such a self is drawing boundaries around it that will protect it from invasion." *Id.* at 168-69. In so doing, "boundary imagery masks the existence of relationships and their centrality to concepts like property and privacy." *Id.* at 178. Nedelsky believes that "[w]hat is essential to the development of autonomy is not protection against intrusion but constructive relationship." *Id.* at 168. Accordingly, she concludes that "[w]e need a language of law whose metaphoric structure highlights rather than hides the patterns of relationships its constructs foster and reflect." *Id.* at 163. Nedelsky further argues that privacy relies upon the same metaphor: she asserts that "[w]e associate privacy . . . closely with boundary imagery" and that, "where we treat bounded spheres as indexes of personhood, respecting those boundaries constitutes respecting persons." *Id.* at 177-78.

<sup>336</sup> Professor Alan Hyde hints at a similar insight when he casually draws the following comparison between the property and privacy conceptions:

Rights are often visualized with spatial metaphors; in *Roe v. Wade*, typically, they are "areas or zones." So already the contrast with the body as property is blurred, because the body as a privacy right is always already a kind of area or zone, that is, a piece of property.

HYDE, *supra* note 15, at 82.

<sup>337</sup> *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979); *see also Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (stating that the "power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights"); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 82 (1980) (observing that "one of the essential sticks in the bundle of property rights is the right to exclude others").

invasion of their body<sup>338</sup> or intrusion into their intimate relationships.<sup>339</sup> Accordingly, as Professor Bruce Ackerman points out,

The core of both "privacy" and "property" involves the same abstract right: the right to exclude unwanted interference by third parties. The only real difference between the two concepts is the kind of relationship that is protected from interference—"property" principally protects market relationships while "privacy" protects more spiritual ones.<sup>340</sup>

Beyond the right to exclude, both property and privacy imply the corollary right to exert control or dominion over one's physical or social territory.<sup>341</sup> In its incorporation of these two essential interests, moreover, privacy recalls "[t]he powerful, rhetorical image of property, as that which gives the individual a bulwark of isolated independence from her fellows."<sup>342</sup>

In addition, property and privacy perform parallel functions. The constitutional right to privacy shelters social institutions, such as marriage and the family, that "act as critical buffers between the individual and the power of the State."<sup>343</sup> It shields intimate associations that stand between the individual and the state, delegating personal decisions to the individuals who are involved in such relationships.<sup>344</sup> The right to property similarly decentralizes decisions

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<sup>338</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (1973) (affording constitutional right to abortion, which protects the woman's right to remove the fetus from her body); *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (conferring constitutional right to contraception, thereby protecting a woman's right to prevent the fetus' entry into her body).

<sup>339</sup> See, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia statute criminalizing sodomy and rejecting the argument that the constitutional right to privacy affords shelter to intimate and consensual homosexual relationships); *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (striking down a Wisconsin statute prohibiting residents with unfulfilled child support obligations from marrying without prior court approval because "the right to marry is part of the fundamental 'right of privacy' implicit in the Fourteenth Amendment's Due Process Clause"); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (holding unconstitutional a zoning ordinance precluding a grandmother from living with her two grandsons on the grounds that constitutional privacy encompasses the right of extended family members to reside together); *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (protecting Amish parents' refusal to send their children to public school beyond the eighth grade based upon both the privacy right of parents to rear their children free from governmental interference and the free exercise clause of the first amendment).

<sup>340</sup> Ackerman, *Liberating Abstraction*, *supra* note 105, at 347.

<sup>341</sup> See, e.g., *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261 (1990) (recognizing a constitutional right to control use of one's body by removing life-sustaining medical treatment).

<sup>342</sup> NEDELSKY, THE BOUNDED SELF, *supra* note 320, at 162.

<sup>343</sup> *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984) (refusing constitutional protection to members of a club who sought to associate only with others of the same sex because the organization involved the participation of strangers and was not sufficiently small, selective, and secluded from others to merit privacy rights).

<sup>344</sup> See *Rao*, *supra* note 108, at 1104.

regarding valuable resources<sup>345</sup> by placing them in the hands of the individuals who are deemed to be the owners and thereby permitting commercial transactions to occur on the market.<sup>346</sup> In so doing, both privacy and property operate as structural rights that preserve spheres of decentralized decision-making as a mechanism to check excessive governmental power.<sup>347</sup> By creating and sustaining competing centers of private power, they serve as twin bulwarks against totalitarianism.<sup>348</sup> Both rights police the fragile boundary between individual autonomy and governmental authority, mediating between private interests and public power. In what has become a classic article, Professor Charles Reich declared:

Property draws a circle around the activities of each private individual or organization. Within that circle, the owner has a greater degree of freedom than without. Outside, he must justify or explain his actions, and show his authority. Within, he is master, and the state must explain and justify any interference. Thus, property . . . create[s] zones within which the majority has to yield to the owner.<sup>349</sup>

Precisely the same observation could be made regarding the right of privacy.

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<sup>345</sup> As Professor Joseph Singer observes:

Property rights not only protect people against other persons but serve as a bulwark against state power. By delegating power to individuals and groups to control specific resources, the state attempts to decentralize power relationships. Individuals, rather than officials in a centralized state bureaucracy, have control of many of society's most valued resources.

JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 1203 (2d ed. 1997).

<sup>346</sup> In his insightful book on property, Professor Jeremy Waldron explains that property rules allocate scarce resources by delegating decisions to the particular individuals who are deemed to be the owners:

Each society faces the problem of determining which, among the many competing claims on the resources available for use in that society, are to be satisfied, when, by whom, and under what conditions. In a private property system, a rule is laid down that, in the case of each object, the individual person whose name is attached to that object is to determine how that object shall be used and by whom. His decision is to be upheld by the society as final. . . . The owner of a resource is simply the individual whose determination as to the use of the resource is taken as final.

WALDRON, *supra* note 320, at 39.

<sup>347</sup> Compare, e.g., MATTEI, *supra* note 320, at 32 ("The natural law idea of property developed as a corollary to the notion of individual freedom: a zone of individual sovereignty over property was regarded as the most effective barrier against the unrestricted power of the state."); with Rao, *supra* note 108, at 1104 ("Privacy is a structural right that protects private relationships as a mechanism to check excessive governmental power.").

<sup>348</sup> See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784, 794 (1989) (arguing that privacy is an "anti-totalitarian right" that protects the "freedom not to have one's life too totally determined by . . . [the] state").

<sup>349</sup> Reich, *supra* note 320, at 733 (1964). This insightful classic is the most-cited article ever published in the Yale Law Journal.

Indeed, the constitutional right to privacy may be characterized as the functional analogue of property in the sense that it assures self-ownership.<sup>350</sup> Thus, "the concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'"<sup>351</sup> This statement is remarkably reminiscent of Locke's vision of property as providing the "moral space" within which an individual may exercise control over his own affairs.<sup>352</sup> Furthermore, the Supreme Court's opinion in *Roe v. Wade*<sup>353</sup> traced the genealogy of privacy to "a line of decisions . . . going back perhaps as far as *Union Pacific Railway Co. v. Botsford*"—an early case that, in essence, provided a property right in one's person.<sup>354</sup>

Accordingly, the constitutional right to privacy stems from common law doctrines, such as the right to refuse treatment and the duty of informed consent, that represent ancient ideas regarding ownership of the body.<sup>355</sup> As

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<sup>350</sup> Professor Jeremy Waldron, referring to hypothetical proposals regarding the forcible redistribution of body parts, writes that "[t]he implication is that only a right of self-ownership—as Nozick puts it, 'a line (or hyper-plane) [which] circumscribes an area [of] moral space around an individual'—can provide protection for individual integrity against [such] proposals." WALDRON, *supra* note 320, at 400 (quoting ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 57 (1974)).

<sup>351</sup> *Thornburgh v. American College of Obst. & Gyn.*, 476 U.S. 747, 777 n.5 (1985) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288-89 (1977)); *see also* *Bowers v. Hardwick*, 478 U.S. 186, 208 (1985) (Blackmun, J., dissenting) (quoting the same language).

<sup>352</sup> As Professor Laura Underkuffler explains:

[T]he Lockean ideal of life, liberty and estate envisages property as 'moral space,' within which an individual has control over his own affairs.' It is apparent that property, under this historical view, was broadly defined. It was tied to the notion of human beings as masters of themselves; it involved the maintenance of personal integrity in both a physical and metaphysical sense.

Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 127 (1990).

<sup>353</sup> *See Roe v. Wade*, 410 U.S. 113, 152 (1973) (recognizing that a right of personal privacy exists under the constitution).

<sup>354</sup> *See id.* at 152. In *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), the Court declared: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.

<sup>355</sup> In *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 (1914), for example, Judge Cardozo suggested that a surgeon who performs an operation without his patient's consent commits a trespass, and stated that "[e]very human being of adult years and sound mind has a right to determine what shall be done with his own body." *Id.* at 93. Treatises of that era echo this understanding and refer to the tort of battery as protecting a right of self-ownership. "The plainest and simplest legal rights are those of the person. A man owns his body and limbs more unquestionably and unqualifiedly than his stock in trade or his farm. . . . [One's body] belongs absolutely to the individual; and to him alone." FRANCIS HILLIARD, 1 THE LAW OF TORTS 197 (2d ed. 1861); *see also* *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 278 (1989) (acknowledging the existence of a "liberty

Professor Daniel Ortiz explains:

Like the related concept of property, privacy defines a sphere of individual dominion into which others cannot intrude without the individual's consent or some other sufficient justification. Unlike traditional forms of property, however, it does not represent dominion over things—a physical space over which one possesses at least the power of exclusion—but rather dominion over oneself. It defines a sphere of self-control, a sphere of decision-making authority about oneself, from which one can presumptively exclude others.<sup>356</sup>

Therefore, property finds its counterpart in the rights of physical and mental self-ownership that are often shielded under the umbrella of privacy.

### B. *Divergences*

Despite the many substantive connections and structural similarities shared by privacy and property, the two rights diverge in subtle but significant ways. Property and privacy constructions of the body differ not only in their rhetoric, but also in the results that flow from the choice of legal category and in the vision of the person that underlies them. Accordingly, privacy is *not* just another name for inalienable or quasi-property.

The autonomy individuals exert over a piece of property is fundamentally different from that guaranteed under the constitutional right of privacy. Property protects the owner's autonomy over that which is owned, whereas privacy safeguards an inviolable corporeal identity. Both property and privacy encompass the right to possess one's own body, to exercise a certain degree of control over it, and to exclude others.<sup>357</sup> Yet property envisions a person who "owns" and is thus distinct from his or her body, while privacy views the person as embodied and the body as personified. Under property theory, a person only loosely inhabits his or her body; the self is independent of its physical embodiment.<sup>358</sup> Privacy, by contrast, treats the body as integrally connected to the person such that invasions of the physical being endanger its essential personhood.<sup>359</sup>

Property theory severs the body from the person who owns it, whereas privacy theory maintains the two as indivisible and inextricably intertwined. As property, the body can be detached from its "owner" and fragmented into discrete components, allowing it to be manipulated, transformed, alienated on

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interest" in refusing unwanted medical treatment and connecting that interest with the notion of privacy).

<sup>356</sup> Ortiz, *supra* note 2, at 92 (discussing the concept of privacy in light of political traditions and arguing that privacy is essential to our political system).

<sup>357</sup> See *supra* Part I.

<sup>358</sup> See LOCKE, *supra* note 18, at 1.

<sup>359</sup> See *supra* text accompanying notes 106-17.

the market, or even seized by the state upon payment of just compensation.<sup>360</sup> Privacy, on the other hand, bundles all interests in the body together within a single person. As a result, bodily privacy is generally inalienable and unassailable—it can neither be contracted away to private parties nor confiscated by the government.<sup>361</sup>

### 1. Fragmentation

Property produces a fragmented relationship between the body and its owner, the person "inside" the body, in contrast with privacy, which creates an indivisible corporeal identity.<sup>362</sup> By uncoupling the body from the person and undermining the unity of the physical being, the property paradigm facilitates fragmentation of the body itself, both literally and figuratively. As a result, under property theory, body parts are severable from the person, who may give or sell these parts to others without loss of personal identity;<sup>363</sup> likewise, an owner's "bundle of rights" can be disaggregated and assigned to several different parties. Such fragmentation can result in instrumentalization, alienation, expropriation, and ultimately inequality.

Privacy theory, on the other hand, forecloses such bodily fragmentation by identifying the person with his or her physical presence. Hence, privacy shields the individual against corporeal invasion and alteration and preserves the unity and integrity of the embodied being. It does not, however, confer the power to fragment a person, either literally or metaphorically.<sup>364</sup> Privacy forbids carving up the body or dividing the bundle of bodily rights and distributing these assets to different parties.<sup>365</sup> Rather, privacy conceives the body as one with the person and bundles all privacy interests together in a single individual.

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<sup>360</sup> See *supra* note 29 and accompanying text.

<sup>361</sup> See *supra* Part I.B.

<sup>362</sup> Professor Patricia Williams appears to draw a similar distinction between two different conceptions of autonomy in the body:

Ownership of the self still vacillates for its reference between a Lockean paradigm of radical individualism assuming a dualism between the body as commodity and the person as transactor and an older paradigm in which ownership of the self is understood in terms of the ability to defend one's inalienable corporeal integrity against oppression and abuse.

PATRICIA WILLIAMS, THE ROOSTER'S EGG 230 (1995). Relying upon her insight, Professor Alan Hyde points out that "claims of self-possession may suppose either a fragmented relationship in which a 'person as transactor' owns a 'body as commodity,' or an 'inalienable corporeal integrity.'" HYDE, *supra* note 15, at 55. Both Williams and Hyde simply observe this distinction without attaching a name to either paradigm or comparing their consequences. I believe that these two conceptions of bodily autonomy receive legal protection under the rubric of property and privacy, respectively.

<sup>363</sup> See *supra* Part I.A.

<sup>364</sup> See *supra* Part I.B.

<sup>365</sup> See *supra* Part I.B.

Accordingly, if bodily privacy is constructed in the image of property, it is the property of Blackstone rather than the property of Hohfeld.<sup>366</sup> Property captivated Sir William Blackstone, who portrayed it as an individual and absolute entitlement.<sup>367</sup> Unlike Blackstonian property, however, the right of privacy is not absolute: the state may curtail privacy to serve an important state interest. But privacy parallels Blackstone's concept of property by securing limited rights in the human body that are all bound up with a single owner; indeed, they are inseparable from that owner. Thus, disassembling rights in a human body may be inconsistent with the privacy paradigm, which identifies the body with the person and maintains the wholeness of the body to preserve its physical identity.<sup>368</sup>

This difference between privacy and property constructions of the body mirrors the tension between the theories of Blackstone and Hohfeld. American property law has evolved from the individual and absolute dominion imagined by Blackstone to the social and relative right hypothesized by Wesley Newcomb Hohfeld.<sup>369</sup> Two fundamental axioms of modern property law flow

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<sup>366</sup> See *infra* note 367, and accompanying text.

<sup>367</sup> See 2 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 2 (1765) ("There is nothing which so generally strikes the imagination, and engages the affection of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of every other individual in the universe."). Blackstone's portrait of property resonates with Justice Brandeis' influential image of privacy as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

<sup>368</sup> See *supra* Part I.B.

<sup>369</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 16 (1913) (defining property as a set of legal relations among persons, limited in particular cases); see also JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS 48 (1996) ("To the extent there was a replacement for this Blackstonian conception [of property], it was the familiar 'bundle of rights' notion of modern property law, a vulgarization of Wesley Hohfeld's analytic scheme of jural correlates and opposites, loosely justified by a rough and ready utilitarianism and applied in widely varying ways to legal interests of every kind."); Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 975 (1982) (explaining the significance of Hohfeld's conceptual scheme). In an important article, Kenneth Vandervelde perceptively describes the evolution in the concept of property from Blackstone to Hohfeld:

[A]t the beginning of the nineteenth century, property was ideally defined as absolute dominion over things. Exceptions to this definition suffused property law; instances in which the law declared property to exist even though no 'thing' was involved or the owner's dominion over the thing was not absolute. Each of these exceptions, however, was explained away. . . . The result was a perception that the concept of property rested inevitably in the nature of things and that recognition of some thing as the object of property rights offered a premise from which the owner's control over that thing could be deduced with certainty. . . . As the nineteenth century progressed, increased exceptions to both the physicalist and the absolutist elements of Blackstone's

from Hohfeld's theory—the bundle of rights and the relativity of title.<sup>370</sup> The bundle of rights metaphor facilitates the deconstruction of property, permitting distinct property interests to be disaggregated and assigned to different parties.<sup>371</sup> Relativity of title represents the idea that property rights are neither absolute nor good against the entire world, but rather relative and enforceable only against particular individuals under certain circumstances. Together, these two concepts embody the modern vision of property as a relational right with countervailing interests staking out its boundaries.<sup>372</sup> Every American

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conceptions of property were incorporated into the law. . . . By the beginning of the twentieth century, the Blackstonian conception of property was no longer credible. A new conception emerged and was stated in its definitive form by Wesley Newcomb Hohfeld. This new property was defined as a set of legal relations among persons. Property was no longer defined as dominion over things. Moreover, property was no longer absolute, but limited, with the meaning of the term varying from case to case. The new conception of property failed to solve the problems left by the destruction of the Blackstonian conception. Courts still had to decide whether a particular interest was property, and if it was, how much protection it merited. Nevertheless, the Hohfeld conception provided a vocabulary for discussion that was consistent with the new dephysicalized and limited property.).

Kenneth Vandervelde, *supra* note 335, at 328-30.

<sup>370</sup> The bundle of rights metaphor is actually a shorthand for Wesley Hohfeld's path-breaking analytic scheme, which divided legal rights into eight fundamental elements and explained the basic relationships between these eight elements, structuring them in a system of jural correlates and opposites. See Hohfeld, *supra* note 369, at 16 (defining property as a set of legal relations among persons).

<sup>371</sup> In fact, some scholars suggest that the bundle of rights metaphor may ultimately lead to the disintegration of property as a distinctive concept. See THOMAS C. GREY, *The Disintegration of Property*, in XXII NOMOS, PROPERTY 69 (J. Roland Pennock and John W. Chapman eds., 1980).

<sup>372</sup> A number of scholars have set forth relational approaches to the right of property. See, e.g., MATTEI, COMPARATIVE LAW AND ECONOMICS, *supra* note 320, at 29 (criticizing the "false dichotomy" between property rights and regulation and proposing a "conjunctive theory" of property rights under which "[r]estraints on [property] rights . . . are part of the very conception of property"); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 208-10 (1990) [hereinafter NEDELSKY, PRIVATE PROPERTY] (recommending replacement of the image of boundary as the central metaphor for property rights with the idea of relationships); Gregory Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U. L. REV. 273, 276-77 (1991) (observing that "property is inescapably relational. When the state recognizes and enforces one person's property right, it simultaneously denies property rights in others."); Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 362-63 (1954) (arguing that property in the Blackstonian sense doesn't actually exist for "if any property owner could really do anything he pleased with his own property, the rights of all his neighbors would be undermined . . . private property . . . is always subject to limitations based on the rights of other individuals in the universe"); Radin, *Property and Personhood*, *supra* note 15, at 957 (arguing that greater protection should be accorded to personal property to which persons have become attached and justifiably bound up in a relationship than to fungible property which is interchangeable and held solely as an investment); Joseph William Singer, *The Reliance*

lawyer now understands property to comprise a "bundle of rights," in Hohfeldian terminology, which may be divided up and distributed to many different parties, so that no single individual's property rights are absolute.<sup>373</sup> Moreover, modern property also represents a relational right, such that each person's property rights are relative and limited, circumscribed by the conflicting interests of others.

Hohfeldian theory provides property with a framework that permits fragmentation and recombination of resources in novel and innovative ways in order to create wealth.<sup>374</sup> Hence, the bundle of rights concept of property is more than a metaphor: it serves as a mechanism for deconstructing property into discrete components, while simultaneously recognizing and respecting that many individuals share interests in a precious resource. Privacy, by contrast, lacks a comparable mechanism for deconstructing the body and apportioning rights and responsibilities among various rights-holders. It embodies the Blackstonian paradigm, which concentrates all rights in the hands of a single individual and constructs the body as the sole property of its "owner."<sup>375</sup>

## 2. Instrumentalization

Bodily privacy, however, resembles the right of property as a protection against external interference rather than as a power to engage in productive activity.<sup>376</sup> Privacy is a purely negative entitlement that guarantees security

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*Interest in Property*, 40 STAN. L. REV. 611, 673 (1988) (contending that property rights must be limited to protect reliance interests of those involved in longstanding property relationships); Laura S. Underkuffler, *supra* note 352, at 147-48 (advocating a "comprehensive approach" to property that "explicitly recogniz[es] the tension between the individual and the collective as part of the concept of property . . . [and thereby acknowledges] the interdependence of the self and others").

<sup>373</sup> See ACKERMAN, PRIVATE PROPERTY, *supra* note 28, at 26-27. Ackerman describes the process by which law students are inculcated in the Hohfeldian idea of property, stating:

I think it is fair to say that one of the main points of the first-year Property course is to disabuse entering law students of their primitive lay notions regarding ownership. . . . Instead of defining the relationships between a person and "his" things . . . the law of property considers the way rights to use things may be parceled out amongst a host of competing resource users. Each resource user is conceived as holding a bundle of rights vis-a-vis other potential users; indeed, in the modern American system the ways in which user rights may be legally packaged and distributed are wondrously diverse. . . . Hence, it risks serious confusion to identify any single individual as the owner of any particular thing. . . . Once one begins to think sloppily, it is all too easy to start thinking that "the" property owner, by virtue of being "the" property owner, must necessarily own a *particular* bundle of rights over a thing. And this is to commit the error that separates layman from lawyer.

*Id.*

<sup>374</sup> See Hohfeld, *supra* note 369, at 17.

<sup>375</sup> See *supra* note 367-69 and accompanying text.

<sup>376</sup> See MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 31 (1977) (describing a "fundamental transformation" in the idea of property in the early

from governmental interference,<sup>377</sup> whereas property possesses an affirmative dimension that enables purposive activity. Constructing the body as a form of property implies not only freedom from physical invasion, but also freedom to instrumentalize one's body by technologically manipulating it or otherwise putting it to productive use.<sup>378</sup> Privacy, on the other hand, conceives of the body as a passive entity to be protected from physical interference and alteration but not mined, manipulated, or exploited for profit.<sup>379</sup>

Accordingly, the autonomy conferred by the constitutional right of privacy is not an unlimited right to do with one's body as one pleases. The right of privacy preserves the integrity and unity of the human body, protecting the body against corporeal invasions and alterations without providing affirmative power over the body.<sup>380</sup> Privacy circumscribes the exercise of governmental power, but it does not necessarily bestow power upon individuals. Property, on the other hand, is a sophisticated concept that simultaneously performs dual functions.<sup>381</sup> The designation "property" serves both to limit governmental power and to confer governmental power upon some individuals vis-à-vis others.<sup>382</sup>

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years of the nineteenth century "from a static agrarian conception entitling an owner to undisturbed enjoyment, to a dynamic, instrumental, and more abstract view of property that emphasized the newly paramount virtues of productive use and development"). Some scholars suggest that this dialectic recurs throughout American history and continues to the present day. *See* GREGORY ALEXANDER, COMMODITY AND PROPRIETY 27 (1997) (describing the dialectic between property as a market commodity and property as propriety); *see also* Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1442 (1993) (describing two different visions of property in land—the "transformative economy" which views land as something to be worked and transformed into a human product, and "the economy of nature," which views the landowner's role as primarily "custodial").

<sup>377</sup> *See supra* text accompanying note 106.

<sup>378</sup> *See* Martha Nussbaum *Objectification*, 24 PHIL. & PUB. AFF. 249, 257 (1995) (suggesting that "instrumentality"—when a person "treats the object as a tool of his or her purposes"—is one of the core characteristics of what it means to be an object).

<sup>379</sup> *See supra* Part I.B.

<sup>380</sup> Although fragmentation and instrumentalization are at odds with the right of personal privacy, under the right of relational privacy individuals may use and share their bodies in limited ways, but only within the context of intimate and consensual relationships.

<sup>381</sup> *See* Jeremy Paul, *The Hidden Structure of Takings Law*, 64 S. CAL. L. REV. 1393, 1402 (1991) (arguing that property rights serve "twin roles—as protector of individual rights against other citizens and as safeguard against excessive government interference").

<sup>382</sup> *See* DeShaney v. Winnebago County Dept. of Soc. Servs., 489 U.S. 189, 194-203 (1989) (holding that the government's failure to protect individuals from physical injuries inflicted by private parties generally does not violate the constitutional right of privacy); Jackson v. Joliet, 715 F.2d 1200 (7th Cir. 1983) (finding a negligent police attempt to assist at an accident resulting in death not to violate the due process clause). However, government's failure to protect owners from trespass or other private interference with their possessory rights may constitute a taking of private property. *See* Yee v. City of Escondido,

"Ownership" of one's body implies not only freedom from governmental interference, but also freedom to perform certain activities, such as putting one's body to productive use,<sup>383</sup> extracting a profit from it,<sup>384</sup> and passing it on after death.<sup>385</sup> A major difference between property and privacy reflects this fundamental division between dynamic and static theories of the body, between the dynamic image of the body as an object to be technologically transformed, enhanced, and exploited, and the static image of rights in the body as essentially equivalent to a form of stewardship.

### 3. Alienation

If the body is considered property, it can be carved up into its component parts, and either body parts themselves or discrete "sticks" in the bundle of rights may be separated from the original owner and transferred to others.<sup>386</sup> Thus, property permits fragmentation, while bodily fragmentation in turn begets the possibility of alienation of rights to others. In fact, property traditionally implies alienability—the power to transfer rights to others.<sup>387</sup>

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503 U.S. 519, 532 (1992) (finding that government effects a taking when it requires the landowner to submit to physical occupation of his land but does not effect a taking by mere regulation of use); *Prune Yard Shopping Ctr. v. Robins*, 447 U.S. 74, 84 (1979) (ruling that requirement that mall owner permit expressive activity upon privately-owned property does not amount to a taking); *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979) (finding a government regulation which effectively invited third parties to trespass on private property to be a taking).

<sup>383</sup> See *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1027-29 (1992) (holding that a law that deprives land of all economically beneficial use amounts to a taking unless the proscribed use interests were not part of the owner's initial bundle of rights). The *Lucas* court appears to limit its holding to land, however, stating that "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealings, [a property owner] ought to be aware of the possibility that new regulation might even render his property economically worthless." *See id.* If this distinction between real and personal property rests upon the idea that land ownership is pre-political rather than a mere creation of the state, the same reasoning holds true for the human body. Because the government extensively regulates the body, however, the Court may find that individual expectations to make economically beneficial use of their bodies are unjustified. *See id.*

<sup>384</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 138 (1978) (holding that the Landmark's Law did not prevent the petitioner from realizing a reasonable return on his investment and therefore did not constitute a taking).

<sup>385</sup> See *Hodel v. Irving*, 481 U.S. 704, 717 (1986) (holding that a regulation that "amounts to virtually the abrogation of the right to pass on a certain type of property . . . to one's heirs" constitutes a taking).

<sup>386</sup> See *supra* text accompanying notes 28-29.

<sup>387</sup> See, e.g., Calabresi & Melamed, *Property Rules*, *supra* note 13, at 1105 (explaining that "much of what is generally called private property can be viewed as an entitlement protected by a property rule," a rule that allows the owner of an entitlement to transfer it to others in a voluntary transaction); MUNZER, A THEORY OF PROPERTY, *supra* note 16, at 50 (stating that "property is preeminently something that can be bought and sold in a market").

Although many categories of inalienable property exist,<sup>388</sup> alienability is the norm for property.<sup>389</sup> The law views limits upon alienability as exceptions, justifiable only in response to market failure or other externalities.<sup>390</sup> Consequently, inalienable property is an inherently unstable and precarious category,<sup>391</sup> destined to be the target of sustained assault.<sup>392</sup>

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<sup>388</sup> The rights of beneficiaries of a spendthrift trust, for example, are not alienable, yet they are nevertheless regarded as a form of property. *See, e.g.*, *Broadway Nat'l Bank v. Adams*, 133 Mass. 170, 170 (1882) (finding income from a spendthrift trust neither alienable nor attachable); *see also Andrus v. Allard*, 444 U.S. 51, 66-67 (1979) (holding that a restriction upon the sale of eagle feathers does not constitute a "taking" and suggesting that the right to sell is not the defining feature of property under the takings clause). *But see Hodel*, 481 U.S. at 704 (1987) (holding that a Congressional statute entirely abrogating the right to pass on a certain type of property to one's heirs after death was a taking). However, the concurrence in *Hodel* suggests that the case implicitly overruled *Andrus* and effectively confined it to its facts. *See Hodel*, 481 U.S. at 718 (Scalia, J., concurring) ("I write separately to note that in my view the present statute, insofar as concerns the balance between rights taken and rights left untouched, is indistinguishable from the statute that was at issue in *Andrus v. Allard* . . . Because that comparison is determinative of whether there has been a taking, . . . in finding a taking today our decision effectively limits *Allard* to its facts.") (citations omitted).

<sup>389</sup> *See* MUNZER, A THEORY OF PROPERTY, *supra* note 16, at 49-50 ("[T]ransferability is a highly important feature of property as usually understood . . . [and it] is even more important in the special case of body rights because of their close connection with autonomy.").

<sup>390</sup> *See, e.g.*, Calabresi & Melamed, *Property Rules*, *supra* note 13, at 1111-15 (describing efficiency justifications for inalienability, such as externalities); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 970 (1985) (arguing that "the right of alienation is a normal incident of private ownership" and that restraints on alienation of property are justified only to prevent externalities, such as overexploitation of common resources); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 931 (1985) (setting forth the limited conditions under which the law may restrict the alienability of property).

<sup>391</sup> *See* Radin, *Market-Inalienability*, *supra* note 15, at 1851 ("[P]roperty rights themselves are presumed fully alienable, and inalienable property rights are exceptional and problematic.").

<sup>392</sup> A number of commentators who conceptualize the body as property criticize the NOTA's prohibition on the purchase and sale of human organs for transplant and contend that markets in body parts would provide the same benefits associated with markets in other forms of property. Some of these proponents of a market for body parts advocate inter-vivos sales, that is, transfers for value while the seller is still alive. *See, e.g.*, Marvin Brams, *Transplantable Human Organs: Should Their Sale Be Authorized by State Statutes?*, 3 AM. J.L. & MED. 183, 195 (1977) (arguing that state law should support a combined altruistic market system of organ procurement such that a live donor could sell his organs to a recipient); Keith N. Hylton, *The Law and Economics of Organ Procurement*, 12 LAW & POL'Y, 197, 224 (1990); Richard Michael Boyce, Comment, *Organ Transplantation Crisis: Should the Deficit Be Eliminated Through Inter Vivos Sales?*, 17 AKRON L. REV. 283, 302 (1983) (arguing that the present system of organ donation is an impracticable solution to the

Privacy, on the other hand, does not carry the same connotations. Personal privacy encompasses the right to possess one's own body and the right to exclude others, but does not embrace the power to give, sell, or otherwise transfer body rights to other individuals.<sup>393</sup> And relational privacy safeguards intimate and consensual relationships, but affords little shelter to commercial transactions.<sup>394</sup> Accordingly, we should adopt the language of privacy rather than that of property when we seek to protect self-ownership without suggesting that rights in the human body can be conveyed to others and when we wish to distinguish gifts of the body to family members from sales to strangers.<sup>395</sup>

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current organ shortage); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1216-17 (1974) (advocating a regulated market for human body parts that would permit inter-vivos transfers of non-vital organs). Others advocate a futures market in organs to be removed at death. *See, e.g.*, Lloyd R. Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 1 (1989) (calling for the creation of a market in transplantable organs to be delivered after death); Clifton Perry, *Human Organs and the Open Market*, 91 ETHICS 63, 71 (1980) (proposing a regulated futures market for organs through which a donor's estate receives payment for donated organs); Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 4 (1994) (proposing a regulated market for organs in which the donor's estate receives payment for donated organs); Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL. POL'Y & L., 57 (1989). *See also* Brian G. Hannemann, *Body Parts and Property Rights: A New Commodity for the 1990s*, 22 SW. U. L. REV. 399, 427(1993) (proposing a fully market-alienable property right in the human body, and arguing that a principal benefit of such a market would be to enable successful plaintiffs to receive compensation from "judgment-proof" defendants by filing a lien against the indigent defendant's future interest in his own body); Note, *Regulating the Sale of Human Organs*, 71 VA. L. REV. 1015, 1015 (1985) (arguing that a regulated organ market is a better solution to the problem of scarcity than the wholesale prohibition of organ sales); Comment, *Retailing Human Organs under the Uniform Commercial Code*, 16 J. MARSHALL L. REV. 393, 405 (1983) (arguing that "society should not view the sale of human organs any differently than the sale of other necessary commodities such as food, shelter, and medication").

<sup>393</sup> *See, e.g.*, *Planned Parenthood v. Danforth*, 428 U.S. 52, 71 (1976) (invalidating spousal consent requirement for abortion and ruling that a state may not grant a husband the power to veto his wife's choice to terminate her pregnancy); *In re Baby M*, 525 A.2d 1128, 1159 (N.J. Super. Ct. 1987) (suggesting that surrogacy contracts purporting to grant prospective parents the power to prevent or require an abortion are unconstitutional).

<sup>394</sup> *See, e.g.*, *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (finding that a Connecticut law forbidding the use of contraceptives intrudes upon the right of marital privacy).

<sup>395</sup> Professor Anita Allen makes a similar argument when she declares:

In our jurisprudence, the conceptual vocabulary is in place to make alienable property of women, of children, of kidneys, of hearts, of spleens, and even an individual's cell line. The concepts of property and ownership are elastic enough to let us buy and sell anything we want. We cannot simply look to the language of law to know where to draw the lines. We must first draw the lines where we want them to go and then make

The principal feature of bodily property may be this power to transfer rights to others, whether by sale, gift, or disposition after death.<sup>396</sup> By contrast, the right of personal privacy can be curtailed or relinquished altogether, but it cannot be conveyed to another.<sup>397</sup> Although relational privacy may provide a limited right to donate one's body or body parts to a loved one, it does not similarly allow people to sell their bodies to strangers.<sup>398</sup> The only contexts in which one person apparently holds a privacy interest in the body of another are in cases involving children and incompetent adults. However, there is no real transfer of the individual's right of privacy under such circumstances. Instead, because both children and incompetent adults lack the capacity for full autonomy, others are entrusted with their privacy rights and allowed to make decisions on their behalf by means of a best interests analysis or an inquiry into substituted judgment. Indeed, to the extent that privacy represents a principle of personal autonomy,<sup>399</sup> it is a right that by its very nature is inseparable from the individual and incapable of being exercised by another.<sup>400</sup> Accordingly, the idea that one individual may assert another's privacy right is incoherent.

As a result, the lines that courts draw in many of these decisions precisely track the parameters of privacy jurisprudence. Common law cadaver cases, for example, grant the right to control disposition of a dead body to decedents and their close relatives, but repeatedly deny the right to treat the corpse as an article of commerce.<sup>401</sup> Similarly, *Moore v. Regents of the University of California*<sup>402</sup> affirms the patient's autonomy over his own body but rejects his claim to receive a share of the profits reaped from the valuable cell line derived from his spleen cells.<sup>403</sup> In addition, *Hecht v. Superior Court*<sup>404</sup> ultimately held

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those lines into law.

Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J. L. & PUB. POL'Y 139, 145-46 (1990); *see also* David L. Faigman, *Measuring Constitutionality Transactionally*, 45 HASTINGS L.J. 753, 783 (1994) (arguing that the mode of constitutional analysis should be selected based in part upon the results one seeks to achieve).

<sup>396</sup> *See supra* Part I.A.

<sup>397</sup> *See supra* Part I.B.

<sup>398</sup> *See id.*

<sup>399</sup> *See* Ortiz, *supra* note 2, at 92 (asserting that "privacy addresses . . . the scope and limits of individual autonomy"); Feinberg, *supra* note 1, at 446 (contending that the constitutional right of privacy embodies a philosophical principle of personal autonomy, and comparing this principle to the idea of political sovereignty); Henkin, *supra* note 2, at 1410-11 (arguing that privacy protects a zone of personal autonomy).

<sup>400</sup> *See* Ira M. Ellman, *Cruzan v. Harmon and the Dangerous Claim that Others Can Exercise an Incapacitated Patient's Right to Die*, 29 JURIMETRICS J. 389, 401 (1989) (arguing that a constitutional right grounded in personal autonomy can have no application to a case where others seek to make a decision for a person).

<sup>401</sup> *See supra* text accompanying notes 83-84.

<sup>402</sup> 793 P.2d 479 (Cal. 1990).

<sup>403</sup> *See id.* at 512 (stating that a patient whose cells become the basis for a patentable cell line does not qualify as a joint inventor because he did not intellectually or conceptually

that a man may bestow his sperm upon a lover, but the recipient may not trade the sperm to others.<sup>405</sup> These decisions differentiate between self-ownership and sale of the body to others, while separating the rights of intimate relatives from the interests of strangers. Although such subtle distinctions are alien to property law, they are entirely consistent with the right of privacy.

Properly understood, the right to privacy preserves individual autonomy over the body and insulates intimate and consensual relationships; it extends, however, no similar shield over arms-length transactions.<sup>406</sup> While sexual intercourse within marriage receives shelter under the umbrella of privacy, for example, prostitution remains unprotected since sex is simply exchanged in the course of a commercial transaction,<sup>407</sup> rather than uniting those entwined in an intimate relationship. Likewise, privacy safeguards a woman's right to prevent the fetus from lodging in her body by using contraception and shields a woman's right to remove the fetus from her body by means of abortion.<sup>408</sup> However, privacy certainly does not encompass a right to market the resulting fetal tissue.<sup>409</sup> By the same reasoning, privacy should protect an individual's

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contribute to the product's development).

<sup>404</sup> 59 Cal. Rptr. 2d 222, 226 (Cal. Dist. App. Ct. 1996).

<sup>405</sup> *See id.* at 226 ("The decedent's right to procreate cannot be defeated by some contract . . . his fundamental right to procreate must be jealously guarded.").

<sup>406</sup> *See* Rao, *supra* note 108, at 1079 (arguing that privacy's core purpose is to protect intimate and personal relationships, not commercial transactions between strangers). *Cf.* Roberts v. United States Jaycees, 468 U.S. 609, 614-15 (1984) (declining to extend protection of constitutional privacy to members of a same-sex club on the grounds that "much of the activity central to the formation and maintenance of the association involve[d] the participation of strangers").

<sup>407</sup> *See* Rao, *supra* note 108, at 1106-07 (arguing that the right of relational privacy protects marriage, but not prostitution because the latter involves a commercial transaction rather than an intimate relationship).

<sup>408</sup> *See id.* at 1114 (recognizing that the right of privacy affords women a certain degree of procreative freedom).

<sup>409</sup> The NOTA, for example, prohibits purchasing or selling fetuses and their organs or tissue for the purpose of transplant to others. *See* 42 U.S.C. § 274e(c)(1) (1999) (defining prohibition on sale of human organs to include fetuses, fetal organs, and fetal tissue); *see also* FLA. STAT. ANN. § 873.05 (West 1994) (declaring that "[n]o person shall knowingly advertise or offer to purchase or sell, or purchase, sell, or otherwise transfer, any human embryo for valuable consideration" and criminalizing violation of this section as "a felony of the second degree"); 720 ILL. COMP. STAT. ANN. 510/6(7) (West 1999) (proclaiming that "[n]o person shall sell or experiment upon a fetus produced by the fertilization of a human ovum by a human sperm unless such experimentation is therapeutic to the fetus thereby produced" and providing that "[i]ntentional violation of this section is a Class A misdemeanor"); LA. REV. STAT. ANN. § 9:122 (West 1991) ("The sale of a human ovum, fertilized human ovum, or human embryo is expressly prohibited."); OHIO REV. CODE ANN. § 2919.14 (Anderson 1999) (proscribing experimentation upon or sale of "the product of human conception which is aborted" and providing that violation of this section is a misdemeanor); R.I. GEN. LAWS § 11-54-1(f) (1998)(providing that "[n]o person shall

refusal to supply bone marrow to another<sup>410</sup> and perhaps even an individual's decision to sacrifice a spare kidney to save a loved one. Nonetheless, privacy certainly would not confer a right to sell one's bone marrow or kidney to strangers. These results fit awkwardly under the rubric of property, yet they follow naturally from the precepts of privacy.

By this reasoning, a statute that prohibits gifts of the body to family members is unobjectionable under the law of property, but may be unconstitutional under the law of privacy.<sup>411</sup> Conversely, a law that prohibits commercial trafficking in body parts with strangers poses no problem under the right to privacy, but may encounter sustained opposition as an isolated exception to the general principle of alienability for property. Consequently, instead of creating a special category of inalienable property or quasi-property to address the human body, courts should simply draw upon existing principles of privacy.

#### 4. Expropriation

The contrast between the constitutional protection afforded to property and that conferred upon an interest in privacy represents not only a difference in degree, but also a difference in kind. Under the Due Process Clause, deprivations of property are considered constitutional if rationally related to a legitimate state interest, whereas invasions of privacy warrant heightened scrutiny. More fundamentally, property can be taken from one person and reassigned to another upon payment of compensation, whereas privacy cannot.<sup>412</sup> Hence, we subscribe to some degree to utilitarianism in the area of property, permitting redistribution whenever it maximizes the public welfare, yet we adhere entirely to Kant in the realm of privacy, preventing sacrifice of one person's privacy interest in his or her body even to save the life of another.<sup>413</sup>

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knowingly sell, transfer, distribute, or give away any fetus for a use which is in violation of the provisions of this section"—namely, experimentation—and specifying that "the word 'fetus' shall include an embryo"); VA. CODE ANN. § 32.1-289.1 (Michie 1997) (making it unlawful to buy or sell "any natural body part for any reason including, but not limited to, medical and scientific uses" but allowing exceptions for blood, sperm, and ova).

<sup>410</sup> See *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978) (declining to compel one person to donate his bone marrow in order to save the life of his dying cousin).

<sup>411</sup> See generally George J. Annas, *Life, Liberty, and the Pursuit of Organ Sales*, 14 HASTINGS CTR. REP. 22, 22 (1984) (contending that privacy does not protect the right to sell organs, although it may provide a parent with a constitutional right to donate an organ to his or her child).

<sup>412</sup> Cf. Calabresi & Melamed, *Property Rules*, *supra* note 13, at 1125 (suggesting that liability rules are inappropriate and should not be applied to the right to bodily integrity).

<sup>413</sup> Kant's first maxim provides: "Act so as to treat humanity, whether in thine own person or in the person of another, always as an end, never as a means only." IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 96 (H.J. Paton trans., Harper & Row 1964) (1785). Perhaps different philosophical theories animate other structural and

It follows that property and privacy theories confer radically different forms of protection upon the human body. The Fifth Amendment provides: "nor shall private property be taken for public use without just compensation."<sup>414</sup> Accordingly, the state, by characterizing the body as property, can seize it for a public purpose upon payment of just compensation.<sup>415</sup> Taking property from one person and giving it to another typically satisfies the public use requirement, provided that the transfer has the potential to confer some benefit upon the public as a whole.<sup>416</sup> The redistribution of body parts clearly satisfies this lenient standard since it arguably benefits not only the individual saved by the transplant, but also all of society.<sup>417</sup>

The more difficult question is what counts as a "taking." Confiscation of a whole body or body part would undeniably be construed as a "taking" by analogy to the eminent domain cases, unless the body or body part has been "abandoned" by its owner. Restricting a property owner's right to exclude others from her body would generally be deemed a "taking" as well, though this would depend upon the degree of intrusion and the extent of the public's present access to the body.<sup>418</sup> Further, even tiny physical invasions into the

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substantive provisions of the Constitution. *See, e.g.*, Evan Tsen Lee, *On the Received Wisdom in Federal Courts*, 147 U. PA. L. REV. 1111, 1120 (1999) (advancing a Rawlsian critique of the "received wisdom" in federal courts law that the Supreme Court should actively preserve the state courts as an important forum for the adjudication of federal constitutional claims).

<sup>414</sup> U.S. CONST. amend. V.

<sup>415</sup> Of course, other constitutional provisions would also limit a hypothetical law authorizing the state to confiscate the body parts of the dead for the purpose of transplant into the living, including the Free Exercise Clause of the First Amendment. U.S. CONST. amend. I. Accordingly, such a statute might well be unconstitutional unless it contained a religious exemption, as do the few existing state laws that purport to "take" body parts over the objections of the decedent. *See, e.g.*, OHIO REV. CODE ANN. § 2108.53 (Anderson 1999) (allowing pituitary removal by coroner unless religious objection); VT. STAT. ANN. tit. 18, § 150 (1999) (same). *But cf.* Employment Division v. Smith, 494 U.S. 872, 878 (1990) (upholding law of general applicability as consistent with the Free Exercise Clause of the First Amendment even when it contained no religious exemption).

<sup>416</sup> *See, e.g.*, Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 241-42 (1984) (upholding redistribution of property from landowners to lessees in order to diminish social and economic evils associated with land oligopoly); Berman v. Parker, 348 U.S. 26, 33-34 (1954) (allowing public redevelopment of slum areas for possible sale or lease to private parties); Poletown Neighborhood Council v. Detroit, 304 N.W. 2d 455, 459 (Mich. 1981) (authorizing condemnation of property from individual homeowners for transfer to a private corporation).

<sup>417</sup> When individuals who might have died without a bone marrow or kidney transplant are afforded the means with which to survive, all of society arguably benefits in terms of enhanced productivity associated with the additional years and the diminished need to expend scarce social resources upon expensive treatments, such as kidney dialysis.

<sup>418</sup> *See, e.g.*, Yee v. City of Escondido, 503 U.S. 519, 527-28 (1992) (holding that rent control ordinance affecting mobile park home owners did not amount to physical taking of

body probably would be viewed as "takings," although minimal payment might constitute just compensation.<sup>419</sup>

By contrast, government invasions of the body conceived as an interest in privacy are unconstitutional unless narrowly tailored to serve a compelling interest.<sup>420</sup> This stringent standard makes it much more difficult to invade an individual's bodily privacy than to take her bodily property.<sup>421</sup> However, only significant intrusions into the body even implicate the right to privacy.<sup>422</sup> Consequently, privacy theory permits minor invasions of the body without even requiring the payment of just compensation.<sup>423</sup>

Moreover, although the public use requirement essentially has been eviscerated in the area of property,<sup>424</sup> it still may retain force in the realm of privacy. As Professor Seth Kreimer declares: "The State may conscript its citizens to serve in the public interest, but it may not conscript them to serve one another."<sup>425</sup> Thus, the government may command one property owner to

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park owners' property); *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987) ("Commission could not, without paying compensation, condition grant of permission to rebuild house on property owners' transfer to public of easement across beachfront property"); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980) ("[S]tate constitutional provisions, which permit individuals to exercise free speech and petition rights on the property of a privately owned shopping center to which public is invited, did not violate the shopping center owner's [Constitutional] rights"); *Kaiser Aetna v. United States*, 444 U.S. 164, 173 (1979) ("Government could not require owners to make marina open to the public without compensating the owners").

<sup>419</sup> See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (holding that a cable company's installation of wires upon the landlord's building constituted an unlawful taking, and that a one time, one dollar payment comprised just compensation).

<sup>420</sup> See *Roe v. Wade*, 410 U.S. 113, 155 (1973) (holding state's anti-abortion laws to be overly broad). But cf. *Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992) (adopting "undue burden" standard).

<sup>421</sup> See *Roe*, 410 U.S. at 163 (state has compelling interest in protecting fetus post-viability); *In re A.C.*, 573 A.2d 1235, 1247 (D.C. App. 1990) (expressing "doubt that there could ever be a situation extraordinary or compelling enough to justify a massive intrusion into a person's body, such as a caesarean section, against that person's will"); *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978) (refusing to require bone marrow donation).

<sup>422</sup> See *Schmerber v. California*, 384 U.S. 757, 771-72 (1966) (upholding administration of compulsory blood tests for drunk driving); *Jacobson v. Massachusetts*, 197 U.S. 11, 31 (1905) (upholding law authorizing compulsory immunization).

<sup>423</sup> See *Casey*, 505 U.S. at 877 (instructing that government regulations that do not "unduly burden" a woman's choice to terminate her pregnancy are constitutional); *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (imposing undue burden standard as a threshold requirement, so that only those laws that unduly burden the right to marry are subject to strict scrutiny).

<sup>424</sup> But see *Jed Rubenfeld, Usings*, 102 YALE L.J. 1077, 1148-49 (1993) (advancing a constitutional theory that attempts to read the limitation "for public use" back into the takings clause).

<sup>425</sup> See Kreimer, *supra* note 107, at 848 & n.164 (justifying what amounts to "a

chop down his cedar trees in order to preserve his neighbor's apple orchards,<sup>426</sup> and the government may even give the resulting cedar wood to others to use as a source of fuel.<sup>427</sup> However, the government may not similarly require one person to endanger his health or life in order to save the life of another.<sup>428</sup> On the other hand, invasions of the body that serve weighty interests of the public at large may be constitutional, so that the government may conscript individuals to devote their bodies to the general public in the form of military service.<sup>429</sup> Each person must be treated as a means, and cannot be used to serve others' ends, and the body of one living human being can never be directly sacrificed even to save the lives of several others.

Under property theory, for example, the state of California would possess the power to extract Mr. Moore's spleen against his will for any public purpose, so long as it provides him with just compensation. Conversely, under privacy theory, Mr. Moore would have a constitutional right to refuse removal of his spleen from his body. The state could not seize his spleen unless it

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resurrection of the 'public use' requirement of the Takings Clause" in the context of privacy on the grounds that "[t]he decline of the public use requirement in the property area does not necessarily undercut its propriety in the area of bodily autonomy").

<sup>426</sup> See *Miller v. Schoene*, 276 U.S. 272, 279 (1928) (government ordered cedar trees to be chopped down when it was discovered that the cedars acted as the host for a plant disease that threatened the apple orchards).

<sup>427</sup> Cf. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 243 (1984) (upholding statute transferring title in real property from lessor to lessee to reduce concentration of land ownership); *Poletown Neighborhood Council v. Detroit*, 304 N.W. 2d 455, 459 (Mich. 1981) (allowing private corporation to acquire neighborhood land by condemnation if necessary).

<sup>428</sup> See, e.g., *Casey*, 505 U.S. at 880 (noting that "essential holding of *Roe* forbids a state to interfere with a woman's choice to undergo an abortion procedure if continuing her pregnancy would constitute a threat to her health"); *In re Baby Boy Doe*, 632 N.E.2d 326, 334 (Ill. 1984) (refusing to order caesarean surgery); *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978) (declining to force a donor to donate life saving bone marrow); *In re A.C.*, 573 A.2d 1235, 1247 (D.C. App. 1990) (refusing to allow hospital to decide whether terminally ill patient should undergo caesarean surgery); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 768-69 (1986) *overruled in part by* *Casey*, *supra* (striking down statute requiring physician to employ abortion procedure that maximizes prospect of fetal survival on grounds that the state may not trade off a woman's life or health for the sake of the fetus).

<sup>429</sup> See *Selective Draft Law Cases*, 245 U.S. 366 (1918). The *Selective Draft Law Cases* Court noted:

[A]s we are unable to conceive upon what theory the exaction by government from the citizen of the performance of his supreme and noble duty of contributing to the defense of the rights and honor of the nation, as the result of a war declared by the great representative body of the people, can be said to be the imposition of involuntary servitude in violation of the prohibitions of the Thirteenth Amendment, we are constrained to the conclusion that the contention of that effect is refuted by its mere statement.

*Id.* at 390.

demonstrates that such a course of action does not "unduly burden" his liberty interest in his body or is narrowly tailored to serve a compelling state interest of the general public.

### 5. Inequality

The final difference between property and privacy lies in the dimension of equality. Property rights are inherently unequal in the sense that some individuals may own a great deal of property while others may have little or none. Property theories actually presuppose such disparities as perfectly natural and normal.<sup>430</sup> Inequalities in privacy, on the other hand, are viewed as especially problematic.<sup>431</sup> Privacy theory envisions all persons as possessing an equivalent capacity for privacy and an equal right to be free from government interference, although in practice the extent of privacy often correlates with the ownership of property. Indeed, the entire institution of slavery predicated itself upon the idea that people may be equated with property. Hence, inequality is the inevitable byproduct of property terminology.<sup>432</sup>

## IV. PROPERTY VS. PRIVACY: MAPPING THE HUMAN BODY

As a result of their many structural and substantive similarities, privacy and property constructions of the body may be viewed as interchangeable and confused with one another. Thus, property theories occasionally penetrate the

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<sup>430</sup> See NEDELSKY, PRIVATE PROPERTY, *supra* note 372, at 208 (1990) (arguing that property serves as a flawed model for other rights because the right of property is premised upon inequality). Cf. JEAN JACQUES ROUSSEAU, DISCOURSES (Victor Gourevitch trans., Cambridge University Press, 1997) (1762) (identifying the idea of property as the origin of all inequality).

<sup>431</sup> See e.g. *Zablocki v. Redhail*, 434 U.S. 374, 387 (1978) (striking down Wisconsin law restricting the right to marry for those too poor to fulfill child support obligations pursuant to both Due Process and Equal Protection); *Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) (striking down Massachusetts law regulating distribution of contraceptives on grounds that it distinguished between married and single persons in violation of the Equal Protection Clause); *Skinner v. Oklahoma*, 316 U.S. 535, 535 (1942) (striking down Oklahoma law authorizing forcible sterilization of certain classes of criminals under the Equal Protection Clause). *But see Harris v. McRae*, 448 U.S. 297, 317-18 (1980) (right to privacy does not require government to fund abortions when it funds childbirth); *Maher v. Roe*, 432 U.S. 464, 474 (1977) (government may choose to fund only childbirth and not abortions).

<sup>432</sup> This is a fact that many commentators emphasize when they compare surrogacy contracts to slavery and criticize them on those grounds. See, e.g., PATRICIA J. WILLIAMS, ON BEING THE OBJECT OF PROPERTY, THE ALCHEMY OF RACE AND RIGHTS 216-236 (1991) (analogizing surrogacy to slavery); Anita L. Allen, *Surrogacy, Slavery, and the Ownership of Life*, 13 HARV. J.L. & PUB. POL'Y 139, 140 (1989) (arguing that, "although slavery and surrogacy are not coterminous," aspects of the American experience with slavery "may be instructive" on the question of surrogacy).

realm of privacy,<sup>433</sup> while some privacy theories appear to resemble the conventional idea of property.<sup>434</sup> However, the differences between these two constructions, not their similarities, define when the principles of privacy rather than the rules of property should govern the human body.

Property and privacy constructions of the body converge to the extent that they secure identical interests—namely, the right to possess one's own body and the right to exclude others. Where the two diverge is in their concept of the relationship between the person and the body. Property protects the autonomy of an owner over the object of ownership, whereas privacy safeguards personal identity. A person does not "own" his or her body under the right of privacy. Instead, privacy envisions the body as an integral part of the person.<sup>435</sup> Indeed, because of the body's close identification with the person, invasions of the corporeal being endanger its personhood. By contrast, the law of property differentiates between the owner and that which is owned, seeing the person as distinct from his or her embodiment. Thus, property presupposes the existence of self independent of the physical being,<sup>436</sup> while privacy views the person as embodied and the body as personified.<sup>437</sup>

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<sup>433</sup> See, e.g., CARMEL SHALEV, *BIRTH POWER: THE CASE FOR SURROGACY* (1989) (contending that it is consistent with feminism for women to be able to use their reproductive capacity to earn money and power); Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 323-24 (1978) (advocating free markets in adoption); Richard A. Posner, *The Ethics and Economics of Enforcing Contracts of Surrogate Motherhood*, 5 J. CONTEMP. HEALTH L. & POL'Y 21, 22-23 (1989) (applying market model to surrogacy); Goldberg, *supra* note 12, at 1597 (advancing property arguments for abortion rights); Looper-Friedman, *supra* note 12, at 253 (same).

<sup>434</sup> See, e.g., JOHN A. ROBERTSON, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 206 (1994) (advancing principle of procreative liberty, which would provide a constitutional right to purchase sperm, eggs, and gestational services and even to enforce preconception agreements to rear offspring); Gregory S. Crespi, *Overcoming the Legal Obstacles to the Creation of a Futures Market in Bodily Organs*, 55 OHIO ST. L.J. 1, 59 (1994) (contending that federal and state statutes proscribing trade in human organs may violate the constitutional right of privacy); Johnson, *supra* note 15, at 741-42 (same).

<sup>435</sup> See IMMANUEL KANT, *LECTURES ON ETHICS* 166 (Louis Infield trans., Harper Torchbooks 1963) (1930) (stating that "[t]he underlying moral principle is that man is not his own property and cannot do with his body what he will. The body is part of the self; in its togetherness with the self it constitutes the person").

<sup>436</sup> The philosophy of Descartes is characterized by this dualistic vision of the relationship between the person and the body, vividly captured in his "cogito ergo sum." RENEE DESCARTES, *DISCOURSE ON METHOD*, PART 4, IN DESCARTES' *PHILOSOPHICAL WRITINGS* 141 (N. Smith trans., 1952) ("I knew that I was a substance whose whole essence or nature consists entirely in thinking, and which, for its existence has no need of place, and is not dependent on any material thing; so that this I, that is to say, the soul, by which I am what I am, is entirely distinct from the body, and is indeed more easy to know than the body, and would not itself cease to be all that it is, even should the body cease to exist.").

<sup>437</sup> In so doing, privacy appears to reject Cartesian dualism and embrace a unitarian

As a result, under property theory the body becomes transformed into an object of ownership, capable theoretically of separation from its owner, the person "inside" the body. Under privacy theory, on the other hand, the two are indivisible, inextricably intertwined. Indeed, to the extent that privacy embodies a principle of personal autonomy,<sup>438</sup> it manifests a right that, by its very nature, cannot be separated from the individual and thus cannot be exercised by another.<sup>439</sup>

It follows that privacy theory entitles the body to protection as the physical embodiment of a person, the subject of a privacy interest, whereas property theory reduces the body to a mere object of ownership. What sets apart these two constructions of the human body is the profound difference between persons who serve as the subjects of privacy interests and things that are the objects of property ownership.<sup>440</sup> The distinction lies in the boundary that divides persons from things and subjects from objects.<sup>441</sup> This boundary rests in turn upon three basic principles. Therefore, whether the body should be identified as the subject of a privacy interest or the object of property ownership depends essentially upon (1) whether it is living or dead; (2) whether it is integrated with the whole person or a separate part; and (3) whether it is involved in a personal relationship or an object relationship.

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vision of the body as one with the person. This philosophy of the body has many famous exponents. *See, e.g.*, PAUL RAMSEY, THE PATIENT AS PERSON xiii (1970) ("Just as man is a sacredness in the social and political order, so he is a sacredness in the natural, biological order. He is a sacredness in bodily life. He is an embodied soul or ensouled body.").

<sup>438</sup> See text accompanying notes 393-400.

<sup>439</sup> See Ira M. Ellman, *Cruzan v. Harmon and the Dangerous Claim that Others Can Exercise an Incapacitated Patient's Right to Die*, 29 JURIMETRICS J. 389, 394-99 (1989) (arguing that a constitutional right grounded in the principle of personal autonomy can have no application to a case where others seek to make a decision for a person).

<sup>440</sup> Theologian Joseph Fletcher argues that it is the capacity for autonomy that divides "persons" from "objects":

To be a person, to have moral being, is to have the capacity for intelligent causal action. . . . In Biblical terms it means that man is made in the image of God, and that therefore he is self-conscious, saying "I am," and that he is self-determined, saying "I will." . . . This is what it means to be a person and not an object to be manipulated either by doctors of medicine or by the impulsive operations of physical nature.

JOSEPH FLETCHER, MORALS AND MEDICINE 218-19 (1954).

<sup>441</sup> The division between privacy and property theories of the body thus mirrors the distinction between persons and things, subjects and objects, a distinction also relied upon by Kant:

"Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property."

KANT, LECTURES ON ETHICS, *supra* note 435, at 165.

These three principles define when the human body should be protected as an interest in privacy rather than a species of property. Together, they construct a conceptual map of the human body, allocating different claims to the realms of privacy and property.

#### A. *Commodification: The Subject/Person vs. the Object/Thing*

Privacy rights attach to persons, whereas property law governs objects. Hence the line that divides privacy and property interests in the body necessarily embodies the boundary between the body as person and the body as thing, between subject and object.

##### 1. The Living vs. the Dead

Death marks the ultimate boundary between persons and things, thus the choice between privacy and property constructions often depends upon whether the body is characterized as alive or dead.<sup>442</sup> While the bodies of living persons are shielded from physical invasions and alterations under the right of privacy, the bodies of dead persons are afforded protection under the rules of property. In *In the Matter of Quinlan*,<sup>443</sup> for example, the New Jersey Supreme Court addressed a parent's claim to have a child who was alive but in a persistent vegetative state removed from a respirator in the language of constitutional privacy.<sup>444</sup> The Court ruled that "the unwritten constitutional right of privacy . . . is broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions."<sup>445</sup> In *Strachan v. John F. Kennedy Memorial*

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<sup>442</sup> The question what defines a "person" is one that has plagued philosophers and theologians for centuries. Some answer this question by applying philosophical principles of the person as the subject of rights, the agents of their own destiny, entities that are endowed with the capacity for rational autonomy. *See, e.g.*, John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 533-35 (1980). Others answer this question by relying upon scientific concepts such as a functioning neo-cortex. *See, e.g.*, Joseph Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, 1972 HASTINGS CTR. REP. 1 ("Neocortical function is the key to humanness, the essential trait, the human *sine qua non*."); H. TRISTRAM ENGELHARDT, THE FOUNDATIONS OF BIOETHICS 215 (1986), and still others by invoking religious ideals of a spirit or a soul. Whatever the attributes that constitute personhood, our society draws the legal line at brain-death. *See* UNIFORM DEFINITION OF DEATH ACT (UDDA), 12 U.L.A. 340 (1991). Hence I will not venture further into this territory where religions war and science fears to tread.

<sup>443</sup> 355 A.2d 647 (N.J. 1976).

<sup>444</sup> *See id.* at 647 (observing that although in a comatose state, patient exhibited primitive brain stem functions). Cf. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (addressing parents' right to discontinue provision of artificial hydration and nutrition to daughter who was in a persistent vegetative state under the rubric of a Fourteenth Amendment liberty interest).

<sup>445</sup> *Quinlan*, 355 A.2d at 663 ("Although the Constitution does not explicitly mention a

*Hospital*,<sup>446</sup> on the other hand, the very same court protected the right of parents to have their brain-dead child removed from a respirator under the rubric of property, holding that the hospital's delay in disconnecting the body from the respirator and turning it over to the parents for burial violated their quasi-property rights in their dead son's body.<sup>447</sup> In both cases, the parents called for precisely the same act—that their child be unplugged from the respirator that kept the body biologically alive. The only salient difference between the facts of these two cases is that Karen Ann Quinlan still retained brain-stem activity, whereas Jeffrey Strachan was devoid of all brain function. But the legal principle that distinguishes one case from the other is the fine line between life and death, for while Quinlan was declared legally alive, albeit in a persistent vegetative state, Strachan was pronounced brain-dead, rendering him the legal equivalent of a corpse.

This distinction also sheds light upon a difficult question often posed by philosophers though seldom confronted by the law, namely whether body parts may be taken from one person and reassigned to another. Many philosophers label the body "property," and from the strong protection our intuitions afford living bodies, they infer that property in general should be equally immune from redistribution.<sup>448</sup> Yet the living body cannot be forcibly redistributed

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right to privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution").

<sup>446</sup> 538 A.2d 346 (N.J. 1988).

<sup>447</sup> *Id.* at 350 ("For more than half a century this state has recognized a quasi property right in the body of a dead person.").

<sup>448</sup> Relying upon Robert Nozick and Jan Narveson, among others, Gerald Gaus states that "libertarians often suggest that our intuition that . . . it is wrong to carve up a person also shows that it is wrong to tax him; both, we are told, are unjustified expropriations of his property." Gerald F. Gaus, *Property, Rights, and Freedom*, 11 SOC. PHIL & POL'Y 209, 214-15 (1994) (citing Jan Narveson, Robert Nozick, and Tibor Machan). *See also* WALDRON, *supra* note 320, at 399-400 (arguing that libertarians like Nozick fear that "[a] commitment to maximizing utility or even a Rawlsian commitment to maximizing the prospects of the worst-off group in society may require us to redistribute body parts, unless we are prepared to recognize a basic entitlement to self-ownership").

In his classic work, *ANARCHY, STATE, AND UTOPIA*, for example, Robert Nozick asks whether "all entitlements [may] be relegated to relatively superficial levels . . . [including] people's entitlements to the parts of their own bodies" and suggests that "[a]n application of [John Rawls'] principle of maximizing the position of those worst off might well involve forceable redistribution of bodily parts" on the rationale that "You've been sighted for all these years; now one—or even both—of your eyes is to be transplanted to others." ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 206 (1974). "Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits," Nozick argues, redistribution of any property is essentially equivalent to redistribution of the body: "If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you." *Id.* at 172; *see also* JAN NARVESON, THE

precisely because it is *not* property but part of a person shielded by the constitutional right of privacy.<sup>449</sup> Consequently, in *McFall v. Shimp*,<sup>450</sup> the court refused to sacrifice Shimp's body to serve the needs of another, even though the removal of his bone marrow posed little risk to him and his cousin needed the bone marrow to survive.<sup>451</sup> The court ruled that "[f]orceable extraction of living body tissue causes revulsion to the judicial mind."<sup>452</sup> Such stringent protection of the body does not flow from the law of property, but rather from the "sanctity of the individual" and the "absolute right to . . . 'bodily security,'" ideas that resonate more closely with the right of privacy.<sup>453</sup> Indeed, had the court come to a different conclusion and compelled the donation of bone marrow, Shimp could probably have claimed a violation of his own constitutional right of privacy, specifically his right to be free from physical invasions of his body.<sup>454</sup>

The same principle does not apply to dead bodies, which are essentially "divorced" from the person and thus no longer shielded under the umbrella of

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LIBERTARIAN IDEA 66-67 (1988) (contending that "the libertarian thesis is really the thesis that a right to our persons as our property is the sole fundamental right there is" and suggesting that a rule against redistribution of property follows, because "few socialists, to take another Nozickian example, accept that if you are blind and I have two good eyes, then in the interests of equality I am morally bound to part with one of them and turn it over to you, should it be medically possible to do that").

<sup>449</sup> Lawyers as well as philosophers sometimes make the mistake of equating the body with property in order to shield it from compulsory redistribution. Professor Mark Tushnet, for example, suggests that a principal ground for affording individuals property in their own bodies "is that it would be outrageous for some collective agency to commandeer [one person's] spleen in the interests of another person's health." Tushnet assumes that "it would be equally outrageous for the agency to override the man's decision to put his removed spleen to a use that all would agree is less than optimal. He can donate it to his cousin even if the agency would, on balance, decide that a distant stranger would benefit more," concluding that "these intuitions support a contemporary judgment that people have strong property rights in their spleens." Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1367 (1984). If protection of the body derives from the law of property, however, the "outrageous" scenarios that Tushnet imagines could one day become a reality.

<sup>450</sup> 10 Pa. D. & C.3d 90 (1978).

<sup>451</sup> *See id.* at 91.

<sup>452</sup> *Id.* at 92 (likening such practices to the barbarity of the Holocaust and the Inquisition).

<sup>453</sup> *Id.* *See also* *Curran v. Bosze*, 566 N.E.2d 1319, 1324 (Ill. 1990) (protecting the body as "the foundation of self-determination and inviolability of the person").

<sup>454</sup> *See, e.g.*, *Winston v. Lee*, 470 U.S. 753, 764 (1985) (surgical removal of bullet); *Rochin v. California*, 342 U.S. 165, 172 (1952) (stomach-pumping). A court order compelling one person to donate his bone marrow to another would appear to constitute state action in violation of the right of personal privacy under the reasoning of *Shelley v. Kraemer*, 334 U.S. 1, 18-19 (1948) (holding that court enforcement of private racially restrictive covenants constitutes state action).

privacy.<sup>455</sup> As a result, any degree of autonomy individuals possess over their bodies after death must stem from another source. The obvious candidate is the law of property.<sup>456</sup> Indeed, the distinction between living and dead bodies is firmly embedded in cases that examine the constitutionality of laws authorizing the government to confiscate organs from a corpse without prior consent from the decedent or his family.<sup>457</sup> Property can be redistributed, though privacy cannot. Accordingly, this distinction is consistent with the different outcomes in cases involving the redistribution of body parts from living and dead bodies.<sup>458</sup> Almost all of these decisions address the issue under the rubric of property and uphold such laws as constitutional.<sup>459</sup> Even when the right to privacy is considered in this context, its application is generally rejected on grounds that dead persons retain no privacy interests in their own bodies<sup>460</sup> and family members possess privacy interests only in their

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<sup>455</sup> This argument rests upon the premise that a physical body may be necessary, but is not sufficient, for personhood, a principle that Section 1 of the Uniform Determination of Death Act apparently recognizes by equating the end of life with brain-death. See *supra* note 442 (setting forth various ideas of what constitutes a person while relying upon the legal definition of death).

<sup>456</sup> If we seek to shield dead bodies from private interference and to safeguard the relational interests of family members, tort theory probably suffices. Indeed, this was part of the rationale underlying the common law quasi-property in a corpse. *See supra* text accompanying notes 83-84. Unlike property, however, tort law guards only against private parties, but it does not necessarily prevent overreaching by the government. Government deprivations of individual rights protected by tort law do not necessarily implicate the Constitution. Even as a protection against private parties, moreover, tort law may be inadequate because it imposes no liability in the absence of a duty and thus immunizes the actions of third parties and strangers. Also, tort law usually turn upon an assessment of wrongfulness and thereby holds accountable only those who are negligent or engage in wrongful activity. Furthermore, it confers only a negative right to be free from interference, offering no affirmative power to control use of dead bodies, direct their disposal, or donate them to others. *See Moore v. Regents of the University of Cal.*, 793 P.2d 479, 510 (Cal. 1990) (Mosk, J., dissenting) (explaining the property law theory behind a patient's rights in his own body tissue). Accordingly, a property theory may be necessary to the extent that we also seek to protect commercial value, vindicate the interests of strangers, and prevent abuse by the government. Thus, the transition from a tort theory to a property theory transforms both the substance of claims and the identity of the parties who may bring suit. This Article, however, addresses only the autonomy of the body vis-a-vis the government, although some of its insights may be instructive regarding the differences between privacy and property theories in the private law context as well.

<sup>457</sup> *See supra* Part II.A.

<sup>458</sup> *See id.*

<sup>459</sup> *See id.*

<sup>460</sup> *See, e.g., Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984) (pointing out that the right to privacy is a "personal one" that "ends with the death of the person to whom it is of value").

ongoing relationships with the living.<sup>461</sup> Instead, most courts resort to property discourse to sustain these statutes under the most minimal standard of constitutional review, finding no violation of constitutionally protected property rights either because the bodies of the dead are not deemed private property<sup>462</sup> or because the public need for organs is found to outweigh any property interests that are involved.<sup>463</sup>

The decision to apply property rather than privacy to cases involving the removal of organs from a corpse is probably correct, yet property analysis is itself indeterminate because it does not necessarily yield one particular answer. If the bodies of the dead are property, then they might constitute a commons or communal form of property rather than private property. A court could hold, for example, that the common law quasi-property right in a corpse resembles a public trust rather than a right of individual ownership. Under this theory, the common law conferred quasi-property rights upon individuals only as stewards for the entire community and never regarded the corpse as a category of property capable of being reduced to individual ownership. Indeed, this appears to be the theory underlying *Pierce v. Proprietors of Swan Point Cemetery*,<sup>464</sup> which explained the difference between quasi-property in a corpse and complete ownership:

Although . . . the body is not property in the usually recognized sense of the word, yet we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.<sup>465</sup>

Accordingly, a law seizing dead bodies in order to harvest their organs to benefit the living would not require payment of compensation to the decedent's

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<sup>461</sup> See, e.g., *Florida v. Powell*, 497 So. 2d 1188, 1193 (Fla. 1986) (holding that a tort claim for interference with burial "does not rise to the constitutional dimension of a fundamental right" of privacy); *Mansaw v. Midwest Organ Bank*, No. 9700271 CV-W-6, 1998 U.S. Dist. Lexis 10307, at \*28 n.15 (W.D. Mo. July 8, 1998) (concluding that any "constitutionally protectible liberty interest that a parent may have in a minor child dies with the child").

<sup>462</sup> See, e.g., *Georgia Lions Eye Bank v. Lavant*, 335 S.E.2d 127, 128 (Ga. 1985) (recognizing only a common law quasi-property interest in next of kin that may be abrogated by the legislature); *Powell*, 497 So. 2d at 1191 (citing general agreement of authorities that next of kin have no property rights in the remains of family members).

<sup>463</sup> See, e.g., *Mansaw* 1998 U.S. Dist. Lexis 10307, at \*25-26 n.13 (weighing the state interest of alleviating the "chronic shortage of suitable organ donors" against a father's "far less compelling" property interest in his son's body).

<sup>464</sup> 10 R.I. 227 (1872) (addressing daughter's claim against her father's widow for wrongfully disinterring and reburying his remains).

<sup>465</sup> *Id.* at 242-43.

estate or next of kin if this category of property was never individually owned, but always belonged to the community. No individual could claim a taking of private property if the interest in the bodies of the dead was not part of any individual's bundle of rights in the first place.

However, the passage of the Uniform Anatomical Gift Act (UAGA)<sup>466</sup> over thirty years ago may have transformed our background expectations about this category of property. The UAGA treats the dead body as the property of an individual owner who has the sole right to dispose of it without regard for others. Specifically, individuals possess the right to consent to post-mortem donation of their bodies and body parts while they are alive or to devise them by means of a will.<sup>467</sup> And if the decedent fails to exercise these rights, his or her body—along with the rest of the decedent's property—descends to the heirs, who acquire the power to donate the body after death.<sup>468</sup> By vesting in the individual complete control over his or her corpse and by authorizing the transfer of power to donate the bodies of the dead to the next of kin, the UAGA apparently converts what was formerly quasi-property into individual property. By this reasoning, if the government "takes" the privately-owned body without obtaining consent from the decedent or the next of kin, it must provide just compensation. To the extent that current laws presume consent and prohibit removal of body parts from a corpse if there are express indications to the contrary, however, they may not amount to "takings" that require the payment of compensation.

Another theory is also compatible with this line of cases. Even if the right of personal privacy extinguishes upon death, the body does not necessarily transform from the subject of a privacy interest into the object of property ownership. To the contrary, the difference between forcible redistribution of body parts from the living and the dead may simply turn upon the presence or absence of a right of personal privacy. The state interest in the body may triumph only when it outweighs any individual interest.<sup>469</sup> Accordingly, the state should not be able to seize organs from a living human being over his or her objections and reassign them to others because that action would violate the individual's right of personal privacy. In the absence of a countervailing individual interest, however, the state is free to transplant organs from the bodies of the dead to preserve the lives of others. By not attaching the label of property to a dead body, this theory avoids the troubling implications of that legal category, including the possibility that a corpse could be treated as an article of commerce capable of transfer by its "owner" as a future interest when alive or through a sale by close relatives upon death. At the same time, this

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<sup>466</sup> UNIFORM ANATOMICAL GIFT ACT (amended in 1987), 8A U.L.A. 63 (1993).

<sup>467</sup> See *id.* at § 2(a)(i).

<sup>468</sup> See *id.* at § 2(e).

<sup>469</sup> See, e.g., *Mansaw v. Midwest Organ Bank*, No. 9700271 CV-W-6, 1998 U.S. Dist. Lexis 10307, at \*28 (W.D. Mo. July 8, 1998) (concluding that father's interest in son's body is outweighed by state interest).

theory denies individuals even the limited autonomy of a property owner over their bodies after death as against the government. In addition, it also appears inconsistent with the provisions of the UAGA, which represents an ownership philosophy.<sup>470</sup>

A similar analysis may be applied to state statutes that invalidate the living wills of incompetent pregnant women. By this reasoning, an incompetent pregnant woman is clearly the subject of privacy rights and not the object of property law so long as she remains alive. If incompetent persons possess a constitutional right to refuse or remove life-sustaining medical treatment,<sup>471</sup> and if pregnant women have a right to be free from unduly burdensome interference with their choice to terminate pregnancy prior to viability,<sup>472</sup> then the incompetent pregnant woman should be afforded the same rights.<sup>473</sup> Nor does the conjunction of these two factors alter the analysis, for incompetence itself should not divest a pregnant woman of either the right to refuse medical treatment or the right to abort.<sup>474</sup> Accordingly, state statutes that disregard a pregnant woman's prior request that doctors disconnect her from life support, as embodied in a living will or the appointment of a surrogate decisionmaker, deprive her of both of these rights and are likely unconstitutional, at least prior to fetal viability.<sup>475</sup> Indeed, to the extent that the state grants these privacy rights to others, the disparities in the legal protection afforded to an incompetent pregnant woman are especially problematic and may also deny her equality under the law.

Yet the brain-dead pregnant woman stands in an entirely different position. She has crossed the legal boundary separating life from death, and thus receives precisely the same treatment under law as a corpse. If she continues to possess some degree of autonomy over her body after death, that autonomy must derive from property rather than privacy. Consequently, the state may conscript her body for public use as a fetal incubator just as it may conscript

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<sup>470</sup> See *supra*, note 64-70 and accompanying text.

<sup>471</sup> See, e.g., *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 279 (1990) (assuming constitutional protection for a competent person's right to refuse medical treatment and extending this protection to incompetent persons as well); *In the Matter of Quinlan*, 355 A.2d 647, 647 (N.J. 1976).

<sup>472</sup> See *Planned Parenthood v. Casey*, 505 U.S. 833, 876-77 (1992) ("clarify[ing] what is meant by an undue burden").

<sup>473</sup> See John A. Robertson, *Posthumous Reproduction*, 69 IND. L.J. 1027, 1060 (1994) (arguing that, under Justice O'Connor's concurrence in *Cruzan*, state statutes disregarding a competent pregnant woman's advance directive against treatment would fail strict scrutiny if applied before viability).

<sup>474</sup> See *In re A.C.*, 573 A.2d 1235, 1246 (D.C. 1990) (equating incompetent person's decisions regarding treatment made while competent with competent persons' decisions); *Matter of Moe*, 385 Mass. 555, 432 N.E.2d 712 (1982) (holding that incompetent persons also possess a constitutional right to privacy that encompasses the choice to have an abortion or consent to sterilization).

<sup>475</sup> See *id.* at 1060.

any other form of property. If it does, however, it must provide just compensation, as only Pennsylvania currently purports to do. By forcing the state to internalize the costs of its action, the compensation requirement may act as both a political and economic constraint upon the state's use of its takings power, obliging legislators to publicly justify the massive expenditures entailed by a decision to keep a brain-dead pregnant woman's body biologically alive in order to preserve a fetus.

## 2. The Whole Body vs. Body Parts

Another boundary between persons and things is defined by the contours of the living human body. The right of privacy governs parts within a whole body, not the law of property; accordingly, stomach pumping, extraction of a bullet, and even withdrawal of a blood sample from an intact body are all characterized as invasions of personal privacy rather than as "takings" or "deprivations" of bodily property.<sup>476</sup> But although the intact body is identified with the person, parts of a body that are severed from the person lose the protection of privacy and may become objects of property.<sup>477</sup> It follows that laws regulating intact bodies implicate the right of privacy, whereas laws regulating the sale or disposal of excised body parts relate to property.

This distinction is also deeply embedded in case law. In *Green v. Commissioner*,<sup>478</sup> for example, a tax court treated blood extracted from

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<sup>476</sup> See, e.g., *Rochin v. California*, 342 U.S. 165, 209 (1952) (stomach-pumping); *Winston v. Lee*, 470 U.S. 753, 759 (1985) (bullet removal); *Schmerber v. California*, 384 U.S. 757, 767 (1966) (blood sample).

<sup>477</sup> Several commentators draw a similar line between body parts and whole bodies, though they do not elaborate upon or explain this distinction. Professor Radin, for example, distinguishes between body parts inside and outside the body, stating:

The idea of property in one's body presents some interesting paradoxes. In some cases, bodily parts can become fungible commodities, just as other personal property can become fungible with a change in its relationship with the owner: Blood can be withdrawn and used in a transfusion; hair can be cut off and used by a wigmaker; organs can be transplanted. On the other hand, bodily parts may be too "personal" to be property at all. We have an intuition that property necessarily refers to something in the outside world, separate from oneself. . . . [T]he idea of property seems to require some perceptible boundary, at least insofar as property requires the notion of a thing, and the notion of thing requires separation from self. This intuition makes it seem appropriate to call parts of the body property only after they have been removed from the system.

Radin, *Property and Personhood*, *supra* note 15, at 966. See also Munzer, *An Uneasy Case*, *supra* note 15, at 275 (distinguishing between whole bodies and body parts that are separable from a living body, and arguing that even if persons lack property rights in their whole bodies, it does not necessarily follow that they lack property rights in their body parts).

<sup>478</sup> 74 T.C. 1229, 1232 (T.C. 1980) (noting that income received from selling one's own blood is taxable).

Margaret Green's body as a taxable commodity,<sup>479</sup> although it notably refused to extend this line of reasoning to encompass her entire body.<sup>1</sup> However, a law authorizing Green's rare blood to be taken from and used by the state for a public purpose or a court order compelling the transfusion of blood into Green's body over her objections should implicate her right of privacy.<sup>480</sup> Similarly, if the government seeks to remove an eye from a sighted person for redistribution to another, that certainly would violate the individual's right of personal privacy,<sup>481</sup> but if a removed eyeball is washed down the drain by a government actor, the individual may allege only a loss of property.<sup>482</sup> By the same reasoning, if an individual seeks to amputate his or her leg over government objections, such a claim might implicate the right of privacy, but if the amputated limb is inadvertently cremated, the individual suffers only an injury to property.<sup>483</sup>

The California Supreme Court could have applied a similar analysis in *Moore v. Regents of the University of California*,<sup>484</sup> in which a leukemia patient sought recovery for doctors' unauthorized use of his spleen tissue in their own research,<sup>485</sup> since the case involved a state actor, even though no constitutional violations were actually alleged. Housed within his body, Moore's spleen was not his property; instead, it was part of his person and thus

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<sup>479</sup> *Id.* at 1234 (comparing extracted blood to other saleable raw materials, such as eggs, milk, and honey).

<sup>480</sup> See, e.g., *In re Fetus Brown*, 689 N.E.2d 397, 405 (Ill. App. Ct. 1997) (holding that the state could not force a pregnant woman to undergo a blood transfusion for the benefit of her viable fetus); *In re Dubreuil*, 629 So. 2d 819, 822-24 (Fla. 1993) (requiring state to prove compelling interest to override pregnant woman's constitutional right to refuse treatment and reversing trial court's decision to order blood transfusion on grounds that this "heavy burden" had not been satisfied).

<sup>481</sup> Cf. *McFall v. Shimp*, 10 Pa. D. & C.3d 90, 91 (1978) (allowing defendant to refuse compatibility tests for a bone marrow transplant under principles of "bodily security" originating in English common law).

<sup>482</sup> See *Mokry v. University of Tex. Health Science Ctr.*, 529 S.W.2d 802, 804 (Tex. Civ. App. 1975) (allowing recovery for negligent loss of plaintiff's left eyeball after surgical removal to determine whether the eye was cancerous).

<sup>483</sup> See, e.g., *Browning v. Norton-Children's Hosp.*, 504 S.W.2d 713, 714-15 (Ky. 1974) (holding that patient could not recover for cremation of his amputated leg when he failed to make known his wishes and that hospital had no duty to retain leg indefinitely). Under the same theory, a pacemaker or an artificial limb may be governed by the law of property only so long as it is separate from a living human body. Once integrated with the body, however, such objects become part of the person and should be afforded protection under the individual's right of privacy. Similarly, a cloned organ or other body part may be regulated as an object of property prior to integration, although a cloned person should receive shelter under the right of privacy.

<sup>484</sup> 793 P.2d 479 (Cal. 1990).

<sup>485</sup> *Id.* at 480-83 (factual history of case).

protected under the rubric of privacy.<sup>486</sup> Accordingly, Moore had no property right to sell his spleen, nor could the state seize the spleen from him over his objections upon payment of compensation. Once doctors removed the spleen, however, it assumed many attributes of property. It could be technologically manipulated to create a valuable product, put to productive use, or transferred to others. If the state simply sought to confiscate a diseased spleen already removed from Moore's body with his consent, there would be no violation of Moore's right to privacy; such state action should implicate only the right to property. Moreover, courts should consider a removed organ property of the person from whose body it was withdrawn, even though the state may take the organ to further a public purpose upon payment of just compensation. Thus, the California Supreme Court should have recognized that Moore's relationship to his spleen once it was removed from his body transformed from a privacy interest into a property right. The court's mistake lay in its conflation of the two situations. To hold that the severed spleen became Moore's property would not have required holding that it was also his property while still integrated with his body. Yet the court denied Moore any property rights in his own spleen, though it still treated the detached spleen itself as a sort of commons or communal property—like oil, water, or wild animals—which was free for "capture" by the first person who recognized its commercial potential and brought it under his control.<sup>487</sup> The scientists who mixed their labor with the spleen created a valuable product and acquired the property rights that should have been Moore's.<sup>488</sup>

But if Moore's spleen may become property once liberated from his person, why shouldn't it also be regarded as his property prior to removal from his body? Shouldn't those parts of the human body that are not integral to survival be considered property when they are still within an intact living body? The answer to these question is "no," and it follows from the same principles and policies furthered by the abortion cases.<sup>489</sup> The reason that body parts within a person should never be conceptualized as "property" is that such an idea opens the possibility of separate ownership, which could create conflicts between the property rights of the "owner" of a body part and the privacy interests of the person within whose body the part currently resides. Separate ownership of a

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<sup>486</sup> See *id.* at 488-89.

<sup>487</sup> See *id.* at 489 (denying claim of conversion because of plaintiff's insufficient ownership interest in the removed spleen).

<sup>488</sup> See *id.* at 482. See also *Pierson v. Post*, 3 Cai. Cas. 175 (N.Y. Sup. Ct. 1805) (granting property right in a fox to the first person who captured it and brought it within his certain control); *Elliff v. Texon Drilling Co.*, 210 S.W.2d 588, 561-62 (Tex. 1948) (applying rule of capture to oil that migrated across property lines).

<sup>489</sup> See Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception"*, 43 STAN. L. REV. 599, 627-34 (1991) (arguing that an embryo or fetus within a woman's body cannot be treated as a separate legal person prior to viability because of the negative consequences of such a characterization for women's autonomy over their own bodies).

body part within a living human being is at odds with the principle of personal autonomy because it affords one individual pervasive power over the body of another, while divided ownership of a person undermines individual equality.

### B. Commercialization: Personal Relationships vs. Object Relationships

The right of personal privacy safeguards the integrity of the intact living human body as the physical embodiment of a person, but it does not shelter either dead bodies or severed body parts, which have lost their personhood and may become objects of property. Similarly, the right of relational privacy casts a mantle of immunity from state interference around intimate and consensual relationships, but it does not necessarily shield commercial transactions between strangers, nor does it apply to object relationships. Relational privacy governs the realm of affective ties rather than arms-length exchange, providing constitutional shelter to personal relationships rather than commercial transactions or object relationships.<sup>490</sup> As a consequence, it comports with the many laws that afford less protection to commerce in the human body than to gifts that flow from love or community solidarity.

Accordingly, laws restricting the rights to marry, to reside with one's family members, and to maintain a relationship with one's child all receive heightened scrutiny under the umbrella of privacy because they involve intimate and personal relationships.<sup>491</sup> By the same reasoning, parents may possess a constitutional right to donate bone marrow or a kidney to their children, and a law that prevents such gifts of the body between family members may violate the right of relational privacy.<sup>492</sup> Laws that prohibit the sale of human organs

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<sup>490</sup> Just as property encompasses certain object relationships, such as the right to possess, the right to exclude others, the right to use, the right to transfer by sale or by gift, and the right to dispose after death, privacy embraces a wide range of personal relationships, including the right to marry, the right to reside with one's relatives, the right to procreate or not to procreate, and the right to rear children. *Compare* BLACK'S LAW DICTIONARY 1216 (6th ed. 1990) (defining property as "an aggregate of rights" that includes "the right to dispose of a thing in every legal way, to possess it, to use it, and to exclude everyone else from interfering with it") and MUNZER, A THEORY OF PROPERTY, *supra* note 16, at 22 (explaining the "incidents of ownership" Honore thought necessary to establish an ownership relationship) and Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1667 (1988) (declaring that the "classical liberal conception of property embraces a number of broad aspects or indicia, often condensed to three: the exclusive rights to possession, use, and disposition") with Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992) (observing that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education") and Roe v. Wade, 410 U.S. 113, 152-53 (1973) (stating that the right to privacy "has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education") (citations omitted).

<sup>491</sup> See *supra* text accompanying notes 182-84.

<sup>492</sup> See Annas, *supra* note 411, at 22 (suggesting that although "[t]here does not seem to

to strangers or proscribe commercial surrogacy, on the other hand, should not be subject to heightened scrutiny because such laws regulate commercial transactions rather than intimate relationships.

Yet the line between intimate relationships and commercial transactions is not always clear. It is the presence or absence of a relationship—measured by the degree of connection and the length of duration, among other factors—that defines whether the right of relational privacy attaches.<sup>493</sup> The mere element of exchange does not divest close and longstanding commitments between persons of all constitutional protection. Indeed, even the institution of marriage and the bond between parent and child may be permeated by profit motives,<sup>494</sup> though this circumstance, standing alone, should not cause such relationships to forfeit constitutional shelter. A relationship that is no more than a commercial transaction, however, is not entitled to protection under the umbrella of privacy; otherwise, every contract could become the subject of a constitutional right.<sup>495</sup> Further, commercial transactions may be less likely to involve close and longstanding commitments than familial associations.<sup>496</sup>

Although personal relationships are analyzed under the right of privacy, object relationships implicate the law of property. This idea also finds support in cases addressing alternative methods of conception. In *Hecht v. Superior Court*,<sup>497</sup> for example, the court suggested that a bequest of sperm to a lover

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be any constitutional right implicit in the "right to privacy" to sell one's nonvital organs, it seems likely . . . that a court would find a constitutional right for a parent (or perhaps any close relative) to donate a nonvital organ in an effort to save the life of that person's child".

<sup>493</sup> Others factors are involved as well. *See* *Roberts v. United States Jaycees*, 468 U.S. 609, 620 (1984) (describing the qualities that entitle a relationship to the protection of privacy, including "such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship").

<sup>494</sup> The idea that one person may marry another for money, or to obtain financial security, is quite common in our culture. Also, a parent may reap economic and psychological benefits from their relationship with a child athlete or movie star.

<sup>495</sup> Such a rule would resurrect the now-discredited Lochnerian notion that the right to make and enforce contracts is enshrined in the Constitution, constructing privacy in the image of property without recognizing the important differences between the two rights.

<sup>496</sup> Of course, one can always imagine exceptions to this generalization. An intimate and longstanding relationship with a lover one supports financially or a foster family in which foster parents receive payment but also develop an emotional attachment to the child may warrant protection under the right of relational privacy. *See Smith v. Organization of Foster Families*, 431 U.S. 816, 854 (1977) (suggesting that foster families with whom children resided for more than one year might receive protection under the right of privacy). Conversely, privacy does not aid a biological parent who makes little or no effort to develop or maintain a parent-child relationship. *See Lehr v. Robertson*, 463 U.S. 248, 261 (1983) ("But the mere existence of a biological link does not merit equivalent constitutional protection."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("But this is not a case in which the unwed father at any time had, or sought, actual or legal custody of his child.").

<sup>497</sup> 20 Cal. Rptr. 2d. 275, (Cal. App. Dep't Super. Ct. 1993), *disposition modified by*

may receive protection under the right of privacy,<sup>498</sup> even though sperm that is exchanged in a settlement agreement or sold to strangers should be governed only by the law of property. Similarly, in *Davis v. Davis*,<sup>499</sup> the Tennessee Supreme Court invoked the right of privacy in a dispute between a divorced couple over the fate of their frozen embryos,<sup>500</sup> although *York v. Jones*<sup>501</sup> addressed an embryo dispute between a couple and a fertility clinic by recourse to the law of property, ruling that an embryo in the custody of a clinic must be returned to its true owners under the law of bailment.<sup>502</sup>

This distinction yields some interesting results when applied to laws regarding extracorporeal embryos. Although embryos themselves are not full-fledged persons,<sup>503</sup> they differ from other body parts because of their potential to develop into a person. Accordingly, if individuals seek to enter into or extricate themselves from personal relationships with their frozen embryos as potential children, that course of action implicates the right of privacy. As a result, a law prohibiting individuals from uniting their own gametes with the assistance of in vitro fertilization to produce children, or a law that requires couples to donate unused embryos to others for "adoptive implantation," should be subject to heightened scrutiny because such laws may infringe the right of relational privacy. Moreover, the government cannot simply "take" embryos from their progenitors upon payment of just compensation because they are not property; instead, they are part of a potential relationship protected under the rubric of privacy.

In the absence of a relationship between the person and the embryo, however, the embryo may be addressed as an object of ownership governed by the law of property. For example, individuals who seek to sell their spare embryos or physicians and clinics that possess no personal attachment to embryos and retain them solely for their research or commercial value treat the embryos as essentially fungible and interchangeable, much like other objects of ownership.<sup>504</sup> As a result, their relationships with the embryos merit only the

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<sup>498</sup> *Hecht*, 59 Cal. Rptr. 222, 226 (Cal. App. Dep't Sup. Ct. 1996) (focusing on the "fundamental liberty" of procreation rather than on property law).

<sup>499</sup> *Hecht*, 20 Cal. Rptr. 2d at 283 ("[A]t the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decisionmaking authority as to the use of his sperm for reproduction.").

<sup>500</sup> *842 S.W.2d 588* (Tenn. 1992) (holding in a divorce action that preembryos are not "persons" or "property" but occupy a special interim category).

<sup>501</sup> *Id.* at 600 ("[T]he right of procreation is a vital part of an individual's right to privacy.").

<sup>502</sup> *717 F. Supp. 421* (E.D. Va. 1989).

<sup>503</sup> *Id.* at 427 (recognizing plaintiffs' property interest in their pre-zygote).

<sup>504</sup> *Cf. Roe v. Wade*, 410 U.S. 113, 158 (1973) (holding that a fetus is not a person under the Constitution).

<sup>505</sup> *See Radin, Property and Personhood, supra* note 15, at 960 (distinguishing between "personal property" that is "bound up with a person," such as a wedding ring, and "fungible property" that is held for purely instrumental reasons, such as money).

same legal protection afforded to other object relationships. Accordingly, laws regulating embryos in the possession of physicians or clinics implicate property rather than privacy; they need only be rationally related to a legitimate state interest, and the state may confiscate unclaimed embryos in the custody of a fertility clinic for public use generally or for transfer to others.<sup>505</sup> Indeed, if abandoned embryos are regarded as a commons or communal form of property, the state should have the power to seize them from a clinic even without the payment of compensation.

On the other hand, legal claims regarding dead bodies and separated body parts, even when they involve emotional connections, do not implicate the right of privacy. In such claims, the attachment is not to a person but to an object incapable of achieving personhood.<sup>506</sup> Accordingly, attachments to a corpse or body part should be viewed as object relationships that receive shelter under the rubric of property, albeit with the recognition that "property" may be protected for its emotional significance as well as its economic value.

### CONCLUSION

Whether the human body should be characterized as a species of property or as a subject of privacy interests largely depends upon the consequences that flow from the choice of category. The designation "property" or "privacy" is a legal conclusion that follows from, rather than precedes, the analysis. If society permits a part of the body to be separated from the person and alienated to others or seized by the state, that part of the body constitutes "property," regardless of the legal label attached to it. But if bodies and body parts are deemed inalienable and unassailable, however, they should be regarded as the subjects of privacy interests rather than the objects of property law. If autonomy consists of the right to resist invasions of the body and to open one's body to others in the context of intimate and consensual relationships, the body should be envisioned as a subject of privacy interests. But if autonomy consists of the power to instrumentalize the body by extracting value from it and exchanging it with others, then the body should be considered a form of property. It follows that property in the body is necessary in order to protect commercial value and to provide a legal framework that governs the interests of strangers, whereas privacy suffices to preserve an individual's rights in his or her own body and to safeguard the relational interests of family members.

Treatment of intact living human bodies as the subject of a privacy right rather than the object of property ownership provides a normatively attractive

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<sup>505</sup> Of course, the progenitors do not lose the protection afforded by the right of relational privacy over their embryos simply because they are in the temporary custody of a physician or clinic.

<sup>506</sup> Application of the label "personal relationship" to an individual's relationship with a dead body or a severed body part would seem to fall into the trap of "fetishism." See Radin, *Property and Personhood*, *supra* note 15, at 968-70 (defining "fetishism" as the existence of a "bad" relationship with an object).

account that is also roughly consistent with our current jurisprudence. Privacy theory secures a limited form of self-ownership without permitting rights in the human body to be conveyed to others, and it shields intimate associations but not arms-length transactions. Dead bodies and severed body parts, on the other hand, are not sheltered under the umbrella of privacy because they are no longer inextricably intertwined with a person. As a result, they may be transferred to others or seized by the state without loss of personal identity. Accordingly, to afford individuals a limited degree of autonomy over their bodies after death or separation from the person, these objects should receive at least some protection under the law of property.