

# AGAINST THE RIGHT TO BODILY INTEGRITY: OF CYBORGS AND HUMAN RIGHTS

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## INTRODUCTION

Creating a list of fundamental human rights is a controversial project, but there is one right that appears in many lists—a right to bodily integrity, security, or control over one’s own body.<sup>1</sup> The content of what the right should be is hotly contested.<sup>2</sup> For instance, does the right to bodily integrity require that organ selling be forbidden?<sup>3</sup> Or, do funda-

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1. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Rochin v. California*, 342 U.S. 165 (1952) (recognizing a right to “bodily integrity”); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, 72, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/043/88/IMG/NR004388.pdf?OpenElement> (stating in Article 3 that “[e]veryone has the right to life, liberty and security of person”); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* 78 (2000) (listing bodily integrity as one of ten “central human functional capabilities”).

2. See, e.g., Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, in *PROPERTY RIGHTS* 259, 261 (Ellen Frankel Paul et al. eds., 1994); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 360–63 (2000) (describing the American constitutional right to bodily integrity and the fact that it has the character of a privacy interest—not a property interest—in that it protects against state interference, but does not protect a right to alienate the interest); see also Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 511–12, 546 (2003) (“[T]he result may soon be, among other things, patents on human fetuses that are genetically modified in ways one can only imagine. Patent protection could convert such fetuses, to the extent they are denied constitutional protection, into justifiable commodities, supplying life-saving tissue and organs to sick children and adults.”).

3. See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., *ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS* 99 (1986); HASTINGS CTR., *ETHICAL, LEGAL AND POLICY ISSUES PERTAINING TO SOLID ORGAN PROCUREMENT: A REPORT OF THE PROJECT ON ORGAN TRANSPLANTATION* 3–4 (1985); Munzer, *supra* note 2, at 266 (describing the Kantian human dignity argument as applied to organ sales); see also Susan M. Shell, *Kant’s Concept of Human Dignity as a Resource for Bioethics*, in *HUMAN DIGNITY AND BIOETHICS: ESSAYS COMMISSIONED BY THE PRESIDENT’S COUNCIL ON BIOETHICS* 333, 344–45 (2008), available at [http://www.bioethics.gov/reports/human\\_dignity/human\\_dignity\\_and\\_bioethics.pdf](http://www.bioethics.gov/reports/human_dignity/human_dignity_and_bioethics.pdf).

mental rights require that organ selling be permitted?<sup>4</sup> What about sales of the use of one's body, such as prostitution? Do we violate fundamental rights by permitting the practice?<sup>5</sup> Do we violate fundamental rights by forbidding it?<sup>6</sup> What about the sale of manual labor that is injurious to the body?<sup>7</sup> In other words, there is deep disagreement about whether the right over one's body and its uses is a property-like right that must be alienable in exchange for money, or is a dignity or privacy-like right that must not be sold.

In this article, I argue that both sides are off the mark. The concept of a monolithic, fundamental right to bodily "integrity" is both descriptively and normatively wrong. There should be no legal "right to control one's own body," saleable or not, with a scope that matches up perfectly with the physical borders of the organic, physically continuous human body. This is not to say that we should abandon many familiar rights such as the right to not be tortured or raped. Rather, it is to say that there should be no one-to-one mapping between the physical borders of the organic, integrated human body and the legal borders of the rights derived from it.

For instance, once we determine the relationship between our bodies and fundamental rights, we might not derive any freedom to resist vaccination (although certainly other rights, such as religious rights, might protect this freedom<sup>8</sup>). On the other hand, we might be led to pro-

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4. Cf. Eugene Volokh, *Medical Self-Defense, Prohibited Experimental Therapies, and Payment for Organs*, 120 HARV. L. REV. 1813, 1835 (2007). Volokh based his argument not in a right to "bodily integrity," but in a right to self-defense. *Id.* at 1815–16.

5. See Stephanie Farrior, *The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to Its Potential*, 10 HARV. HUM. RTS. J. 213, 218 n.24 (1997) (noting the argument made by Coalition Against Trafficking in Women that prostitution "usurps and negates prostitute women's right to human dignity, bodily integrity and physical and mental well-being"); Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 677 (2004) (pointing out that the view—"any form of prostitution is a human rights violation"—is supported by the 1949 UN Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others where it states that "prostitution and . . . traffic in persons for the purposes of prostitution are incompatible with the dignity and worth of the human person").

6. See Int'l Comm. for Prostitutes' Rights, *World Charter for Prostitute Rights, in A VINDICATION OF THE RIGHTS OF WHORES* 40, 40 (Gail Pheterson ed., 1989), available at [http://www.walnet.org/csis/groups/icpr\\_charter.html](http://www.walnet.org/csis/groups/icpr_charter.html); Norma Jean Almodovar, *For Their Own Good: The Results of the Prostitution Laws as Enforced by Cops, Politicians and Judges*, 10 HASTINGS WOMEN'S L.J. 119, 123 (1999) (arguing that the subsidiary effects of criminalizing prostitution is "violative of human rights and dignity"); Larson, *supra* note 5, at 681 (describing arguments for legitimizing prostitution on the grounds that it "is a free choice made by an autonomous individual" and that "[r]espect for women's self-determination requires respect for female choices about sex and survival"); see also DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 262 (1989).

7. See, e.g., RABBINICAL COUNCIL OF AM., *POLICY STATEMENT ON HUMAN DIGNITY AND LABOR* (1987), <http://www.rabbis.org/news/article.cfm?id=101063> (describing the fact that "workers in chemical factories may be exposed to dangerous chemicals or radiation, the effects of which are not recognized or diagnosed for many years" as compromising human dignity, to explain a position supporting "legislation that will raise the standards of employment" in that and other industries).

8. E.g., *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 91 (E.D.N.Y. 1987) (finding that under the First Amendment, religious exemption to New York's mandatory inoculation program for school children must be extended to all persons who sincerely

text freedoms of dress and makeup, even though these activities do not involve the manipulation of one's organic, physically continuous human body.<sup>9</sup> Similarly, the relationship of the body to fundamental rights might lead us to regulate contracts entered into between patients and sellers of prostheses, despite the fact that prostheses are not human. On the other hand, we might not find a justification for either prohibiting or permitting blood sales.<sup>10</sup>

In Part I, I argue that those who promote an inalienable or noncommodifiable right to bodily integrity—a right that cannot be exchanged for money—fail to recognize the fact that possession is not the only important right in a physical object. Even when the sale of possessory rights in body parts is prohibited, the sale of use and exclusion rights in the body, such as the sale of manual labor, are permitted, and these sales can cause the same sort of physical harm and risk that sale of possessory rights can cause. Indeed, I show that even market exchanges in the possession and use of *non-human* objects can cause the same sort of physical harm and risk that property rights in parts and uses of the human body can cause. This is increasingly the case given dependence on medical and other technological devices for sustaining life and health. In sum, those promoting dignity-based rights in the organic, integrated, human body that cannot be alienated for money are descriptively wrong about the body's complex relationship to its surroundings.

In Part II, I argue that those who favor a property-like right to possess and use the human body and its parts free from limits neglect the fact that property and contract rights can be regulated: ownership of an object does not entail sole dominion over the object. Thus, even if “your body is your property,” that does not entail a fundamental right to free markets in bodies, their parts, and their uses. In other words, those promoting property-like rights in the organic, integrated, human body that must be alienable for money, as a matter of fundamental rights, are descriptively wrong about property.

In Part III, I argue that as a normative matter, we should not use dignity or autonomy arguments to promote any monolithic right to bodily integrity, whether alienable or not. However, my critique of a monolithic concept of a right to bodily integrity, demarcated by the organic, human, physically integrated body's borders, still leaves room to justify a more

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hold religious beliefs, and not just persons who are bona fide members of a recognized religious organization).

9. Cf. Gowri Ramachandran, *Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing*, 66 MD. L. REV. 11, 60–69 (2006).

10. However, there may be other, purely policy-based, non-rights-based justifications for the regulation of those transactions, such as public health. See, e.g., RICHARD TITMUS, *THE GIFT RELATIONSHIP* (1970), reprinted in *THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY*, 57–315, at 314 (Ann Oakley & John Ashton eds., 1997) (“[C]ommercial markets are much more likely to distribute contaminated blood; the risks for the patient of disease and death are substantially greater.”).

nuanced version of rights in the body. Thus, I consider dignity and autonomy as approaches to justifying more nuanced rights in the human body, ones whose legal borders may not line up with the human body's physical borders. I conclude that dignity as a basis for singling out the body and prohibiting these sales is too arbitrary for a pluralistic society. Autonomy as a basis for prohibiting the regulation of these sales ignores the inevitable presence of economic and cultural coercion. Finally, I consider and critique the capability approach to justifying nuanced rights in the human body, since it arguably solves many of the problems identified with dignity and autonomy.

Nevertheless, all this critique need not bring us to the conclusion that human or fundamental rights have nothing to say about torture, prostitution, or forced labor. In Part IV, I propose that the body's relationship to fundamental rights can be rooted in a proceduralist approach—such as the use of fundamental rights to promote a dynamic, evolving culture—just as speech rights are thought to promote political and cultural processes. The reason is that the body is uniquely “personal and political.”<sup>11</sup> The body is especially personal because it grounds our subjective experience, the experience that others cannot directly access. But the body is also especially political because it is a primary site for exploring different values, subcultures, and identities. This means that to avoid a stagnant culture, we should use fundamental rights to avoid the consolidation of control over individuals' bodies, whether in the hands of the state or in the hands of economically powerful actors. Avoiding such consolidated control is a key component of ensuring that the formation of identities, subcultures, and cultural values is not directed by a powerful few.

This way of justifying the relationship between the body and fundamental rights does not lead to either an inalienable “right to bodily integrity” or to a particularly alienable “right to control one's own body.” Under this approach, the organic, integrated body no longer marks any border between what we have human or fundamental rights in and what we do not. To demonstrate, in Part VI provide some tentative examples of how we would apply this view to questions such as state intrusion on the body, rights to modify one's own body, prostitution, organ selling, and the regulation of property and contract due to its effect on bodies, such as patent law, employment and housing law, and welfare law. Instead of creating fundamental rights to protect “bodily integrity” in these situations, we should create fundamental rights where necessary to avoid monopolies over bodies.

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11. “The personal is political” was coined by members of New York Radical Women, including Carol Hanisch, in the late 1960s. JENNIFER BAUMGARDNER & AMY RICHARDS, *MANIFESTA: YOUNG WOMEN, FEMINISM, AND THE FUTURE* 19 (2000).

### I. WHAT THE DIGNITY OR PRIVACY VERSION OF BODILY INTEGRITY IS MISSING DESCRIPTIVELY: BODIES DEPEND ON ENVIRONMENTS

There may be simple utilitarian policy reasons to regulate or deregulate particular instances of body commodification. For instance, some argue that prohibiting blood selling improves the quality of the supply of blood.<sup>12</sup> Others argue that permitting prostitution would increase economic and social welfare.<sup>13</sup> But in this article, I focus on rights in bodily use and possession that would trump these typical political concerns of increased economic welfare, public health, or the expression of a society's cultural values through law.<sup>14</sup> In other words, should constitutional law, human rights law, or other forms of counter-majoritarian law have any role in these debates? If so, what should those rights in bodily use and possession look like?

There is a great deal of disagreement over this question, but one significant class of views on the subject relies on the following concern: the commodification of the human body's uses or components risks harm to human dignity, or perhaps privacy or personhood, in a way analogous to the way that slavery, the ultimate commodification of the human body, does.<sup>15</sup>

For this set of views, affording the formal legal status of property to the body or its uses and parts is problematic because it threatens what is often described as a fundamental right to human dignity.<sup>16</sup> Alternately, it is described as threatening a fundamental right to bodily integrity,<sup>17</sup> respect for the sacredness or sanctity of human life,<sup>18</sup> religious moral man-

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12. See, e.g., TITMUS, *supra* note 10, at 206, 270, 314.

13. E.g., Almodovar, *supra* note 6, at 127 (“‘Quality of life’ is a subjective concept and the least impressive argument for the continued harassment, arrest and incarceration of a group of people who are trying to improve their quality of life by earning a living.”); Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 696 (1998) (“The legalization of prostitution, far from promoting the demise of love, is likely to make things a little better for women who have too few options to begin with.”).

14. Cf. Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 115 (2007) (arguing that “individuals naturally impute socially harmful consequences to behavior that defies their moral norms,” thus supporting law that “repress[es] morally deviant behavior” while “honestly perceiv[ing] themselves to be motivated only by . . . harm prevention”).

15. See MICHELE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* 194–96 (2006) (describing authors opposing commodification of body parts on the grounds that it is like slavery); see also DAVID B. RESNIK, *OWNING THE GENOME: A MORAL ANALYSIS OF DNA PATENTING* 1–7 (2004) (describing controversy over DNA patenting that includes slippery slope arguments ending in slavery).

16. E.g., sources cited *supra* note 3.

17. E.g., Rao, *supra* note 2, at 387–88 (describing the American constitutional right to bodily integrity and the fact that it has the character of a privacy interest, not a property interest, in that it protects against state interference but does not protect a right to alienate the interest).

18. E.g., Proclamation No. 8339, 74 Fed. Reg. 3955 (Jan. 15, 2009) (proclaiming the President's designation of January 18, 2009 as National Sanctity of Human Life Day); Daniel C. Dennett, *How to Protect Human Dignity from Science*, in HUMAN DIGNITY AND BIOETHICS, *supra* note 3, at 39, 40 (“Human life, tradition says, is infinitely valuable, and even sacred . . . .”); William P. Clark, Op-Ed, *For Reagan, All Life Was Sacred*, N.Y. TIMES, June 11, 2004, at A27, available at 2004 WLNR 5467725.

dates,<sup>19</sup> or “personhood.”<sup>20</sup> This is part of the justification provided for prohibitions on organ selling<sup>21</sup> and prostitution.<sup>22</sup> It is not just moral conservatives who fit within this camp, however. There are disability rights activists, those who are concerned with the rights of sexual minorities, and egalitarians who oppose, on dignitarian-type grounds, leaving the modification of bodies up to markets.

The argument might go as follows: A ban on slavery means that humans are fundamentally ineligible for the legal status of property—that which persons (including corporations) may both exercise control over and alienate, either in whole or in part, and often in exchange for money.<sup>23</sup> Therefore, to allow for property rights in parts or uses of humans would blur the line between humans and property. This would threaten dignitary rights in our own bodies, respect for our own bodies, and perhaps even respect for human dignity itself.<sup>24</sup> Of course, there are more nuanced objections to commodification of the body,<sup>25</sup> but many of them share a reliance on the concept that some set of commodification practices threatens human dignity, a fundamental aspect of “personhood” such as bodily integrity, or some similar universal concept such as a fun-

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19. *E.g.*, Vatican Bishop Points to Modern Social Sins, CATHOLIC NEWS AGENCY, Mar. 11, 2008, <http://www.catholicnewsagency.com/new.php?n=12031> (reporting the inclusion of “‘bioethical’ violations such as birth control” and “‘morally dubious’ experiments such as stem cell research” in a list of seven modern social sins released by the Vatican via an interview with Bishop Girotti); *see also* Nicola Gori, *The New Forms of Social Sin*, L’OSSERVATORE ROMANO, Mar. 9, 2008, *available at* [http://blog.acton.org/uploads/penitentiary\\_interview.pdf](http://blog.acton.org/uploads/penitentiary_interview.pdf) (interview with Bishop Girotti).

20. *E.g.*, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852, 1885 (1987) [hereinafter Radin, *Market-Inalienability*]; *see also* MARGARET JANE RADIN, *CONTESTED COMMODITIES* 55–56 (1996) [hereinafter RADIN, *CONTESTED COMMODITIES*]; Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 1014–15 (1982) [hereinafter Radin, *Property and Personhood*].

21. *E.g.*, U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 96; Munzer, *supra* note 2, at 266 (describing the Kantian human dignity argument as applied to organ sales).

22. *E.g.*, Susan Estrich, *What I Couldn’t Teach Spitzer at Harvard Law*, REAL CLEAR POLITICS, Mar. 13, 2008, [http://www.realclearpolitics.com/articles/2008/03/what\\_i\\_couldnt\\_teach\\_eliot\\_spi.html](http://www.realclearpolitics.com/articles/2008/03/what_i_couldnt_teach_eliot_spi.html):

I really believe it is none of my business, as a member of the public or the media, if a political or business leader has an affair. I don’t sit in judgment of other people’s marriages or their private lives. But prostitution isn’t just sex. Prostitution objectifies the women who engage in it, dehumanizes sex and sexuality, and turns both into commodities with a price tag.

*See also* Ann Lucas, *The Currency of Sex: Prostitution, Law, and Commodification*, in *RETHINKING COMMODIFICATION* 248, 248 (Martha M. Ertman & Joan C. Williams eds., 2005) (“[M]ost objections to prostitution are commodification-based.”).

23. STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 48–49 (1990) (“Property rights are body rights that protect the choice to transfer.”); Radin, *Market-Inalienability*, *supra* note 20, at 1854 n.19 (“Traditional property rights are alienable in all senses except cancellation; they may be forfeited, relinquished, waived, condemned, and transferred by both gift and sale.”).

24. *See, e.g.*, DAVID B. RESNIK, *OWNING THE GENOME: A MORAL ANALYSIS OF DNA PATENTING* 1–7 (2004) (describing the controversy over DNA patenting that includes “slippery slope” arguments ending in slavery).

25. *See, e.g.*, Rao, *supra* note 2, at 455–56 (arguing that a principle in accord with our intuitions on the subject would allow for property rights in body parts that have been detached from a person, but would not allow for property rights in parts still internal to a person’s body).

damental human “capability”<sup>26</sup> for bodily integrity. The idea has roots in Catholic thinking,<sup>27</sup> and also appears in a Kantian argument that human dignity requires persons not to make these sales.<sup>28</sup> Bioethics committees and advisory boards commonly use the fact that something involves body commodification as a reason to be ethically concerned about it.<sup>29</sup>

The public approach to this question—whether commodification of the body is *per se* problematic—is somewhat schizophrenic, especially in the United States. Selling of organs is forbidden by statute,<sup>30</sup> and blood banks will not keep sold blood; yet some plasma centers use purchased blood.<sup>31</sup> The sale of manual labor is permitted, including physically intimate manual labor such as massage therapy. Even payment to volunteers who are willing to have their colons and vaginas invaded by medical students learning how to perform various exams is permitted.<sup>32</sup> However, prostitution is forbidden in most of the United States.

Nevertheless, arguments against various practices of body commodification, *on the grounds* that commodification of the body is problematic to dignity or personhood, continue to have a great deal of purchase, despite the existence of practices ranging from plasma selling to the largely uncontroversial sale of physical labor.<sup>33</sup> The view that there is something threatening about assigning the legal status of property to people or parts of people, at least some of the time—for instance, when the part of the person is not detached<sup>34</sup>—continues to have a great deal of

26. NUSSBAUM, *supra* note 1, at 78 (listing bodily integrity as one of ten “central human functional capabilities”). It is important to note that although Nussbaum supports an intuitionist, seemingly dignitarian approach to developing her list of capabilities, and although bodily integrity maintains a place on her list, her specific views on how to apply those capabilities to law do not necessarily lead to anti-body-commodification positions. For instance, Nussbaum has elsewhere argued for the legalization of prostitution. See Nussbaum, *supra* note 13, at 723–24. On the other hand, Radin has derived from Nussbaum’s capabilities approach and concept of human flourishing a stance against some forms of commodification. RADIN, *CONTESTED COMMODITIES*, *supra* note 20, at 64, 93–96.

27. See U.S. CONFERENCE OF CATHOLIC BISHOPS, *SHARING CATHOLIC SOCIAL TEACHING 5* (1998), available at [http://www.archdiocese-chgo.org/departments/peace\\_and\\_justice/pdf/teaching\\_doc/sharing\\_social\\_t.pdf](http://www.archdiocese-chgo.org/departments/peace_and_justice/pdf/teaching_doc/sharing_social_t.pdf) (“[T]he Catholic Church proclaims that human life is sacred and that the dignity of the human person is the foundation of a moral vision for society. . . . [This belief] is the foundation of all the principles of our social teaching.”).

28. See Munzer, *supra* note 2, at 259; Shell, *supra* note 3, at 344–45.

29. See, e.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., *supra* note 3, at 96; see also The President’s Council on Bioethics, <http://www.bioethics.gov> (last visited Nov. 2, 2009) (listing “Property in the Body” as one of its main “Topics of Council Concern”). The Council was disbanded on June 11, 2009. Nicholas Wade, *Obama Plans to Replace Bioethics Panel*, N.Y. TIMES, June 18, 2009, at A24, available at 2009 WLNR 11613820.

30. 42 U.S.C. § 274e(a) (2006).

31. Steven R. Salbu, *AIDS and the Blood Supply: An Analysis of Law, Regulation, and Public Policy*, 74 WASH U. L.Q. 913, 942 n.163 (1996) (describing the move in the United States towards an all donated blood supply, as encouraged by FDA regulations).

32. See Nussbaum, *supra* note 13, at 701, 706.

33. See *id.* at 693 (“ALL of us, with the exception of the independently wealthy and the unemployed, take money for the use of our body.”); Salbu, *supra* note 31, at 944–46.

34. See, e.g., Rao, *supra* note 2, at 455–56 (arguing that a rule forbidding property rights in body parts when the parts are internal to a person, but permitting property rights in body parts when detached from a person, would fit best with our intuitions).

force. Even anxiety about prostitution, which involves the sale not of a body part, but rather of a service employing the physical body, is often expressed in the terms that it is a commodification of the body.<sup>35</sup>

However, it is not the specter of human parts or even humans having the formal legal status of property that makes slavery and indentured servitude so horrifying, or markets in human body parts so worrisome.<sup>36</sup> In other words, we should not rest our concern with these practices on a formalist idea that humans or human parts having the legal status of property is itself an affront to some definition of what it means to be a human, to some concept of inviolable dignity. This focus is descriptively misplaced, as it relies on an overly simplistic conception of the relationship between humans' bodies and their environments. Whatever human dignity or personhood means, property rights *already* threaten it, even where the line between property and persons is clear.

For instance, if we prohibited the sale of possession rights in bodies and their parts, the sale of use rights would still pose risks to dignity in the sense of health, physical well-being, and physical independence: "The precedents for making use of one another's bodies are sufficiently well established in manual labor . . . ."<sup>37</sup> But manual labor often causes changes to the body over time, such as repetitive stress injuries. Suppose person A sells use of her hands until their function is so impaired that she requires assistance to get dressed and lives with constant pain. Suppose person B sells possession of her blood, or even a kidney, but remains healthy and relatively pain-free. Although person A "merely" sold the use of her body, and person B sold a possessory right to part of her body, can we say that the laborer has somehow risked or harmed her bodily dignity less?

On the other hand, it would be infeasible to go so far as to prohibit sales of use rights in the body because this would prohibit all wage labor. The use of person A's body was commodified not just when she was injured, but even when she sold the "labor of animation."<sup>38</sup> And a professor commodifies the use of her body by agreeing to stand in front of a

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35. *E.g.*, sources cited *supra* note 22.

36. *See* GOODWIN, *supra* note 15, at 198:

Slavery's pernicious effect is not exclusively derived from a market evaluation in the human body. Indeed, many slaves were given away as gifts. . . . The villainy of slavery is best characterized by the creation of a chattel system wherein Black men, women, and children were explicitly and exclusively exploited; stripped of their humanity, tortured, bred, denied legal protection, forbidden educational instruction and religious expression.

37. Martyn Evans, *The Utility of the Body*, in OWNERSHIP OF THE HUMAN BODY: PHILOSOPHICAL CONSIDERATIONS ON THE USE OF THE HUMAN BODY AND ITS PARTS IN HEALTHCARE 207, 207 (Henk A.M.J. Ten Have & Jos V.M. Welie eds., 1998).

38. Sarah S. Jain, *The Prosthetic Imagination: Enabling and Disabling the Prosthesis Trope*, 24 SCI., TECH., & HUM. VALUES 31, 32 (1999) (internal quotation marks omitted) (quoting Elaine Scarry, *The Merging of Bodies and Artifacts in the Social Contract*, in CULTURE ON THE BRINK 85, 97 (Gretchen Bender & Timothy Druckery eds., 1994)).

classroom for specified periods of time and talk about particular subjects, using her mouth, lungs, and brain.<sup>39</sup>

One might imagine that we can separate the professor example from the prostitute or someone engaging in manual labor based on whether the work is typically thought of as selling the “use of one’s body”—whether the work is culturally viewed as bodily work. But even work not typically thought of in this way could raise concerns about bodily dignity. For example, an employer who requires an employee to wear particular clothes has not in fact required the employee to change his organic, physically continuous body. Most would not describe such an employee, presuming he is not a model, as having sold the use of his body. However, the clothes worn may have an effect on the employee’s body so significant that it cannot be cognitively overcome. Suppose the clothing required is high heels. Walking about in high heels is an entirely different bodily experience than not, even if we leave aside the possibility of long term injury to the body that can stem from wearing high heels. Or suppose the clothing required is tight jeans, skirts with petticoats, or other physically uncomfortable or cumbersome attire; is this somehow less physically intrusive or cognitively overpowering to the worker than the process of having one’s blood withdrawn for sale, or an employer’s requirement that one’s fingernails be trimmed? Umberto Eco has described the experience of wearing tight jeans as so physically affecting that it makes him write differently.<sup>40</sup> For many persons, the tight jeans requirement is far more intrusive than the fingernail-trimming requirement, and for some, it would even be experienced as more intrusive than a requirement to obtain a vaccination.

It is not just sales of the use of one’s body that can cause the same sorts of physical harm or dignitary intrusions that sale of the parts of one’s body can. Even the exchange of use or possession rights in completely inorganic material which has no attributes of personhood can result in the same type of threats to bodily integrity or self-control that property rights in human parts are thought to raise. For instance, it is completely unremarkable for property rights to exist in electronic gadgets. But we might be concerned if owners of patents on products such as pacemakers and robotic arms were permitted to enforce “end user license agreements” (“EULAs”)<sup>41</sup> against patients. These EULAs could in effect restrict what patients can do with products that have become merged with their own bodies. And we should rightly, I argue, be similarly con-

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39. Nussbaum, *supra* note 13, at 704 (constructing this example).

40. UMBERTO ECO, *Lumbar Thought*, in *TRAVELS IN HYPERREALITY* 191, 193–95 (William Weaver trans., Harcourt Brace Jovanovich 1986) (1983).

41. An End User License Agreement is a contract that dictates the terms under which an end-user can use software or a device. Users often become a party to these contracts without reading them due to their length and form. See Kevin W. Grierson, Annotation, *Enforceability of “Click-wrap” or “Shrinkwrap” Agreements Common in Computer Software, Hardware, and Internet Transactions*, 106 A.L.R. 5TH 309, § 2(a) (2003).

cerned with the effects of property rights in wheelchairs, cochlear implants, tools used in labor, and other such devices on the bodies of those who need or desire to use them.

If that example is too *sui generis*, we can consider that exercise of even the most mundane property right—the right to develop real estate—can affect the bodily dignity of others. If that property right is unregulated with respect to the installation of wheelchair ramps, then how property holders choose to exercise the right will have far-reaching effects on the mobility and lived bodily experience of persons who require wheelchairs to get around. Whether such persons' bodies are “disabled” or not will depend on how those property rights are exercised. And yet, the property holders will have had this effect on others' bodies without having physically “touched,” possessed, or used the bodies of the persons using wheelchairs.<sup>42</sup>

In other words, we can construct many examples where someone has exercised property-like rights over something other than possession of a person or its parts, yet has entailed significant effects on another's lived physical experience. Some of the examples involved the exercise of possession and use rights over non-human objects, while other examples involved the sale of use rights in a human or its parts. In some of these examples, the effects on lived physical experiences are even more significant than the effects of selling possessory rights to a part of the body—selling blood, for instance. The reason we can construct these examples is that bodies, like any other objects, have a complex relationship with their environment.<sup>43</sup> Just as failure to provide a neighbor with an easement can affect the neighbor's ability to use his property,<sup>44</sup> failure to install a wheelchair ramp can affect another's ability to use his body.

This is why refraining from physical intrusions on the human body does not necessarily match up with maximal dignity for the person. There are many ways for the dignity or integrity of bodies to be very significantly affected by cultural norms, markets in items other than bodies, and political rules. Once we recognize that our physical and social

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42. See Samuel R. Bagenstos, *Subordination, Stigma, and “Disability,”* 86 VA. L. REV. 397, 429 (2000) (describing an acceptance of the social model of disability in the United States, in which “disability is attributed primarily to a disabling environment instead of bodily defects or deficiencies” (internal quotation marks omitted) (quoting Harlan Hahn, *Feminist Perspectives, Disability, Sexuality and Law: New Issues and Agendas*, 4 S. CAL. REV. L. & WOMEN'S STUD. 97, 101 (1994)); Mairian Corker & Tom Shakespeare, *Mapping the Terrain*, in *DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY* 1, 2–3 (Mairian Corker & Tom Shakespeare eds., 2002) (describing the shift from medical model of disability to social model, in which activists raised awareness of the fact that impairment alone does not cause disability, but rather social and economic conditions overlaying impairment).

43. See sources cited *supra* note 42.

44. For instance, an easement by necessity can be required to ensure that another's parcel of land has road access. *E.g.*, *Wilson v. Smith*, 197 S.E.2d 23, 25 (N.C. Ct. App. 1973) (“A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over the land retained by the grantor or land owned by a stranger.”).

experience of our bodies cannot be easily isolated from the environment, we can see why simply drawing a physical line between persons and property should not satisfy any concerns we might have with bodily dignity, even if we could agree on what dignity means. We should not be satisfied that we have protected persons physically by defining personhood so as to include, as most accounts do, bodily integrity.<sup>45</sup> As a descriptive matter, this approach is too simplistic.

While the fiction of a human body that could ever be made totally free from “intrusion” or given complete “integrity”<sup>46</sup> continues to retain purchase in debates about activities such as organ selling and prostitution,<sup>47</sup> it is about to face a profound challenge: developments in biotechnology have already begun to result in very obvious physical mergers of human and non-human parts and entities. For instance, in the case of a pacemaker or a robotic arm, humans are merging with inorganic property of the sort that is routinely and uncontroversially commodified.<sup>48</sup> In the case of merging plant genetic material with human genetic material, humans may merge with property that is organic, but which is nevertheless still routinely commodified.<sup>49</sup> In the case of merging human and animal genetic material, transplanting an animal organ into a human, or growing a human organ inside an animal, humans may merge with organic property that is legally, but controversially, commodified.<sup>50</sup> In some ways this merger is nothing new.<sup>51</sup> As I’ve argued above, very common forms of property such as real estate can have significant effects on the lived physical experience of our own bodies.<sup>52</sup> However, developments in biotechnology are making this fact more visible. In the long run, as these mer-

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45. *E.g.*, JAMES HUGHES, *CITIZEN CYBORG: WHY DEMOCRATIC SOCIETIES MUST RESPOND TO THE REDESIGNED HUMAN OF THE FUTURE* 73, 229–31 (2004) (arguing for “personhood-based ‘cyborg citizenship’ versus ‘human racism,’” yet nevertheless asserting that personhood requires self-ownership of bodies); NUSSBAUM *supra* note 1, at 78 (including “bodily integrity” in her list of capabilities).

46. *See* DONNA J. HARAWAY, *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century*, in *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 149, 150 (1991); Jain, *supra* note 38, at 43.

47. *See, e.g.*, sources cited *supra* notes 3, 21, 22.

48. *E.g.*, Brian Mockenhaupt, *Rebuilding: Bryan Anderson*, *ESQUIRE MAG.*, Mar. 2008, at 184, available at 2008 WLNR 25444912.

49. *See generally* Michael D. Rivard, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 *UCLA L. REV.* 1425, 1434–41 (1992) (describing processes for creating transgenic species).

50. *See* Elizabeth L. DeCoux, *Pretenders to the Throne: A First Amendment Analysis of the Property Status of Animals*, 18 *FORDHAM ENVTL. L. REV.* 185, 220–21 (2007) (describing the successful implantation of human embryonic stem cells into mouse embryos, and the resulting mouse-human hybrids, which had a small amount of human brain cells fully integrated into their brains otherwise made up of native mouse brain cells).

51. Some argue that humans are “embodied in an extended technological world,” rather than existing as “distinct beings in an antagonistic relationship with their surroundings.” Robert Pepperell, *The Posthuman Manifesto*, *KRITIKOS*, Feb. 2009, <http://intertheory.org/pepperell.htm>; *cf.* HARAWAY, *supra* note 46, at 150 (attempting to disrupt the naturalization of the human body and of gender, but without seeking to be innocent or transcendent of the systems of power and coercion that socially construct gender and the body).

52. *See supra* text accompanying note 42.

gers between people and property become more common, sustaining different formal legal statuses for people and other objects may appear more and more arbitrary.

Prostheses such as robotic arms are likely to become common in part because the wars in Iraq and Afghanistan have produced hundreds of amputees, spurring large increases in funding for prosthetic technology. Amazing developments in the field are occurring.<sup>53</sup> Researchers at the University of Pittsburgh, for instance, have recently announced the successful development of a robotic arm that a monkey can learn to control sufficiently to pick up and eat food, using only a small device installed in its brain.<sup>54</sup>

Transgenic species, or entities which include DNA from two different species, have already been created.<sup>55</sup> The species appear to exhibit phenotypic characteristics of both species.<sup>56</sup> Animal-human “hybrids” or plant-human “hybrids”<sup>57</sup> might someday be useful for growing or developing replacement organs or tissue for humans, as one example of the drive behind this research.<sup>58</sup>

This prominent merger of humans and property has raised a great deal of anxiety over how we may avoid the state of legalized slavery or other related threats to human dignity. For instance, recent scholarship on “patenting people” has concerned itself with the mixture of human and animal parts, especially genetic material.<sup>59</sup> This scholarship expresses fear that because human genetic material can currently be patented legally, and has been, eventually animal-human hybrids with many human characteristics may be patented, and perhaps even turned into a slave class.<sup>60</sup> The specter now exists of a farm of highly intelligent pig-human

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53. See Mockenhaupt, *supra* note 48, at 184 (“Funding for prosthetics projects has swelled significantly over the past six years. The Defense Advanced Research Projects Agency, or DARPA, is bankrolling one of the most ambitious programs, the \$85 million Revolutionizing Prosthetics project to build a prosthetic arm that matches the human arm in functionality by next year. . . . The fusion of man and machine is upon us, the extraordinary enabling the everyday.”).

54. Benedict Carey, *Monkey Thinks, Moving Artificial Arms as Own*, N.Y. TIMES, May 29, 2008, at A1, available at 2008 WLNR 10097697.

55. See DeCoux, *supra* note 50, at 222.

56. *Id.*

57. Politicians have referred to animal-human hybrids, probably meaning both chimeras and transgenic species, where chimeras contain cells from two different entities, and transgenic beings contain DNA from two different entities. See Stephen Munzer, *Human-Nonhuman Chimeras in Embryonic Stem Cell Research*, 21 HARV. J.L. & TECH. 123, 124 (2007) (providing these definitions).

58. See Bagley, *supra* note 2, at 505–06.

59. *Id.* at 506–07.

60. See, e.g., *id.* at 502, 511–12. Indeed, in 2006, Cardozo Law School hosted an entire two-day conference on the legal, moral, and policy implications of patenting human DNA, human-animal hybrids, and other biotechnological innovations. Numerous law professors, government patent lawyers, and others presented arguments at this conference, at which Bagley was the keynote speaker. See Margo A. Bagley, Keynote Address at the Benjamin N. Cardozo School of Law Patenting People Conference (Nov. 12, 2006).

hybrids being raised for removal of their kidneys and slaughter.<sup>61</sup> Property rights in human genetic material are thought to also threaten humans' rights to do as they will with their own bodies—their own genetic material. A patent-holder on genetic material might, for instance, prevent a person with that material from reproducing.<sup>62</sup>

Some of the literature has drawn on these fears to simply oppose the technology that blurs the line between humans and property. The opposition ranges from proposing outright bans to moderate “think before we act” proposals.<sup>63</sup> This opposition literature finds itself in alliance with religious conservative activists who also oppose technologies that blur the line between humans and non-humans.<sup>64</sup> These religious activists argue that without a rigid definition of humans, encompassing everything from embryos to persons in irreversible vegetative states, the degradation of human dignity will eventually result.<sup>65</sup>

In contrast, some argue that we must simply update our definition of what a legal person is to potentially include entities that are not completely human.<sup>66</sup> On this view, armed with a proper definition of legal personhood, we could simply forbid property rights in anything that counts as a person, whether completely human or not: property rights in an embryo would be fine perhaps, but property rights in a pig with a high functioning human brain would perhaps not be acceptable.

But despite the existence of these dramatically different responses, both fail to come to terms with the hard truth that all of this technology confronts us with: it is not enough to decide the difficult question of who is a person and then simply forbid property rights in that person. It takes much more than giving persons' bodies a special, formal legal status of “non-property” to sufficiently protect the physical well-being and independence of those bodies.

## II. WHAT THE PROPERTY VERSION OF BODILY INTEGRITY IS MISSING DESCRIPTIVELY: PROPERTY IS NOT SOLE DOMINION

An alternate approach to the question of what bodily integrity might mean views control over one's body as a property-like right, essential to freedom or autonomy. In this camp are persons who believe that there is

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61. Cf. Bagley, *supra* note 2, at 506 (describing a patented method for producing human organs from pigs).

62. See HUGHES, *supra* note 45, at 231 (proposing regulation to prevent this from happening).

63. See Bagley, *supra* note 2, at 473.

64. *E.g.*, *id.* at 510 (quoting with approval Professor Leon Kass, a religiously-inspired bioethicist and former chair of President George W. Bush's Council on Bioethics).

65. See *id.* at 496–97.

66. As an example of this approach, the U.S. Patent and Trademark Office initially rejected a patent application for a HuMouse because it “embraces a human being,” arguing that the Thirteenth Amendment would prohibit such a patent. Gregory R. Hagen & Sébastien A. Gittens, *Patenting Part-Human Chimeras, Transgenics and Stem Cells for Transplantation in the United States, Canada, and Europe*, 14 RICH. J.L. & TECH. 11, 34, 49 (2008).

a fundamental right to control over one's own body or its parts.<sup>67</sup> This theory would not only protect the body from unwanted intrusion, but also would protect one's right to modify one's body, choose to accept or reject medical treatment, and the like. However, autonomy includes the autonomy to contract one's autonomy away. Thus, the strong version of this view would require that commodification of the body be permitted, not simply when it is good economic or social policy, but because to do otherwise would interfere with fundamental rights to ownership of one's own body.<sup>68</sup> Strong libertarians would see prohibitions on the commodification of human bodies as unjust impositions on autonomy, and a coherent application of this view would therefore seem to permit organ selling, prostitution, the sale of genetically prized embryos, or employer preferences for "upgraded" workers.<sup>69</sup>

But to the extent this view derives the right to commodify one's body from a property right in one's own body,<sup>70</sup> it relies on a descriptively impoverished view of property as "sole dominion" over an object. The person with ownership of the property, on this view, has the right to use it, exclude others, possess it, and alienate it.<sup>71</sup> Because persons own their own bodies, the implication is that they must have the right to sell use and possessory rights in their body and its parts.

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67. Though they are not libertarians, major proponents of the transhumanist movement, which supports the use of technology to make humans "better than well," have cited this argument from autonomy in support of permitting such technologies. HUGHES, *supra* note 45, at 207, 229 (arguing that "[o]nly beings with personhood are exempt from being property, since we each own ourselves and can't be alienated from ownership of ourselves," and noting, with approval, "disparate movements, like transgender rights, working to radicalize our control over our own bodies"); Nick Bostrom, *In Defense of Posthuman Dignity*, 19 *BIOETHICS* 202, 210 (2005) ("A liberal democracy should normally permit incursions into morphological and reproductive freedoms only in cases where somebody is abusing these freedoms to harm another person."); cf. Volokh, *supra* note 4, at 1835 (arguing for a right to sell and buy organs rooted in the right to self defense).

See also Bonnie Steinbock, *Sperm as Property*, 6 *STAN. L. & POL'Y REV.* 57, 66 (1995) (arguing that "individual autonomy should prevail, and sperm is correctly regarded as property that can be bequeathed by will"); Mary Taylor Danforth, Current Topic in Law and Policy, *Cells, Sales, and Royalties: The Patient's Right to a Portion of the Profits*, 6 *YALE L. & POL'Y REV.* 179, 191-95 (1988) ("Th[e] property-based notion of control over one's name or likeness should be extended to one's body parts. The common law recognizes the individual's exclusive right to use what is inherently personal, and nothing is more personal than one's own genetic material."); Roy Hardiman, Comment, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 *UCLA L. REV.* 207, 218 (1986) (arguing that "human tissue possesses characteristics that satisfy many of the criteria for establishing rights in tangible property").

68. See sources cited *supra* note 67.

69. E.g., DAVID A. J. RICHARDS, *SEX, DRUGS, DEATH, AND THE LAW* 84-127 (1982) (arguing that properly understood autonomy would lead to permission for prostitution); cf. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 139 (3d ed. 1986) (suggesting that a market in babies could benefit those who can bear children but do not want them and those who cannot bear children but want them).

70. See sources cited *supra* note 67.

71. See WILLIAM BLACKSTONE, 2 *COMMENTARIES* \*2; see also Robert P. Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 *U. CIN. L. REV.* 67, 69 (1985) (arguing that the reading of Blackstone as promoting "absolute" property rights is overbroad, and that he believed property was "'independent of civil institutions' only in the most theoretical sense").

But descriptively, ownership does not entail sole dominion over property.<sup>72</sup> Instead, property is best thought of as a “bundle of sticks,” where the sticks are rights and responsibilities that can be disaggregated from the bundle.<sup>73</sup> Thus, for instance, the law of nuisance may prevent me from using my property in a manner that pollutes the air and disturbs my neighbor.<sup>74</sup> Or, my neighbor may have an easement by necessity across my property, requiring me to permit her to cross my property so that her parcel is not landlocked.<sup>75</sup> She may have this right even as I retain possession of and title to the property. The removal of these “sticks” from my “bundle” of property rights is not generally considered a violation of any fundamental right to my property.<sup>76</sup> That is why even the common law of property includes rights such as the easement by necessity or the nuisance action.<sup>77</sup>

What I do with my property affects other people, and thus, the fact that the body may be analogized to property does not exempt it from this general principle which permits property regulation for the sake of social welfare and efficiency. While extremely low levels of regulation, or even no regulation, might in fact be the best way to achieve social welfare, this social welfare debate over regulation has nothing to do with fundamental rights. For instance, if my body is like any other form of property, whether the state should decriminalize prostitution would depend on whether (1) the practice is inherently unsafe, (2) women are better off overall when the practice is prohibited or when it is permitted, and (3)

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72. See Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022, 1026–29 (2009) (contrasting the classic ownership model of property with more modern relational models of property, such as a proposed stewardship model, that would be more descriptively and normatively appropriate to recognizing cultural property claims); David Fagundes, *Property Rhetoric and the Public Domain*, 94 *MINN. L. REV.* (forthcoming 2010) (manuscript at 25, on file with author) (describing the popular myth of property as dominion over things, and contrasting it to the more accurate conception of property as a “system that structures social relationships with resources”).

73. See Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 742 (1917):

In opposition to the ideas embodied in the passages just given, it is submitted that instead of there being a single right with a single correlative duty resting on all the persons against whom the right avails, there are many separate and distinct rights, actual and potential, each one of which has a correlative duty resting upon some one person.

74. See, e.g., *Aldred’s Case*, 9 *Co. Rep.* 57b, 58a (1610) (finding the building of a pig sty too close to a neighbor’s house to violate the neighbor’s rights).

75. See, e.g., *Wilson v. Smith*, 197 *S.E.2d* 23, 25 (N.C. Ct. App. 1973) (“A way of necessity arises when one grants a parcel of land surrounded by his other land, or when the grantee has no access to it except over the land retained by the grantor or land owned by a stranger.”).

76. For instance, regulation that limits the use of property is not considered a “taking” in the United States even if discrete segments of the property rights are essentially removed, such as ability to exploit airspace above land. See *Penn Cent. Transp. Co. v. New York City*, 438 *U.S.* 104, 130 (1978). Nor, for instance, has labor regulation been considered to violate fundamental substantive due process rights to property or contract in the United States since 1937. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 *U.S.* 1, 49 (1937) (upholding the National Labor Relations Act).

77. See *Wilson*, 197 *S.E.2d* at 26; *Aldred’s Case*, 9 *Co. Rep.* at 58b.

regulation would promote public health and safety better than criminalization.<sup>78</sup>

One might respond to this descriptive point about the legitimacy of property regulation by arguing that the body is a particularly special repository of autonomy. On this view, the body is not like other forms of property, and deserves to be protected by a kind of fundamental right to sole dominion that other property does not entail. A strong proponent of liberalism might go even further and argue that the state should not regulate traditional forms of property either: the state should not prohibit me from being a prostitute *or* from chopping down my trees because both are exercises of my autonomy. But as Part III will show, both of these positions are normatively wrong.

### III. WHY DIGNITY, AUTONOMY, AND CAPABILITY APPROACHES TO RIGHTS IN THE BODY ARE NORMATIVELY WRONG

#### A. *What's Normatively Wrong with Dignity*

Many may feel that my descriptive critique of the dignitarian approach to bodily integrity is not enough reason to be against a dignitarian right to bodily integrity. Maybe the fiction of a body with integrity that cannot be intruded on is a good fiction—one that should be promoted as much as possible. Perhaps we *should* be carving off the body from the environment in which it exists. For example, some argue that it is a good idea to resist technological advances that will blur the lines between bodies and their environments even further, in order to ensure that people continue to think of human bodies and life as sacred. Thus, perhaps we *should* think of dignity as harmed more severely when the body has the formal legal status of property than when it does not. Perhaps we really should consider the person who sold her kidney to have suffered greater dignitary harm than the person who sold the use of her hands to her employer until they were unusable. Or perhaps we really should consider a prostitute to suffer greater dignitary harm than a person who, as a result of poverty, puts his prosthetic arm up for sale on eBay.

In this section, I argue that attempts to resist technological advances and maintain a rigid distinction between humans and property may lead to less, not more, human and social flourishing. Technology that blurs this line holds the potential to improve the lives of those who are sick, injured, or disabled, or those who simply want to improve and modernize their bodies.

I also critique the use of dignity as a justification for even more nuanced rights in the body, ones that permit some forms of body commodification but not others. The reason is that dignity requires a univer-

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78. See sources cited *supra* note 13.

sal account of what is, essentially, a human, and what are the components of human dignity.<sup>79</sup> Such universal accounts of what a dignified life consists of are likely biased, and therefore carry with them the danger of becoming oppressive. This is not only a problem with using dignity to promote a monolithic privacy like right to bodily integrity, it is also a problem with using dignity to justify even more nuanced rights in the body.

### 1. Pluralism

Many have an intuition that a right to control one's own body is fundamental to human dignity, human flourishing, or liberty.<sup>80</sup> This concept might support the right to protect the body from intrusion, but would encompass no right to mutilate one's own body, to consent to euthanasia, sell one's organs, or otherwise show "disrespect" for one's body.<sup>81</sup> The notion that the body has special status is commonly held. For instance, a Department of Health and Human Services task force, in issuing recommendations on organ transplantation, once stated "society's moral values militate against regarding the body as a commodity."<sup>82</sup> It went on to cite a report from the Hastings Center that said:

The view that the body is intimately tied to our conceptions of personal identity, dignity, and self-worth is reflected in the unique status accorded to the body within our legal tradition as something that cannot and should not be bought or sold. Religious and secular atti-

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79. One of the best accounts of this form, and from which we can learn a great deal, is Martha Nussbaum's development and defense of a universal list of basic human capabilities. But her work demonstrates that rigorous attempts to define universal dignitarian human capabilities or rights rely on "intuition," which she acknowledges is subject to "distortion." Our intuitions about what is minimally required for a life with dignity are subject to our own biases. For this reason, Nussbaum is careful to describe the list as contingent and tentative, and also to allow for mechanisms of cultural change that could help us revise the list, such as being able to imagine and reason. MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 83, 174–75 (2006).

80. *E.g.*, *Vacco v. Quill*, 521 U.S. 793, 807 (1997) (clarifying that the right to refuse medical treatment rests in the right "to bodily integrity and freedom from unwanted touching"); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (citing *Rochin v. California*, 342 U.S. 165, 172 (1952) (recognizing the right to bodily integrity); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (recognizing "a general liberty interest in refusing medical treatment"); NUSSBAUM, *supra* note 1, at 78 (including it within her list of capabilities); *see also* MODEL PENAL CODE § 211.1 (1980) (consolidating battery, mayhem, and assault into a single crime); RESTATEMENT (SECOND) OF TORTS §§ 13, 18, 21 (1965) (defining battery and assault).

81. *E.g.*, *Vacco*, 521 U.S. at 808 ("By permitting everyone to refuse unwanted medical treatment while prohibiting anyone from assisting a suicide, New York law follows a longstanding and rational distinction.")

82. Henry Hansmann, *The Economics and Ethics of Markets for Human Organs*, 14 J. HEALTH POL., POL'Y & L. 57, 59 (1989) (internal quotation marks omitted) (quoting U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 3, at 96).

tudes . . . make it plain just how widespread is the ethical stance maintaining that the body ought to have special moral standing.<sup>83</sup>

Many other countries also forbid organ sales.<sup>84</sup> But this view loses its appeal quickly when we consider that what one community may find to express a lack of self-respect, another community may find an ultimately fulfilling and meaningful use of the body.<sup>85</sup> Changing the shape of one's genitals might seem to some "disrespectful" of the body with which one is born, but for some transgender persons, it is a self-affirming expression of self and identity. Having sex in exchange for money may be experienced as degrading for some prostitutes, but can be a fulfilling career for other prostitutes. For instance, some prostitutes defy the presumption that emotional connections cannot be made through commodified sex, by forming friendships with clients, or having "favorite" clients.<sup>86</sup> Which, if any, is most degrading—getting paid to have an advertisement tattooed on one's arm, getting paid to have sex, or getting paid to give a massage? The answer will surely be culturally contingent. Covering one's breasts or hair could be alternately understood as expressing shame or expressing self-respect.<sup>87</sup> In a pluralist society, dignitary concerns seem an inadequate justification for forbidding people from commodifying their bodies—they rely on conceptions of human nature or what constitutes a good life that are not universally or even widely shared, such as religious or "intuitionist" conceptions.

One of the most famous proponents of this dignitarian approach, Leon Kass, the chair of the President's Council on Bioethics from 2002–2005, encourages us to listen to the "wisdom of repugnance" in critiquing certain practices as harmful to human dignity.<sup>88</sup> Kass has lamented not only the immorality of reproductive technologies, but also the offensiveness of licking ice cream cones in public.<sup>89</sup>

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83. Kevin W. Wildes, *Libertarianism and Ownership of the Human Body*, in OWNERSHIP OF THE HUMAN BODY, *supra* note 37, at 143, 152 (quoting U.S. DEP'T OF HEALTH & HUMAN SERVS., *supra* note 3, at 96).

84. *E.g.*, Transplantation of Human Organs Act, No. 42 of 1994 (India); Human Tissue Gift Act, R.S.B.C. 1996, ch. 211 § 10 (Can.). *See generally* WORLD HEALTH ORG., HUMAN ORGAN TRANSPLANTATION: A REPORT ON DEVELOPMENTS UNDER THE AUSPICES OF WHO, 1987–1991, at 15–26 (1991) (surveying and listing countries that ban organ sales and those that do not).

85. *See* Wildes, *supra* note 83, at 147 ("Much of the effort to regulate and constrain the use of the human body is embedded in a moral language of 'sanctity', 'dignity', 'justice', 'integrity', and 'solidarity' that assumes particular moral commitments.").

86. Lucas, *supra* note 22, at 248, 252.

87. *See* FADWA EL GUINDI, VEIL: MODESTY, PRIVACY AND RESISTANCE 13 (1999) (discussing the evolution of differing views pertaining to veiling practices); *cf.* CAROLYN G. HEILBRUN, THE EDUCATION OF A WOMAN: THE LIFE OF GLORIA STEINEM, at xviii (1995) (describing Steinem's "feminis[m] in a miniskirt" as a walking "contradiction").

88. Leon R. Kass, *The Wisdom of Repugnance*, THE NEW REPUBLIC, June 2, 1997, available at [http://www.catholiceducation.org/articles/medical\\_ethics/me0006.html](http://www.catholiceducation.org/articles/medical_ethics/me0006.html).

89. LEON R. KASS, THE HUNGRY SOUL: EATING AND THE PERFECTING OF OUR NATURE 148–149 (1994):

Worst of all from this point of view are those more uncivilized forms of eating, like licking an ice cream cone—a catlike activity that has been made acceptable in informal

Some members of this camp would permit modifications to the body that do not entail the sale of the body, its parts, or uses, such as the free donation of an organ to a sibling in need, or the creation of an animal-human hybrid over which nobody holds intellectual property rights.<sup>90</sup> Others would object even to some of these modifications that could not fairly be called “commodification”<sup>91</sup> because they involve no economic exchange. But what characterizes this camp is the argument that the root of the right to bodily integrity is a dignitary one. Because people disagree over the contours of dignity, what exactly constitutes an offense against dignity varies widely, and this is why the group contains both moral conservatives and liberals.

This debate over whether a change to or use of one’s body is self-respecting appears even when the change is widely thought of as a medical “improvement.” For instance, obtaining a cochlear implant that permits the user to hear might seem a thoroughly unobjectionable alteration of one’s body to many. But to some members of the deaf community, it can represent a rejection of one’s self, as well as one’s community—a selling out, if you will, to dominant norms of communication and language.<sup>92</sup> Thus, in a pluralistic society, we cannot rest our rights in the body on what actions demonstrate respect for the body and what actions do not. To do so would rigidly fix the definitions of what are appropriate uses and forms of the body.

Moreover, hewing to convention on the appropriate use and forms of the body will not only lead to stagnation, it lacks compassion. For instance, in his 2006 State of the Union speech, former President George W. Bush opposed animal-human hybrids as one of many technologies that the religious right fears will blur the line between humans and the rest of the world.<sup>93</sup> Even more recently, in March of 2008, the Vatican published a list of seven modern sins that includes genetic manipulation, morally debatable experiments, and violation of the fundamental rights of human nature.<sup>94</sup> But what if animal-human hybrids or stem cell re-

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America but that still offends those who know why eating in public is offensive. I fear that I may by this remark lose the sympathy of many readers, people who will condescendingly regard as quaint or even priggish the . . . view that eating in the street is for dogs. . . . This doglike feeding, if one must engage in it, ought to be kept from public view, where, even if *we* feel no shame, others are compelled to witness our shameful behavior.

90. For instance, United States law permits voluntary organ donation while forbidding organ sales. 42 U.S.C.A. § 274e(a) (West 2009).

91. *See id.*; *see also* sources cited *supra* note 19.

92. *E.g.*, *SOUND AND FURY* (PBS 2000) (documenting a deaf child’s wish to obtain a cochlear implant in defiance of her deaf parents’ wishes).

93. George W. Bush, Address Before a Joint Session of Congress on the State of the Union (Jan. 31, 2006) (transcript available at [http://www.c-span.org/executive/transcript.asp?cat=current&code=bush\\_admin&year=2006](http://www.c-span.org/executive/transcript.asp?cat=current&code=bush_admin&year=2006)).

94. *See* sources cited *supra* note 19.

search can be used to alleviate a patient's severe pain?<sup>95</sup> Other grounds for opposing these technologies may exist, but a conventionalist's argument from "the wisdom of repugnance"<sup>96</sup> is a particularly unconvincing basis in a pluralistic society. Similarly unconvincing is an argument rooted in the desire to preserve categorical distinctions between persons and property, without a theory of why such a distinction is so worthwhile as to overcome the claims of persons who are physically suffering and their families. Both the kidney seller, who could use compensation to improve her life, and the kidney purchaser, whose health is dramatically improved through transplantation, must be answered to.<sup>97</sup>

## 2. Dignity of the Body as a Social Justice Concept?

Some argue, in contrast, that compassion actually requires this formalist distinction between people, who are afforded special status, and property.<sup>98</sup> On this view, we must hold the line between persons and property fast, as a way of protecting persons with disabilities and other biologically disfavored persons, who might otherwise be deemed not worthwhile. The concern is that such persons would have their lives, security, and other needs "balanced" against other interests, rather than respected as inalienable and non-negotiable rights.<sup>99</sup> Life as a person with disabilities, an abnormal person, or even an average person who refuses to bring his or her body into conformance with current cultural norms, would become a "choice" that would not be protected.<sup>100</sup>

For instance, some argue that treating embryos as mere property could cause the destruction of lesbian and gay persons or persons with disabilities through genetic selection of "straight embryos" or "able-bodied embryos."<sup>101</sup> The "gay embryos" or "disabled embryos" could simply be destroyed, as one's property can be destroyed. Or perhaps the "straight, able-bodied embryos" would command a higher price in the

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95. Stem cell research is widely discussed for its potential to lead to the development of treatments for diseases, and animal-human hybrids might be used to develop organs for transplantation into humans. See Bagley, *supra* note 2, at 472, 520.

96. See Kass, *supra* note 88.

97. E.g., Volokh, *supra* note 4, at 1835 (arguing that forbidding organ sales violates the right to self defense of those who need organs).

98. See Jean Bethke Elshtain, *The Body and the Quest for Control, in IS HUMAN NATURE OBSOLETE?: GENETICS, BIOENGINEERING, AND THE FUTURE OF THE HUMAN CONDITION* 155, 161 (Harold W. Baillie & Timothy K. Casey eds., 2005).

99. See, e.g., *id.* at 155-61.

100. *Id.* at 161 (arguing that parents who chose not to abort children with Down's Syndrome and other disabilities would be viewed as having made a choice to do so that society need not support).

101. See e.g., Jennifer S. Geetter, *Coding for Change: The Power of the Human Genome to Transform the American Health Insurance System*, 28 AM. J.L. & MED. 1, 27 (2002) ("The very phrase 'wrongful birth' suggests that the birth of the disabled child was wrong and should have been prevented." (internal quotation marks omitted) (quoting *Taylor v. Kurapati*, 600 N.W.2d 670, 688-91 (Mich. Ct. App. 1999))).

market than “gay embryos” or “disabled embryos,” creating a significant status harm for lesbian and gay persons and persons with disabilities.<sup>102</sup>

In another example, some egalitarians argue that commodification of the body could permit economic disparities to widen between those who can afford financially valuable upgrades to their bodies and those who cannot.<sup>103</sup> Perhaps an upgrade to the body would give a person more abilities—such as strength or intelligence—that would be a great advantage in the employment market. Those who could not afford such upgrades would find it increasingly difficult to earn a good wage, once forced to compete with those whose greater wealth, or whose parents’ greater wealth, afforded them the opportunity to buy into privately owned body modifying technology.

Thus, some members of the dignitarian camp would forbid property rights in embryos, in order to prevent perhaps their destruction and likely their sale on the basis of their genetic content. Others might forbid employers from discriminating against those who fail to get certain upgrades to their bodies.

The idea is that the special status of the natural human body must be maintained to prevent some bodies from being worth less than other bodies; otherwise our impulse is to require “natural” bodies to change, rather than changing the environment and society that is inhospitable to them. In other words, our impulse to accommodate different bodies, especially those that are disabled, would be hindered.<sup>104</sup>

However, intuitive ideas about what is natural and what is not do not necessarily lead to protected bodies because aspects of our environment may feel intuitively natural. For instance, the existence of stairs in many buildings and lack of wheelchair ramps may seem a natural, given state of affairs. It took years of activism and scholarly writing by disability advocates to interrogate the medical model of disability and instead promote the “social model” of disability, under which we can distinguish between physical impairment and the social conditions, such as the use of stairs rather than ramps, that turn an impairment into a disability.<sup>105</sup> As

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102. Aside from ignoring that cultural pressure to perform a heterosexual identity is, and in many cultures has been, enough to crush and subordinate lesbian, gay, and bisexual practice and identity, this argument also fails to recognize that some persons would prefer to have gay children or to be gay, and would choose those options. See generally Eve Kosofsky Sedgwick, *How to Bring Your Kids up Gay*, 29 *SOC. TEXT* 18 (1991).

103. See HUGHES, *supra* note 45, at 130–31 (describing the Center for Genetics and Society’s argument that cloning and the creation of inheritable genetic modifications will lead to such a situation).

104. E.g., Elshtain, *supra* note 98, at 163 (“[S]urroundings in which bodies are situated fades as the body gets enshrined as a kind of messianic project.”).

105. See Corker & Shakespeare, *supra* note 42, at 3 (describing the shift from the medical model of disability to the social model, in which activists raised awareness of the fact that impairment alone does not cause disability, but rather social and economic conditions overlaying impairment).

another example, a person with a severe allergy to unprocessed nuts, or to locally native plants, could easily be subject to a belief that his or her body is improperly adapted to the “natural” environment, if we simply rely on intuitive ideas about what is natural. And lesbian, gay, and bisexual people have long been accused of having “unnatural” sexual desires because same sex sexual activity does not “naturally” lead to reproduction. Thus, what sexual minorities do with their bodies is often left unprotected by the appeal to intuitions about nature.

And indeed, it is not clear that in all cases changing the environment is necessarily more compassionate than changing bodies. It may sometimes be better to alleviate suffering by changing what we have previously thought to be “the central core of our humanity,”<sup>106</sup> rather than by changing the environment. A formalist approach that reveres the organic body or listens to the “wisdom of repugnance” does not adequately allow for this, and can therefore seriously harm the rights of those with different bodies, too.

For instance, transgender persons who choose to obtain body modifying surgery or engage in body disguising dress practices are changing their bodies, rather than the environment, both of which are probably contributors to gender identity disorder (“GID”).<sup>107</sup> It is unclear why the insistence that we change the environment, rather than permitting transgender persons to change their bodies and clothing, is a superior response to GID. This is especially so when we realize that awareness of and respect for the bodies of transgender persons may contribute to positive changes in the cultural environment. Transgender persons who obtain body-modifying surgery or dress in a manner that obscures parts of the body do not necessarily accommodate or reconstitute social constructions of gender—these practices can destabilize those constructions.<sup>108</sup> Questioning gender constructions and stereotypes can then lead to changes in the environment and social order, rather than stubborn refusals to change the environment in which our bodies exist.

As an example of where this desire to glorify and dignify the natural body can lead, we can look to Jean Elshtain. Elshtain at times appears to be a defender of those who are different, such as persons with disabilities and sexual minorities, but she also expresses concern with a society that might no longer feel disgust towards a human body “riddled with pieces of metal.”<sup>109</sup> Yet, that body riddled with metal may be a person with disabilities who, like all of us, is using the available technology to live the

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106. Elshtain, *supra* note 100, at 167.

107. I use the term GID because it is a well-recognized term, not to express any agreement with the medical characterization of many transgender persons as having a “disorder.” See Dean Spade, *Resisting Medicine, Re/modeling Gender*, 18 BERKELEY WOMEN’S L.J. 15, 19–21 (2003).

108. Judith Butler, *Imitation and Gender Insubordination*, in THE LESBIAN AND GAY STUDIES READER 307, 313–14, 318 (Henry Abelove et al. eds., 1993).

109. Elshtain, *supra* note 100, at 167.

best life possible. Alternately, it might be a person who elects to have numerous piercings as an important religious or identity related practice. Revulsion towards such a body doesn't seem compassionate at all.

I believe the worth of different bodies, and the rights of persons with different bodies, is better located in the public's interest in people with different bodies as a means of facilitating cultural change, rather than in a naturalist or intuitionist account of "what is a human." For instance, we can value the bodies of persons with hearing impairments by looking at the richness and beauty of sign language, rather than by valorizing the "natural" state of the impairment and rejecting the wishes of the deaf child who desires a cochlear implant.<sup>110</sup> This way of valuing different bodies—based on their important place in cultural evolution—might work better for persons with disabilities because it recognizes the fact that people are constituted by and within technology. It is persons with disabilities for whom this fact makes a great deal of material difference. In contrast, the naturalist approach might lead to less support for welfare rights to technology that would assist persons with disabilities. Why would a government-funded health care system pay for a cochlear implant, or for a wheelchair, if deafness or inability to walk were revered as "natural"?

The naturalist account is of course similarly dangerous for persons with minority sexual identities. What is "naturally human" or "intuitively" beautiful or repulsive is always contested, and plenty of persons who promote this formalist approach also promote the subordination of sexual minorities and women.<sup>111</sup> If we reflect on how societies have historically treated sexual minorities and persons with disabilities, the "wisdom of repugnance" does not, in my view, seem to be the safest approach for these groups.

Abandoning a naturalist or intuitive source of rights in favor of this approach, geared at social and cultural change, need not mean that people's bodies are only worth something when they have the capacity for rational, political engagement. Instead, we can recognize that bodies are sites of identity and cultural performance, and are therefore worth something to others, even when they are mentally or otherwise disabled in a way that makes traditional political participation impossible. People can be loved, be part of society, and be part of our culture without being

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110. In the documentary film *Sound and Fury*, a young child's deaf parents forbade her from receiving a cochlear implant, after much debate with other members of the deaf community and both hearing-impaired and non-hearing-impaired family members. They determined that the implant would be a rejection of the rich and valuable deaf community they were a part of and that was often discriminated against unjustly. *SOUND AND FURY* (PBS 2000). While views on the parents' decision may vary, there is something tragic in the circumstances that led to the parents being unable to value both the deaf community and their daughter's desire to experience what hearing is like.

111. E.g., Leon R. Kass, *The End of Courtship* (pt. 1), *BOUNDLESS*, Oct. 13, 2005, <http://www.boundless.org/2005/articles/a0001154.cfm> (arguing that women should be modest and mothers).

part of our politics.<sup>112</sup> Thus, we don't need an organic account of who is naturally a human in order to value many different kinds of bodies. We can recognize the importance of embodiment without revering the types of embodiment we are used to, or responding with disgust to the types that we are not.

*B. What's Normatively Wrong with Autonomy*

I have argued that the property-like approach to bodily integrity is descriptively wrong about property—fundamental property rights are not violated merely because they are heavily regulated. But as noted in Part II, some might argue that normatively, we *should* protect either property rights in the body or even all property rights against regulation, as a component of autonomy. In this section, I argue against the use of autonomy as a basis for property-like fundamental rights in the body or any other form of property that would trump typical political concerns such as public health or even parentalism.

One might argue from an autonomy or personhood standpoint that we *should* carve out a property-like right in our bodies, marked off by the physical borders of the body. This right would be different from other property rights in that it would be freer from restraints on alienation and would truly serve as a trump of typical political concerns driving regulation. The idea is that the body, more than property, is particularly fundamental to personhood or autonomy.<sup>113</sup>

But property, too, can be a crucial part of personhood and autonomy, much more so than certain body parts. Margaret Radin, for instance, has persuasively argued that certain forms of property are properly understood as personal in nature, such as wedding rings or houses.<sup>114</sup> The clothes I choose to wear may be a more important component of my personhood than my fingernails, as another example.

Regulation of property can even impact personhood via the body itself. This occurs whenever property is tied to the use and experience of one's body. For instance, if the state forbids the sale of corsets, makeup, and high heels, it infringes on the manner in which I make my body culturally visible and the manner in which I physically experience my body. The same is true when the state regulates sex toys and medical devices. Food and drug regulation limits what we can ingest, and the Controlled

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112. See MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* 96–106 (2006).

113. Cf. Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 800 (1989) (arguing that control of the body is “formative”).

114. See Radin, *Property and Personhood*, *supra* note 20, at 959–61.

Substances Act can determine whether someone's body exists in pain or not.<sup>115</sup>

By arguing that the body is not a special repository of autonomy or personhood, I do not deny that the body may have a special *relationship* to autonomy, stemming from the cognitive force that being physically controlled can have. It may be impossible in many circumstances to mentally "overcome" experiences like pain or physical restriction, and therefore control of another's body may amount to the destruction of that person's autonomy<sup>116</sup> in a way that control of their property could not compare. Torture has, for this reason, been described as "unmaking the world" of the victim.<sup>117</sup> It is easy to see, with this in mind, why one concerned with autonomy would argue that the government should not be permitted to control the individual's body in a manner that is cognitively overpowering, such as by forcing the individual to endure pain, requiring the individual to experience pregnancy (or prohibiting the individual from having such an experience), or prohibiting the individual's use of psychoactive drugs.

But the claim that regulation of kidney sales, prostitution, manual labor, and other forms of body commodification interferes particularly egregiously with autonomy merely because these activities involve parts or uses of the body would not be supported. An environmental regulation that prevents me from chopping down trees on my land and selling them is no less cognitively overpowering than a public health regulation that prevents me from selling my kidney or engaging in prostitution. Even though having a kidney removed or engaging in sex might have cognitive effects that an individual desires and that cannot be duplicated in any other way, a prohibition on engaging in these activities for money doesn't prevent the individual from having those experiences at all: the individual can still give the kidney away for free, or consent to sex for free.

One might respond to this with the even stronger libertarian view that all property rights should trump typical regulation, whether property rights in the body or not. The problem with this view normatively is that commodification itself, whether of the body or other material, is not en-

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115. See *Gonzales v. Raich*, 545 U.S. 1, 7 (2005) (noting, in the context of a case upholding the Controlled Substance Act's prohibition on possession of marijuana as a valid exercise of Congress's commerce clause authority, that plaintiff's "physician believes that forgoing cannabis treatments would certainly cause [her] excruciating pain and could very well prove fatal").

116. Rubenfeld, *supra* note 113, at 788–89:

Yet power need not be directed at the undeveloped mind to have this effect; it may also do so if directed at the fully-developed body. . . . Indeed, bodily control may be the more effective medium to the extent that thought cannot, as it were, meet such control head on, as it might when confronted by an idea that it is told to accept. . . . [I]ts effect can be *formative*, shaping identity at a point where intellectual resistance cannot meet it.

117. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 37–38 (1985).

tirely unproblematic for autonomy, as choices can be coerced not only by the state but also by private actors. If the state attempts to promote autonomy by refraining from all regulation of what can and cannot be done with the body altogether, those with private sources of power will be free to interfere with the choices of others. When we live as members of a society, our choices concerning our bodies will never be absolutely “free,” in the sense that they are uncoerced, uncontrolled, or undetermined by others.<sup>118</sup>

For instance, when a person has a disability and obtains prosthetics to assist with the disability, this is in part because the person’s body has been socially constructed as disabled. If we all used sign language to communicate, fewer deaf persons would desire cochlear implants. In another example, if we failed to classify persons on the basis of the shape of their genitals, fewer transgender persons would desire genital surgery. If actresses didn’t receive massive sums of money for looking eternally young, would so many of them “choose” to get injected with Botox?

Someone with a great deal of economic power can offer money to an employee in exchange for the performance of a job, such as manual labor, that eventually damages the employee’s body.<sup>119</sup> Or, someone who owns many buildings will, through her choices about whether to install wheelchair ramps, influence the mobility of many persons with disabilities. Markets that reward attractiveness can incentivize cosmetic surgery.<sup>120</sup> Even the most typical forms of employment, such as waitressing or bartending in a “uniform of makeup,”<sup>121</sup> raise concerns about whether selling control over one’s body in this way is a choice made “freely.”<sup>122</sup> And does someone have sufficient autonomy if he desires a wheelchair for basic mobility, but cannot afford one and is not provided one by his society?<sup>123</sup> In other words, persons are unavoidably embodied in the context of their environment, an environment largely made up of legal relationships of property and contract.

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118. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 209–222 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977); see also Rubinfeld, *supra* note 113, at 770–81 (1976) (making this point with respect to sexuality and Citing Foucault’s *The History of Sexuality*).

119. See *supra* text accompanying notes 36–39.

120. See *supra* note 42 and accompanying text.

121. *Jespersen v. Harrah’s Operating Co.*, 392 F.3d 1076, 1084 (9th Cir. 2004), *aff’d*, 444 F.3d 1104 (9th Cir. 2006) (en banc).

122. See *supra* note 40 and accompanying text.

123. See Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, arts. IV, XX U.N. Doc. A/RES/61/106 (Jan. 24, 2007) (stating obligations of parties to promote research into and affordable access to aids for persons with disabilities, including mobility aids); cf. Dean Spade, *Documenting Gender*, 59 HASTINGS L.J. 731, 782–91 (2008) (documenting the double bind created by, on the one hand, the exclusion of gender confirming medical care such as sex-reassignment surgery or hormone therapy from Medicaid and other state funded health coverage, and, on the other hand, state demands that transgender persons obtain such treatment in order to legitimize their status and be appropriately gender classified).

In critiquing the notion that inviolable private property-like rights best promote autonomy, I am not advocating the eradication of private property. That, too would threaten autonomy, since state coercion is no less a form of coercion than economic coercion. Moreover, even without economic and state coercion, social and cultural coercion remain. For instance, one might obtain cosmetic surgery even in the absence of financial incentives to do so because one desires an intimate relationship, and cultural norms may prefer people with certain kinds of bodies. Or, one might be pressured by family members to donate a kidney to a sibling.

Thus, there is no mechanism by which we can “maximize” autonomy over the body. All we can do is make decisions about where to allocate the coercive power that will inevitably influence individual choices concerning the body.<sup>124</sup> We might choose to allocate all that power in totally unregulated private hands, through a strict libertarian “no state action” doctrine. Or, we might choose to allocate that power in the hands of those with cultural capital, while forbidding or limiting its exercise in economic transactions. Thus, we might limit rights to contract away one’s control over one’s body, while permitting families and other social groups to coerce individuals into giving up that control. The problem with the autonomy argument is that it doesn’t help us choose from these alternatives. We cannot compare all allocations for “levels of autonomy.” Some would even say that the notion of autonomy is itself essentially an illusion for anyone who lives in a social context.<sup>125</sup> But even if we do not take this strong a position in critiquing autonomy, it is still a poor basis for a right in one’s body that trumps typical regulation.

*C. The Capability Approach—Combining Dignitary Approaches with Liberal “Choice”*

There are some essentially liberal justifications of human or fundamental rights that acknowledge the problem of private coercion. These accounts therefore reject the libertarian approach in favor of one that might require positive efforts to promote truer autonomy. In this section, I consider and reject a strong example of such an account as an alternate way of justifying human rights in the body.

Martha Nussbaum’s capability approach, drawing on Amartya Sen’s capability approach to measuring welfare,<sup>126</sup> uses an intuitive approach to reach a list of “capabilities” she argues are essential to human dignity,<sup>127</sup> and she includes bodily integrity in this list.<sup>128</sup> However, she

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124. See FOUCAULT, *supra* note 118, at 194.

125. *Id.*; see also MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 159 (Robert Hurley trans., Pantheon Books 1978) (1976) (“The irony of this deployment is in having us believe that our ‘liberation’ is in the balance.”).

126. See generally AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 131–37 (1999).

127. NUSSBAUM, *supra* note 1, at 74–75.

128. *Id.* at 78.

would not require one to maintain one's own bodily integrity, but would only require, in a liberal way, that each person has the *capability* to do so.<sup>129</sup> Moreover, she includes holding property on the list of capabilities.<sup>130</sup> Thus, her approach to rights over one's body combines elements of the traditional liberal autonomy idea with the intuitionist dignity idea.<sup>131</sup>

However, what distinguishes Nussbaum from a libertarian is that for this capability to be provided to all, in the face of the problem of private coercion and control described above, positive government action may be necessary. As a result, the capability for bodily integrity will in many cases need to come at the expense of some portion of the capability to hold property or obtain employment. It wouldn't make sense to "trade off" these two important and essential capabilities against each other, under the approach,<sup>132</sup> but it is also true that not all the capabilities can necessarily be maximized simultaneously. They are instead treated as minimum thresholds—thresholds that incidentally do not appear to be met for many of the world's citizens. Thus, one capability might be reduced in order to promote another, as long as one did not reduce the capability below the minimum threshold. This approach is intended to be flexible,<sup>133</sup> which is part of why it is very coherent, as well as compassionate and realistic in a way that neither the "wisdom of repugnance" approach nor the libertarian approach is. However, the capabilities approach does not seem to help us answer the question of *when* freedom of contract or property must be regulated in order to provide and promote the capability for bodily integrity, and when it should not be. The purpose simply doesn't seem to be to provide a principle for deciding that question.

Moreover, the justification for regulating contract, property, and other forms of individual choice stems, at bottom, from intuitions. Nussbaum's approach is self-consciously "intuitionist."<sup>134</sup> Thus, despite her use of "capabilities," rather than fixed requirements for a life worth living, this soft liberal approach still takes admittedly biased intuitions and uses them universally<sup>135</sup> as a justification for regulating behavior. Nuss-

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129. *See id.* at 87.

130. *Id.* at 80.

131. *Id.* at 91.

132. *See* NUSSBAUM, *supra* note 79, at 167.

133. *Id.* at 78–79:

I consider the list as open-ended and subject to ongoing revision and rethinking, in the way that any society's account of its most fundamental entitlements is always subject to supplementation (or deletion).

I also insist . . . that the items . . . be specified in a somewhat abstract and general way, precisely in order to leave room for the activities of specifying and deliberating by citizens and their legislatures and courts.

134. *Id.* at 174–75.

135. *Id.* at 78 ("The capabilities approach is fully universal . . . . The approach is in this way similar to the international human rights approach . . . ."). It is important to note, though, that Nussbaum does not argue that the universal nature of the list "license[s] intervention with the affairs of a

baum is laudably cautious about all this, and indicates for this very reason that the list of capabilities must be updated periodically, but the strong risk of biased intuitions being used to justify oppressive regulation still remains.

#### IV. WHAT THE BODY HAS TO DO WITH FUNDAMENTAL RIGHTS

Does all this critique mean that human rights have nothing to do with bodies? Do rights have nothing to do with controversial questions such as whether to permit prostitution, whether the state may force vaccination, or whether organ selling should be permitted? In other words, should all these questions only be resolved on the basis of typical political and welfare concerns, with no rights “trumping” those concerns? Having critiqued the autonomy, dignity, and capability approaches to resolving these questions, in this Part I propose a different ground for rights in bodies. However, this justification would not support a right to “bodily integrity,” alienable or not.

##### A. *Proceduralist Theories of Rights*

Autonomy, dignity, and even compelling combinations of such concepts are not the only reasons in which we can ground fundamental rights. Rights can also be vehicles for promoting social and cultural change—ways of helping us update our intuitions. Free speech rights, for instance, have been promoted on this basis.<sup>136</sup> While laws, social norms, and cultural values will always determine what choices are available to us,<sup>137</sup> we can use rights as vehicles for ensuring that those norms can change, and that their evolution is not determined solely by orthodoxy.<sup>138</sup> Such a conception of rights would promote speech rights, for instance, on the proceduralist theory that this contributes to a democratic culture, or even to a search for truth,<sup>139</sup> rather than on an autonomy theory. This might lead to obligations that the government subsidize the speech of those with less capital, or limit freedom of contract so as to protect employee and tenant speech as against the property rights of employers and landlords.

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state that does not recognize them.” *Id.* at 80. She states that “military and economic sanctions are justified only in certain very grave circumstances.” *Id.*

136. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948) (arguing that access to unconstrained information and ideas is necessary to an informed populace and the functioning of democracy).

137. See Kahan, *supra* note 14, at 115 (arguing that even when consciously justified in secular, pluralist terms, laws will often be driven by the expression of cultural values and repression of deviant moral values).

138. Ramachandran, *supra* note 9, at 18.

139. D.A. LLOYD THOMAS, *IN DEFENCE OF LIBERALISM* 36 (1988) (“The case for a liberal set of individual rights does not rest on the assumption that we already know what is intrinsically valuable. Rather, it rests on a plausible claim about how it is possible to have better formed beliefs about what is valuable.”).

Of course, law cannot eradicate social norms, and we probably wouldn't want it to. However, it is important that those norms be capable of changing. In order for culture to be capable of change, individuals and subcultures must be better empowered to challenge and contribute to the construction of culture: some level of cultural velocity must be present.<sup>140</sup>

The goal of maintaining cultural velocity shares similarities with Jack Balkin's thesis that in addition to a democratic political system, we need a democratic culture.<sup>141</sup> Protecting the ability of individuals to form affiliations, beliefs, and values—to engage in making culture—is important, I argue, not because those abilities are crucial to autonomy, but rather because those abilities contribute to cultural exchange and evolution.<sup>142</sup>

### *B. Cultural Velocity and Identity*

What I add to this conception is the view that identity is a precursor to cultural and political meaning making. I define identity as the particular values, beliefs, and aspects of ourselves that we deem so important we consider them self-defining. “Our aversions, desires, beliefs, and choices all make up our identity, but our identity in turn then affects our aversions, desires, beliefs, and choices.”<sup>143</sup> “Even when an aspect of identity seems ‘unchosen,’ such as a biological sex or an ethnicity, we still choose, albeit sometimes within very strong and other times within very weak constraints, whether that ‘immutable’ trait will be part of our identity.”<sup>144</sup> Although those choices will always occur within constraints, law can carve out some space for the exercise of agency in the construction of identity. In this way, identity can be self-defining in the good sense of a set of values and practices that one holds dear (but nevertheless could be different), rather than self-defining in the bad sense of a set of stereotypes about a group that are resistant to change. Why would we want to promote diversity and reformability of identity? Because identity

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140. The idea of cultural velocity as a ground for deriving countermajoritarian rights shares similarities with a consequentialist argument made by David Lloyd Thomas in *In Defence of Liberalism*. See *id.* Thomas defends liberalism on utilitarian grounds, but on a unique form of utilitarianism that he calls “experimental” utilitarianism. He rejects traditional utilitarianism because it would require defining what is of utility—what is good, or of value, and he argues that we do not know the answer to that question. However, he argues that we can defend those liberal rights, which would contribute to discovering what is of value, by permitting experiments, in a sense, in what should be valued. *Id.* at 36–37.

In a future piece, I will more thoroughly explore the concept of cultural velocity as a justification for human rights more generally. For purposes of this article, however, it is sufficient to note that such a concept could explain or justify rights in bodies, but not rights over the “integrity” of bodies.

141. See Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3 (2004).

142. See Ramachandran, *supra* note 9, at 31–33.

143. *Id.* at 32.

144. *Id.* For a similar conception of identity as “choice” rather than as “discovered” fact, see AMARTYA SEN, *THE ARGUMENTATIVE INDIAN: WRITINGS ON INDIAN HISTORY, CULTURE AND IDENTITY* 350–52 (2005).

is determined in part by cultural norms, but it is also a ground from which to rally for changing those norms.<sup>145</sup>

We cannot ensure total “freedom of identity” or “freedom of personhood” for the same reasons we cannot maximize “autonomy.” Such freedom is to some extent an illusion, given that even our physical bodies are constructed in part by their social context. Our choices are heavily constrained. But in the face of those constraints, we often see resistance. Sexual minorities, racial minorities, disability activists, and those excluded from aristocracy and nobility are just a few examples of persons who have engaged in culture wars, perhaps not securing themselves “liberation,”<sup>146</sup> but certainly moving culture in radical ways. This is one of the reasons often given for protecting speech rights—such rights facilitate that cultural and political change.

What is often neglected, though, is that resistance to current cultural norms need not take the form of traditional political activism, speech, and interest group formation. Certain identity practices, such as dress, sexual practice, speech, mannerism, body modification, and the like, can themselves be subversive, destabilizing acts that have cultural effects.<sup>147</sup> Judith Butler has described drag as such a practice, calling it “gender insubordination.”<sup>148</sup> These culturally disrupting, identity disrupting practices have been valorized by postmodernists and queer theorists, though their work to do so has often seemed too “academic,” not having any practical import.<sup>149</sup> Part of what makes this celebration of subversion seem pointless is that the prescription to disrupt identity or subvert cultural norms has limited use for someone who will lose her job, be kicked out of school, or sent to jail for doing so.<sup>150</sup> That is where legal rights come into play. Law can carve out some space for individuals, subcultures, families, and other groups to form different, challenging identities, and even reform them, yet still have a job, shelter, and other needs met that would permit participation with the broader culture. In this way, rights can be used to ensure that some level of cultural velocity is maintained.

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145. Ramachandran, *supra* note 9, at 93.

146. See FOUCAULT, *supra* note 118, at 289.

147. Cf. Judith Butler, “Appearances Aside,” 88 CAL. L. REV. 55, 63 (2000).

148. See Ramachandran, *supra* note 9, at 22 (citing Butler, *supra* note 108, at 307).

149. As Seidman has explained in an illuminating history of queer theory’s development, “[t]o the extent . . . that poststructuralist perspectives . . . [has become] a politics of the disruptive gesture, they lack coherence.” STEVEN SEIDMAN, *DIFFERENCE TROUBLES: QUEERING SOCIAL THEORY AND SEXUAL POLITICS* 136 (1997). As he has also noted, “Underlying this politics of subversion is a vague notion that this will encourage new, affirmative forms of personal and social life, although poststructuralists are reluctant to name their social vision.” *Id.* at 134.

150. See Butler, *supra* note 147, at 63:

For this challenge to take place, it must be possible for a person whose appearance calls the category of the person into question to enter into the field of appearance precisely as a person. . . . [A] power that is ‘had’ to the extent that such a person is not first defeated by the powers of discrimination.

*C. Applying Proceduralist Rights in Practice*

Of course, many behaviors are a part of identity formation and reformation. Dressing a particular way is part of identity formation and reformation, but so is smoking, reading certain magazines, speaking in particular dialects, and so on.<sup>151</sup> Law cannot protect the freedom to engage in all such behaviors, especially if we want law to protect these behaviors not just against the state, but to also positively regulate employers, landlords, and other private actors who would use their economic power to direct these behaviors. Thus, although the proceduralist principle of promoting cultural velocity represents a non-intuitionist, consequentialist ground for recognizing certain rights, a practical application of this principle to create actual legal rights must depend on cultural context.<sup>152</sup> We will have to choose some identity formative behaviors to protect legally.

In many societies, freedom of speech will be a sensible right to carve out as a means of promoting cultural velocity. I have argued that freedom of dress in the United States is also a sensible right to carve out, in part because of the unique way in which dress is experienced as both social and deeply personal, experiences that are historically and culturally contingent.<sup>153</sup> I argued that it even ought to be protected to some degree against private regulation, such as in the workplace. How that protection could be functional in the context of American capitalism of course also required attention to the cultural and political context. Thus, a relatively weak “reasonable accommodation” framework was what I proposed.<sup>154</sup> But in a society in which physical appearance is not a particularly common site of identity exploration and formation, a site that is frequently experienced as uniquely personal or physical in nature, for example, it might not make sense to recognize a freedom of dress. Or, in particular professions, such as modeling and acting, it might also not make sense to recognize a freedom of dress.<sup>155</sup>

Once rights that promote cultural velocity are fleshed out in this way, with an eye to the particular context, one might question how this differs from many modern forms of liberalism, such as Martha Nuss-

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151. See Ramachandran, *supra* note 9, at 25, 33.

152. Cf. Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1078 (2007). Riley has argued that good governance need not look like liberal democracy in every cultural context, but has still articulated some core components of good governance that are broadly applicable to many sovereigns, such as the ability to dissent and the ability to exit. *Id.* at 1061–80. The cultural velocity principle would likely result, in virtually every society it were applied to, in protection of the formal ability to dissent and to exit. I believe, however, that these formal abilities would rarely be quite enough to ensure a significant amount of cultural velocity—the amount required to ensure that a culture can evolve and meet new challenges. Room to develop the kinds of different identities and affiliations that lead to the desire to dissent and exit is required, in my view.

153. See Ramachandran, *supra* note 9, at 25.

154. *Id.* at 61.

155. In fact, I proposed a categorical statutory exception for these professions. *Id.* at 63.

baum's intuitionist concept of capabilities. Her approach also varies based on the particular context, and it includes capacities for mental and social development that might produce very similar results to the cultural velocity approach's concern with identity formation and reformation.<sup>156</sup> One might argue that by using culturally contingent facts, such as the importance of appearance manipulation to identity formation in the United States, I have imported what amounts to an intuitionist approach through the back door.

The important difference is the grounds from which I draw the need to protect identity formation. I draw not from intuitionist or dignitarian grounds, nor from an autonomy ground, but from the consequentialist ground that cultural velocity is of procedural value in all cultures because it helps secure the ability to adapt, whatever one's view of a good life is. This means that claims about what will best promote cultural velocity are *empirically falsifiable*. If I argue for a legal protection of dress in the form of a right based on the culturally contingent fact that dress is an important site of identity formation, and dress loses this cultural salience, I would have to change my conclusion.<sup>157</sup> If it turns out that protecting dress in the form of a right hinders, rather than promotes, cultural velocity, I would also have to change my conclusion. What rights we protect through an application of the cultural velocity approach will therefore change when cultural facts change, when scientific understandings change, and when technological advancements change.

Intuition, on the other hand, is by definition slow to change. Intuitions might be formed through repeated observations of the world,<sup>158</sup> or through a complex set of cultural meanings,<sup>159</sup> or both. But however they are formed, intuitions are by definition those beliefs that have become "immediate," and involve "knowing or sensing without the use of rational processes."<sup>160</sup> They are therefore resistant to challenges from empirical evidence.<sup>161</sup>

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156. NUSSBAUM, *supra* note 1, at 78–79 (including "senses, imagination, and thought" on the list of capabilities, as well as "practical reason").

157. In fact, it is entirely within the realm of possibility that I will be forced to change my conclusion about freedom of dress within my lifetime. Because working from home is becoming more and more common, people are spending less time interacting with each other visually, and more time online. If this trend develops dramatically, the importance of dress both as a means of forming an identity, and as an impetus of cultural velocity, might diminish in the future.

158. See Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477–78 (1998) (describing the use of mental heuristics as an example of bounded rationality).

159. See Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1508 (2005) (describing racial schemas, or meanings, as developing not merely in response to data perceived by one who adopts the schema, but also growing out of complicated cultural meanings).

160. AMERICAN HERITAGE DICTIONARY 919 (4th ed. 2000).

161. See Jolls et al., *supra* note 158, at 1477–78; Kang, *supra* note 159, at 1508.

*D. Cultural Velocity and the Body*

A cultural velocity approach seeks to protect diverse formations of identity, but of course many behaviors are related to identity formation. No society can protect all in the form of a legal right. We will have to protect those areas of behavior which are most commonly culturally meaningful, or which are unique in other ways that make them convenient to carve off from other behaviors in the form of a right. Do reasons such as this exist to carve off legal rights protecting control over one's body?

## 1. The Body Is Political

The body is the site of our coming into being socially, and in the United States, as well as in many societies, appears to be a particularly common site of identity exploration, performance, and formation. I am not arguing that the body is socially or culturally important in any "natural" or "essential" way. The argument here is decidedly not an argument that treats the body as sacred, natural, and immutable.<sup>162</sup> Nor is it an argument that treats the body as distinct from and unaffected by the external world and culture.

Indeed, I am positing that the body is not sacred, is deeply alterable, and that "natural" and "unalterable" attributes of our bodies—such as the color of our skin, the shape of our genitals, the color of our eyes, and the texture of our hairs—may be no more important to many of us than "artificial" and "alterable" aspects of our bodies, such as our tattoos, piercings, jewelry, clothing, dyed hair, braided hair, hip implants, or canes.<sup>163</sup>

Rather than treating the body as a temple, I am recognizing its inescapable role—however historically, culturally, or politically contingent—in our experience of self. I recognize that the body may hold no more inherent, acontextual value than chattel. This is precisely why I argue that we should not create a "right in the body" that rests on a formal separation between persons and property, privileging outdated constructions of a biological or "natural" body.

On the other hand, the body's manipulation and alteration as an identity formative practice has become widespread. The body and the world around it have begun to bleed into each other: extreme body mod-

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162. See Shell, *supra* note 3, at 333–34, 345–47 (discussing Kant's "concept of human dignity" and bioethics in stem cell research).

163. In fact, the distinction between the natural or immutable and the artificial or choice-based aspects of our bodies is a slippery one. Skin color, genital shape, eye color, and hair texture are all alterable, with varying levels of effort. Body weight is alterable, but sometimes only with great effort and social support. Tattoos are close to unremovable. Hip implants are removable, but only at great medical cost to those who have them, and once implanted, they are internal to the owner. Are scars from accidents "natural," or "artificial"? What about scars that are deliberately obtained as a form of cosmetic body modification? Scars that result from surgery? Does it matter if the surgery was defined as "elective" or "medically necessary"? Whose definition for those categories should we use?

ification is on a more visible rise, clothes and other objects seem more and more like parts of our bodies and extensions of ourselves, transsexual persons' alterations of their gender are more and more visible, some Asian Americans have opted for eyelid surgery, and Michael Jackson is widely thought to have changed his skin color. And yet, all these trends don't seem to represent a rejection of the body as having any importance at all. These are not even trends toward the soul and mind taking precedence over the body. If transsexual identity were about transcending the importance of genital shapes, then why would so many transsexuals endure the oppression they endure, spend the money they spend, and enter into complicated relationships with the medical establishment to change that which doesn't matter—the shape of one's genitals? Rather, these manipulations, alterations, adornments, and extensions of our bodies themselves carry a great deal of meaning to most of the people engaged in them.<sup>164</sup>

This need not be the case in some science fiction world of the future, and it need not be universal. However, the fact that the meaning of these body manipulations is contingent on a social and cultural context makes them no less foundational a component of identity. It does, however, raise the question of whether the natural body actually makes sense as a repository of special legal status. If we are accounting for the frequency with which the body appears to play some especially important role in identity formative practices, mapping the borders of a legal right precisely onto the physical borders of the “natural,” human body does not make sense; for it is often “artificial” and “elective” manipulations and adornments to the body that are identity performative.

There are many activities that are commonly experienced in terms of their physicality, activities which are experienced as manipulations of the body, but which do not involve alteration of the natural, biological, integrated body. For instance, American feminists who argued for the right of women to wear “sensible clothes,” at the same time they argued for the rights of women to vote and have jobs, did so not just because the clothes that women were coerced to wear held a political meaning that subordinated women, but also because the clothes were physically restrictive. Skirts and petticoats were experienced as a *physical* restraint on women.<sup>165</sup> On the other hand, those who militate for freedom of speech have rarely done so in terms of the right to control the air coming in and out of their lungs and the movements they make with their mouths, de-

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164. Ramachandran, *supra* note 9, at 39.

165. See KARLYNE ANSPACH, *THE WHY OF FASHION* 329–30 (1967) (describing the Bloomerism movement to replace skirts with pants); CHARLOTTE PERKINS GILMAN, *The Force Called Fashion*, in *THE DRESS OF WOMEN: A CRITICAL INTRODUCTION TO THE SYMBOLISM AND SOCIOLOGY OF CLOTHING* 107, 116–17, (Michael R. Hill & Mary Jo Deegan eds., 2002); CHARLOTTE PERKINS GILMAN, *Hope and Comfort*, in *THE DRESS OF WOMEN*, *supra*, at 131, 133–41 (discussing the oppressive nature of fashion).

spite the fact that these behaviors arguably involve the body more intimately in a physical sense, by making use of its internal organs.

Similarly, contracting oneself out for arduous physical labor is often experienced as contracting out one's physical self, while contracting oneself out as a professor—while involving physical activity such as standing and talking—is rarely experienced in this manner.<sup>166</sup> If the reason we should protect rights in our bodies stems from their especially important role in identity formation, in contributing to cultural velocity, then we should focus in particular on those uses of the body which, as a cultural and social matter, are actually experienced as bodily practices of identity formation or reformation.

## 2. The Body is Personal

As the previous section reminded us, the importance of the body as a site of identity experimentation in many societies cannot be overstated. Many persons consider the ways in which they fashion, adorn, and manipulate or modify their bodies (or refuse to do all these things) to be extremely important to their identity and sense of self. The relationship of these behaviors to physical experience is part of what makes them unique among all sorts of identity performative behaviors.

This uniqueness may make many of these behaviors good candidates for special legal protection. Because not all identity performative behaviors can be singled out, it may make sense for us to at least include those which have the unique aspect of being experienced by many as both personal and political, straddling the line between our separation from and connection to others. But is there any reason to single out the human body *per se*, as opposed to some of its extensions, such as clothing and perhaps other chattel, from other arenas of identity exploration? In this section, I consider whether the fact that we have embodied subjectivities<sup>167</sup> provides such a reason.

Embodied subjectivity describes the notion that we are not cognitively separate from our bodies, that we are not minds or souls simply “inhabiting” or “inside” a physical body. We experience the world not as consciousnesses separate from and encapsulated within a body, but rather *through* our bodies.<sup>168</sup>

For instance, what if I purchased artificial eyes to improve my vision, but those artificial eyes contained a filter, blocking me from seeing images that were deemed to undermine the interests of the company that sold me the eyes? This physical change would alter my subjectivity it-

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166. See Nussbaum, *supra* note 13, at 693–94 (pointing out that professorial labor, like prostitution, involves contracting out the body).

167. See, e.g., MARGARET A. MCLAREN, FEMINISM, FOUCAULT, AND EMBODIED SUBJECTIVITY 2–3, 14, 83–91 (2002).

168. See, e.g., *id.* at 83–84.

self—my perception and experience of the world. The power to force or even encourage most persons to implant such a filter would be a great power indeed.

The concept of embodied subjectivity shares something with the view that, “rather than speaking of rights in our bodies[,] it would be more appropriate to say that for Hegel we have rights through our bodies . . . an assault on one’s body is not experienced as damage to one’s property but rather as direct injury to one’s self as a person.”<sup>169</sup>

Indeed, our brains and nervous systems, which in modern times we often imagine to be our “consciousnesses,” are part of our bodies, and thoroughly embedded in our bodies. Nobody has yet succeeded in transferring the contents of a person’s consciousness to a location outside the person’s body. There is currently no way to “upload” your brain to a computer. Even if there were, it is unclear if the computer’s inability to taste, touch, smell, and see would proceed to alter the consciousness in some significant way.<sup>170</sup> Another way to put this “is that all cognitive experience involves the knower in a personal way, rooted in his biological structure.”<sup>171</sup> “We have a subjective experience of our own thought processes, but at best only an imagined representation of what goes on in others’ subjective experience.”<sup>172</sup>

The concept of embodied subjectivity implies that if I change my body, I change the structure through which I perceive and experience—I change my subjectivity. Were we to consider only this, we might promote a human right in the body that maps directly onto the physical, human body. Jed Rubenfeld, for instance, has argued that bodily control should be part of the fundamental right to privacy because it may be a particularly effective way for the state to influence subjects at the “formative” level.<sup>173</sup>

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169. Uffe J. Jensen, *Property, Rights, and the Body: The Danish Context—A Democratic Ethics or Recourse to Abstract Right?*, in OWNERSHIP OF THE HUMAN BODY, *supra* note 37, at 173, 180–81 (alteration in original) (quoting HARRY BROD, *HEGEL’S PHILOSOPHY OF POLITICS* 69 (1992)).

170. This is not to say that the uploaded consciousness’s difference from us would mean it should be treated differently. That question goes to whether legal personhood should be granted to so-called artificial intelligences. See Lawrence B. Solum, *Legal Personhood for Artificial Intelligences*, 70 N.C. L. REV. 1231, 1231–32 (1992) (exploring this question). The point is simply that current persons have embodied subjectivities, and we should therefore consider those embodied subjectivities when we think about what rights to grant persons, and how best to fulfill them. It may be that disembodied subjectivities wouldn’t need the same rights that embodied subjectivities have. This potentially unequal treatment should not trouble us, as this would simply be a case of treating unlike persons differently, rather than treating like persons differently.

171. HUMBERTO R. MATURANA & FRANCISCO J. VARELA, *THE TREE OF KNOWLEDGE: THE BIOLOGICAL ROOTS OF HUMAN UNDERSTANDING* 18 (rev. ed. 1998).

172. TERRENCE W. DEACON, *THE SYMBOLIC SPECIES: THE CO-EVOLUTION OF LANGUAGE AND THE BRAIN* 424 (1997).

173. Rubenfeld, *supra* note 113, at 800–01.

Imagine that we could have filters implanted into our eyes. What if a filter were created that made it impossible for the recipient to see images deemed dangerous to the government, and the government forced us all to have the filters implanted? In contrast, imagine that the state forces us all to paint our houses in the colors of the incumbent political party. We might propose that because we have embodied subjectivities, there is a good reason to be even more frightened of the former state than the latter. If the state can control how its citizens perceive the world, this creates, we might say, a much greater danger of cultural stagnation than if the state can control whether citizens demonstrate support for the government. At least in the latter case, the citizens could reappropriate the incumbent party's colors for some subversive purpose, or could perhaps shift their dissent to other arenas, like dress or speech.

In other words, the idea of embodied subjectivity might provide a factual, scientifically verifiable reason to distinguish between the body and "personhood property" like wedding rings or houses—a reason to create "privacy" rights in the body. However, we should not forget that the body is not *only* personal, due to its important role in our subjective experience; it is also generally political, because it is often the site at which we take on a social form. Thus, some uses of and changes to the body will be more important to the formation and exploration of identity than others, despite the fact that subjectivity is embodied. Moreover, some changes to and uses of the body are commonly experienced in terms of their physicality, such as appearance manipulation, and others are not, such as speech. This is largely a product of social circumstance. Finally, and most importantly, even the subjective, lived experience of the body is inevitably determined in part by social circumstances and coercion. The law *cannot* protect embodied subjectivity by carving off the human body because even this does not make it fully secure from state and private coercion.

Suppose, for instance, that a technological improvement were invented that provided purchasers with additional sixth—or even tenth—"senses." In fact, implants have already been created that would permit the recipient to sense electromagnetic fields.<sup>174</sup> Implants of this sort are property. They are clearly not part of the organic, human body. But the power of the implant seller to retain certain property rights in the implant may become a power to influence the subjectivity of the implant recipient. Such a power is inevitable in a world in which the body and property exist in relation to each other, in which they bleed into each other.

In other words, if there is a "body" that human rights or constitutional law ought to be protecting, it is not the "human body," as defined

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174. Quinn Norton, *A Sixth Sense for a Wired World*, WIRED.COM, June 7, 2006, <http://www.wired.com/gadgets/mods/news/2006/06/71087>.

to mean an organic, physically continuous being distinct and isolated from the surrounding world, but rather the “posthuman body,” defined as constructed by and situated within a social and technological context.<sup>175</sup> Protecting this “posthuman body” can’t be done by carving it off for special legal status because it can’t be carved off at all. Thus, it must be protected through a combination of negative rights against the state and positive regulation of property and contract. Under this view, we should no longer recognize a fundamental right to “bodily integrity,” and fundamental rights should abandon the concern with commodification of human bodies *per se*. However, we should choose rights to protect—both as negative rights and through positive regulation—with a recognition that various uses of and changes to the body are especially important to the formation of diverse identities, and therefore, to the goal of cultural evolution.

In sum, the body is indeed a unique arena of identity reformation because of facts about embodied subjectivity—a subjectivity that is always influenced by the world around the body—and because of facts about the body as an extremely common site of cultural, political, and social identity performance.<sup>176</sup> This provides a fair reason in many societies to give special legal attention to identity development and formation that is related to the body. But it does not provide a sensible reason to create a legal right that maps neatly onto the natural, human body. In the next section, I outline what factors we would appropriately consider, from the cultural velocity perspective, when deciding what kinds of coercion over the body should be carved out for special legal attention.

### 3. Protecting Bodies from Control

Due to the embodied nature of subjectivity, control of a person’s body may in fact become control of that person’s very subjectivity, directing the identity, thoughts, and beliefs of the person being controlled. But our fear of this result may not be substantiated in every instance in which the body is commodified, even when this occurs in a context of coercion.<sup>177</sup> For instance, when blood is removed from the body, sensory experience and inputs do not appear to change dramatically in the long term. When someone engages in sexual activity, future experiences may be altered significantly, but the change might be a positive one, rather than a negative one.<sup>178</sup>

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175. See generally PEPPERELL, *The Posthuman Manifesto*, *supra* note 51.

176. It may even be the fact that subjectivities are embodied that has partially led to the frequency with which cultures treat the body as a primary site of identity expression, formation, and reformation.

177. See Stephen R. Munzer, *Property as Social Relations*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 36, 46–52 (2001) (distinguishing between coercion, exploitation, the use of power, and coercion as a neutral term and a negative term).

178. Of course, if the sexual activity results in pregnancy, these changes to the biological structure are probably severe enough to dramatically change the subjective experience of the person,

Sometimes a bodily intrusion or invasion carries with it a destructive social or cultural meaning that one is subordinate or one's identity worthless. Rape has been described in this manner, for instance. Socially and culturally, bodily invasion and control by another is often experienced as a loss of control over one's identity. On the other hand, those who *consent* to sexual intercourse are not thought to generally experience a loss of self-worth or identity in the way that some rape victims may. We can ask ourselves in these varied situations, in what way does the right to refuse or consent to bodily intrusion and invasion promote the possibility of new and creative exercises of agency in the formation of identity?

An interest of countermajoritarian constitutional or human rights law in individuals' control over their own bodies is the interest in what that control promotes—the capacity for social change as security against stagnation. This explains why we might intrude on the libertarian autonomy to contract away control of the body where it better promotes that public interest. Just as state control of bodies might get in the way of bodies being used to explore and reform cultural identity, too much private control of bodies might, too.

We may legitimately fear that an individual will become unable to form their own opinions, thoughts, make their own decisions, and consider a wide variety of cultural affiliations if another controls their body, even if they consented to that control. Thus, there is something sensible underlying the concern many have with transfers of rights in the body, once we conceive of those rights as connected to cultural and political expression and identity development, rather than merely zones of autonomy. Since subjectivity is embodied and bodies are so important culturally, those transfers may threaten our interest in dispersed, rather than consolidated, control of the formation of subjects and identities. If the formation of subjects is left to the control of the market, we may see societies as static as those in which the formation of subjects is rigidly controlled by the state.

If we cared only about autonomy, we would leave persons to suffer the consequences of their choices. That is what it means to have a choice. And if we cared only about a static notion of respect for the natural body, we would often refuse to permit persons to modify their own bodies. But if we also care about freedom of thought, affiliation, and cultural production because it is good for society, then we might want to prohibit someone from entering into contracts that will inhibit those freedoms, in order to prevent those with greater capital from obtaining a monopoly on these crucial contributors to social, political, and cultural change. The goal of a

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even aside from changes in the way the person is treated socially. Thus, we might want to do our best to ensure pregnancy is a state entered into with some forethought.

society not overly constrained by orthodoxy may require that we forbid persons from entering into too many self-constraints, but would still require respect for most of the choices persons make.

However, getting rid of all social coercion over our bodies is impossible. The relevance of our bodies is largely within a social context. When a property owner places stairs at the front of a building, she makes the bodies of those persons who cannot climb stairs relevant to their experience of the world in a way it would not be had she made the entrance level with the sidewalk. When an employer requires his cocktail waitresses to wear three-inch heels at work, he has not required them, at least in the short term, to modify their natural bodies,<sup>179</sup> but he has changed the way it feels when his employees walk, stand, or even sit. Even “the use of tools and artifacts,” such as at work, “requires a degree of incorporation into the body; . . . the ‘labor of animation.’”<sup>180</sup> And these uses of the body have lasting effects. For instance, despite the fact that Henry Ford believed that repetitive labor would not “injure[] a man in any way,” such injuries do result. (Ford admitted having been told “by parlour experts that repetitive labour is soul—as well as body—destroying, but that has not been the result of our investigations,” he argued.)<sup>181</sup>

Not only is all this private coercion inevitable, human flourishing is possible within the context of all this coercion, and is even facilitated by the existence of private repositories of power. For instance, although capitalism is a system that places a great deal of coercive power in private hands, capitalism can provide the freedom to deviate from social and cultural norms that contributes to the creation of new subcultures. These subcultures can then challenge the very norms from which they deviate. For instance, capitalism opened up a venue for the flourishing of queer culture,<sup>182</sup> and gay men and lesbians have found a refuge in commercial venues such as bars and certain sectors of the entertainment industry.

Similarly, although it would seem that the choice to have sex in exchange for money is always, in some sense, coerced by the need or desire for that money, this commodified sexual activity is not necessarily less fulfilling or more corrupted than sexual activity arising out of “love” or other impulses. For instance, in the work of some pro-sex feminists, prostitutes have reported emotional connections and even having “favo-

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179. Although in the long term he may have caused them lasting injury.

180. Jain, *supra* note 38, at 32 (quoting Elaine Scarry, *The Merging of Bodies and Artifacts in the Social Contract*, in *CULTURE ON THE BRINK* 85, 97 (Gretchen Bender & Timothy Druckery eds., 1994)).

181. *Id.* at 34 (quoting HENRY FORD WITH SAMUEL CROWTHER, *MY LIFE AND WORK* 105 (Doubleday, Page & Co. 1923) (1922)).

182. See John D’Emilio, *Capitalism and Gay Identity*, in *THE LESBIAN AND GAY STUDIES READER*, *supra* note 108, at 467, 473–75.

rite” clients.<sup>183</sup> These positive stories of prostitution can in turn challenge our conceptions of what sexual activity should be and what role it should play in our lives.

Finally, proponents of cultural property rights for indigenous and other groups, in response to arguments that these rights would “commodify” important elements of a culture, have demonstrated how this commodification need not be destructive to a subordinated subculture, and can be used for progressive ends.<sup>184</sup>

In other words, we should acknowledge that human flourishing can occur in the context of economic transactions, and can even be facilitated by it.<sup>185</sup> In the context of the First Amendment, the United States Supreme Court has already recognized this, holding that forbidding profit from speech is an unconstitutional restriction of speech.<sup>186</sup> Thus, a federal law that prevented civil servants from being paid for speeches and writings has been struck down as overly restrictive of speech.<sup>187</sup> Similarly, one of New York’s “Son of Sam” laws was struck down as overly restrictive of speech. The law required convicted criminals profiting from their crimes through books and movie deals to donate the profits to a victim compensation fund.<sup>188</sup> These holdings acknowledge that banning the commodification of a practice, or banning profits from the practice, does not in the context of a generally capitalist economic system “protect” the practice in any sense. Rather, it discourages the practice.

On the other hand, the sometimes deleterious effects of capital on these explorations of and articulations of identity cannot be ignored either. The most visible forms of gay culture have displayed a tendency to idolize the white and the wealthy.<sup>189</sup> And positive stories of prostitutes documented by pro-sex feminists aside, there are plenty of stories of prostitution experienced as exploitative, denigrating, misogynist, and

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183. Lucas, *supra* note 22, at 252.

184. See Carpenter et al., *supra* note 72, at 1026–30; Madhavi Sunder, *Property in Personhood*, in *RETHINKING COMMODIFICATION*, *supra* note 22, at 164, 171 (“[T]here may, in fact, be some room for property in personhood claims if they are grounded on more modern understandings of both culture and property.”).

185. See Carol M. Rose, *Afterword: Whither Commodification?*, in *RETHINKING COMMODIFICATION*, *supra* note 22, at 402, 404 (“Markets seem inappropriate for some things, but then again, maybe markets are pretty useful for exactly the same things.”). Rose also discusses the “market’s possibilities for novelty, liberty, and self-fashioning—not to speak of money.” *Id.* at 421.

186. See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761–62 (1976) (concluding that speech which proposes a commercial transaction is protected by the First Amendment).

187. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 467 (1995) (holding the government to a high burden to justify its “wholesale deterrent to a broad category of expression by a massive number of potential speakers”).

188. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991) (subjecting Son of Sam law to First Amendment scrutiny because it operated as a “disincentive[] to speak”).

189. Ramachandran, *supra* note 9, at 55–56 (using *Will and Grace* and *Queer Eye for the Straight Guy* as examples).

racist. We should acknowledge that systems of capital can facilitate human flourishing but also have an enormous effect on the end results of that flourishing. Leaving that influence unchecked risks the consolidation of power over cultural and social production in the hands of a few. Thus, we may want to soften the effects of capital on practices that promote cultural velocity through regulation of property and contract, rather than through total bans on practices such as commodifying the body.

So what question should we answer when we embark on that project? When should we regulate property and contract in the interest of the special role the body may play in cultural velocity? I propose the following standard: we should ask ourselves, to what degree does the property transfer being contemplated, or the assertion of rights by the property owner, raise the concern that an individual will lose the ability to explore, form, and reform his identity as a social being?

a. Pain

If the control an individual seeks to submit himself to involves pain or extended physical discomfort, the fear may be substantiated. For most persons, subjection to pain and discomfort is cognitively difficult to overcome. Of course, some persons are particularly lucky or resistant; they do not mentally collapse even after years of torture or slavery. But others lose all capacity to interact as social beings. Torture has been described as “unmaking the world” of the victim for this reason.<sup>190</sup> Even those in slavery who are not physically abused can often lose their sense of agency in manufacturing a social identity. The embodied nature of our subjectivities is why the infliction of physical pain through torture can have this effect. In other words, even in the absence of any cultural meaning that torture is disrespectful to the victim, acts like torture may, via control of the body and infliction of pain, too greatly inhibit the individual’s development of an identity.<sup>191</sup>

b. Duration

In addition to the degree of pain a particular intrusion on the body entails, the duration of the consequences of subjection to the physical control of another may be relevant to the capacity to form and reform one’s own identity. For instance, there is a substantiated risk that someone who sells an entire limb will undergo a change in his or her experience of the world so significant (and permanent) that it may be difficult to cognitively overcome the feeling that one’s identity has been altered.<sup>192</sup> Selling oneself into indentured servitude of permanent duration

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190. SCARRY, *supra* note 117, at 37–38.

191. See Rubinfeld, *supra* note 113, at 776–81.

192. See Miho Iwakuma, *The Body as Embodiment: An Investigation of the Body by Merleau-Ponty*, in *DISABILITY/POSTMODERNITY*, *supra* note 42, at 76, 81 (describing the phenomenon of phantom limbs in amputees).

would likely do something similar. But the fear that one will lose the capacity to develop one's identity by selling blood or hair is far less substantiated because neither of these losses is very permanent.

### c. Cultural Meaning

Finally, if the control an individual seeks to give up is over the way the body is culturally read and presented, this can implicate law's interest in dispersing control over formation of identities. Thus, when employees contract away to employers their rights to dress as they please, the interest in dispersed control over bodies is implicated. This need not mean that as the right is balanced against other interests, the right always prevails. However, it does mean that positive regulation of such employment contracts might be one way of promoting cultural velocity through individual rights to "bodily" exploration of identity.

In the next Part, I explore a few tentative examples of how we might apply this standard in the United States. These examples will serve to flesh out how the approach might be applied in a particular cultural context. Even when we take into account current social realities about the importance of the body, the legal rights we would then recognize will look different than traditional rights to bodily integrity we have seen before. The examples will necessarily not be comprehensive, and of course, application of the principle will sometimes involve a host of other considerations, especially when positive property and contract regulation is considered. The purpose of the examples, however, is to help elucidate the difference between rights in the human body and rights that acknowledge the body's importance, but stop treating it as an end in itself.

## V. EXAMPLES OF THE BODY'S RELATIONSHIP TO FUNDAMENTAL RIGHTS

Applying a human or constitutional right that appropriately protects the public interest in cultural velocity, as it relates to the practical importance of the body in cultural velocity, will necessarily require both negative rights against the state and positive property and contract regulation. Only a combination of both negative rights and positive regulation can help to ensure that the legal and social coercion that bodies are subject to does not lead to consolidated control over culture in the hands of a powerful few.

Some of these example applications will result in very familiar negative rights against the state, ones that both dignitarians and libertarians promote, such as the right to refuse medical treatment or other state attempts to mandate changes to the body. Other familiar rights against the state would include the right to change one's own body, such as the right to obtain tattoos and piercings, to cross-dress, or to purchase medical treatment.

Other applications will consist of protecting rights that increase cultural velocity against private regulation, resulting in property regulation that many dignitarians would agree with, but that strong libertarians would reject. For instance, we might limit the ability to sell one's own body part when that sale would result in long term physical pain and thus cognitively interfere with the ability to develop and reform one's identity.

There will also be applications of cultural velocity to protect rights against private coercion that would be totally unfamiliar to either the dignitarian or libertarian approaches. For instance, my approach might lead us to regulate exchanges in ordinary chattel, such as certain implants and prosthetics. Still other forms of regulation might consist in extensions of employment and housing law, protecting people with different bodies from discrimination in these realms.

I also describe in this Part some examples of property and contract regulation, such as total bans on prostitution and organ selling, that do *not* in fact further properly conceived "rights in the body." This is despite the fact that such regulation is frequently justified on the grounds that it protects against commodification of the body.

#### *A. Rights Against State Intrusion—from Torture to Forced Vaccination*

Applying the cultural velocity principle to questions of state intrusion into the body would likely result in the recognition of a relatively familiar negative right against state intrusion into the body. This is because embodied subjectivity creates the danger that many forms of state intrusion on bodies are too cognitively difficult to overcome. If the state can intrude on one's body, and can thereby direct our subjective experiences, this may lead to state suppression of different ways of living, different experiences, and different identities, all of which generally contribute to cultural evolution when left unpunished by criminal law.

Thus, rights to resist severe state imposed pain<sup>193</sup> or very invasive or permanent medical treatment,<sup>194</sup> such as forced sterilization,<sup>195</sup> would likely be included within an application of the cultural velocity approach, just as they would likely be included in the "bodily integrity" rights protected under many dignitarian and autonomy approaches.

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193. *Cf. Baze v. Rees*, 128 S. Ct. 1520, 1530 (2008) (noting that what many forbidden punishments under the Eighth Amendment "had in common was the deliberate infliction of pain for the sake of pain-'superadd[ing]' pain to the death sentence through torture and the like" (alteration in original)).

194. *E.g., Vacco v. Quill*, 521 U.S. 793, 807 (1997) (clarifying that the right to refuse medical treatment rests in the right "to bodily integrity and freedom from unwanted touching").

195. *E.g., Tennessee v. Lane*, 541 U.S. 509, 534 (2004) (Souter, J., concurring) (describing the now discredited but "once-pervasive" forced sterilization of persons with disabilities).

On the other hand, mandatory vaccination does not entail a great degree of pain, the pain felt does not last very long, and the cultural meaning of being marked as a person with or without a vaccination is not very significant to most persons' identity. Thus, no fundamental right to refuse vaccination should stem from the special relationship of the body to rights. This does not mean that rights to refuse vaccination could not stem from other sources, such as religious freedoms.<sup>196</sup> But the argument that rights to bodily integrity or control over one's body should entail rights to refuse vaccination are too fetishistic about the body, subscribing to the fiction that our bodies could ever be "free" from all intrusion that implicates dignity or autonomy.

*B. Rights to Change One's Body—From Abortion to Cross Dressing*

Applying the principle to the question of rights to proactively modify and treat one's body would also likely result in relatively familiar negative rights against state criminalization of those modifications and treatments, such as abortion,<sup>197</sup> or treatments that are necessary to avoid pain.<sup>198</sup> A right to purchase many forms of medical treatment, or even "upgrades" to "healthy" or "normal" bodies, would also likely fall within the scope of rights we would want to protect in order to promote cultural velocity.

In this way, any "bodily" right protected under cultural velocity would be quite different from the American constitutional right to bodily integrity, which distinguishes between rights to resist intrusion into the body and rights to modify one's own body. The United States Supreme Court has recognized a fundamental right to refuse life sustaining medical treatment, but has not recognized a fundamental right to contract for assistance in committing suicide through the use of medication.<sup>199</sup> But the cultural velocity principle would not make this distinction because the right is not grounded merely in the "integrity" of the body, nor even merely in avoiding physical pain.

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196. *E.g., In re Sherr v. Northport–East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 91 (E.D.N.Y. 1987) (finding that under First Amendment, religious exemption to New York's mandatory inoculation program for school children must be extended to all persons who sincerely hold religious beliefs, and not just persons who are bona fide members of a recognized religious organization).

197. *See Roe v. Wade*, 410 U.S. 113, 163 (1973).

198. Some Supreme Court justices have indicated that they would find constitutional fault with laws that prohibit the administration of pain medication necessary to alleviate great suffering, even in instances where the administration of the medicine is virtually certain to cause death. *Washington v. Glucksberg*, 521 U.S. 702, 736–37 (1997) (O'Connor, J., concurring) ("The parties and amici agree that in these States a patient who is suffering from a terminal illness and who is experiencing great pain has no legal barriers to obtaining medication, from qualified physicians, to alleviate that suffering, even to the point of causing unconsciousness and hastening death.").

199. *Compare Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990), with *Vacco*, 521 U.S. at 807.

The principle also recognizes the importance of the body as a means of exploring and forming a cultural identity, and would therefore likely protect choices to engage in numerous kinds of body modifications, such as abortions, surgical and hormonal sex change procedures, cosmetic surgery, tattooing, piercing, and perhaps the ingestion of “mind altering” drugs. Again, rights are rarely absolute in any constitutional system, so professional and safety regulation of many of these practices would likely pass muster, as they do in the American constitutional system.<sup>200</sup>

The right to cross dress, and indeed, to dress as one pleases in public generally, would likely also be appropriately protected, even though dress and the use of jewelry do not involve the alteration of one’s “natural” body. I have argued for such a freedom of dress in a prior work, but it is not on solid footing in American constitutional law.<sup>201</sup> Of course, as with all rights, sometimes the right will need to be balanced against other rights and other interests. Thus, threatening exercises of dress, such as indecent exposure committed with intent to harass and threaten, or the wearing of dangerous weapons as part of an “outfit,” could be regulated, but the point remains that some kind of countermajoritarian right to manipulate one’s appearance would make sense under the cultural velocity principle’s application to the special importance of our bodies.

*C. Rights to Use One’s Body—from Sexual Liberty to Verbal Harassment*

A right to sexual liberty<sup>202</sup> might also be grounded in this cultural velocity principle. Sexual activity is a use of the body that is largely described as having important components of physicality, just as the freedom to manipulate one’s appearance through dress was historically described as a bodily freedom.<sup>203</sup> Moreover, sexual activity is one important means in many cultures of forming cultural affiliations and identity.

But would recognition of the body’s importance to cultural velocity principle mean that we would protect every single use of the body? Could I claim that because my verbal harassment of another person involves use of my mouth that it is protected under the right? Could I claim that because thinking involves my brain, which is part of my body, an inquiry into my intent to commit a crime is an intrusion into my rights over my body?

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200. For instance, the right to obtain an abortion may be limited by health and safety regulations throughout pregnancy. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 874–78 (1992).

201. Ramachandran, *supra* note 9, at 16–17 (describing Supreme Court’s denial of certiorari on the issue in the face of a circuit split).

202. *Cf.* *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (finding criminalization of same sex sodomy between consenting adults in private to violate the due process clause of the Fourteenth Amendment).

203. See James Allon Garland, *Breaking the Enigma Code: Why the Law has Failed to Recognize Sex as Expressive Conduct Under the First Amendment, and Why Sex Between Men Proves that it Should*, 12 L. & SEXUALITY 159, 180–87 (2003) (using the example of relationships between gay men to demonstrate the expressive nature of sex).

Recognition of the body's importance to cultural velocity, as a practical reason to select certain bodily-identity performative behaviors for legal protection, would not provide a reason for selecting speech or thought for legal protection. Those reasons would have to be articulated separately. This is because the cultural velocity conception has abandoned any idea that rights should map onto the physical borders of the human body. Thus, not every use or modification of the human body will necessarily implicate the body in a manner relevant to cultural velocity. Those uses that, as a cultural matter, tend to be experienced and understood as implicating subjectivity and cultural performance will be the uses that sit at the core of the right. This is why dress would be a more plausible candidate for protection than verbal speech, despite the fact that verbal speech involves a great deal of movement of one's mouth—part of the human body—while dress may not involve the movement of any part of the human body. Dress merely involves the placement of chattel upon the human body.

#### *D. Patent Law*

Beyond these mostly familiar negative rights against the state, applying the cultural velocity principle would also likely result in some rather unfamiliar forms of property regulation. For instance, it is possible that we might want to restrict end user license agreements (“EULAs”) in certain forms of chattel because they would threaten individual innovation and ability to form and reform identity. We wouldn't ignore the implications of sellers retaining property rights in highly personal chattel just because it's chattel, rather than part of the organic body.

As one example, we might want to restrict the enforcement of EULAs against users of prostheses and other medical technology that intimately affects mobility, perception, or communication. This would include items like cochlear implants, robotic arms, visual aids, wheelchairs, and the like. While the idea that patent holders on these technologies would enforce EULAs against patients may seem far-fetched, the possibility that they would do so in a future in which many of these devices are “elective” is much stronger. If Apple is willing to enforce such agreements against purchasers of iPhones,<sup>204</sup> would it not consider enforcing them against purchasers of computer or phone implants? Memory card implants?

We might even want to simply restrict the enforcement of EULAs against users of any technology deeply tied to identity formation, whether or not it has anything to do with physicality or the body. It may be that

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204. Katie Hafner, *Altered iPhones Freeze up*, N.Y. TIMES, Sept. 29, 2007 at C1, available at 2007 WLNR 19068410 (“Jennifer Bowcock, an Apple spokeswoman, said that when people went to update their software with their computer through iTunes, a warning appeared on the computer screen, making it clear that any unauthorized modifications to the iPhone software violated the agreement that people entered into when they bought the phone.”).

the importance of the body will start to drop away, over time, and will no longer be a pragmatic, culturally appropriate way of singling out some identity formative practices from others for legal protection. The number of persons who find their phones, Facebook accounts, and other items to be more foundational to identity than even a prosthesis or their clothing may be growing. The cultural velocity approach is well-suited to deal with these sorts of changing conditions because it is an empirically falsifiable, consequentialist approach.

#### *E. Employment and Housing Law*

Another relatively unfamiliar area in which we might want to promote cultural velocity as it relates to bodily identity performance is in the regulation of employment and housing contracts. The U.S. economic system provides very minimal welfare rights, and indeed, provides no welfare entitlements to those who are considered able to work but do not.<sup>205</sup> Thus, the process of entering into employment and housing contracts for most adults in the U.S. is essential. With respect to the workplace, statutes like the Civil Rights Act of 1964<sup>206</sup> have made the American workplace more integrated and diverse along culturally salient categories such as race than many other private institutions such as churches or social clubs.<sup>207</sup> The workplace is already a venue where Americans can learn about those with different identities, where we can be challenged.<sup>208</sup>

We have already made statutory moves toward accommodating differences in bodies in both the employment and housing contexts, and we do not limit ourselves only to those differences in bodies which are fully biologically determined. For instance, we forbid discrimination on the basis of race, sex, and skin color<sup>209</sup> in these contexts, even though both race and sex can be thought of as socially constructed in part. We also require reasonable accommodation, at least in principle, of persons with disabilities at work and in school.<sup>210</sup>

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205. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 permitted states to stop paying benefits to those otherwise eligible for welfare assistance if the recipient did not engage in qualified work. Pub. L. No. 104-193, § 407, 110 Stat. 2105, 2129–34 (codified as amended at 42 U.S.C. § 607 (2006)).

206. See generally 42 U.S.C. §§ 2000e-1 to -17 (2006).

207. See Cynthia L. Estlund, *Working Together: The Workplace, Civil Society, and the Law*, 89 GEO. L.J. 1, 17 (2000) (“[E]ven the partial demographic integration that does exist in the workplace yields far more *social* integration—actual interracial interaction and friendship—than any other domain of American society.”).

208. See Cynthia L. Estlund, *Free Speech and Due Process in the Workplace*, 71 IND. L.J. 101, 112 (1995) (“The workplace functions not only as a self-governing institution and as a regulated institution; it also functions as a crucial intermediate institution that stands between the individual and the state.”).

209. See generally 42 U.S.C. §§ 2000e, 3601–3619 (2006).

210. See generally 42 U.S.C. §§ 12101–12213 (2006).

However, we may want to expand this to accommodating not just biological or “accidental” difference, but also other differences in bodies. We may protect the ability of employees in their use of chattel closely related to the body, such as clothing, jewelry, or hairstyling.<sup>211</sup> We might also protect transgender employees, who change the gender presentation of their bodies through both surgical and somewhat more superficial changes. We could also protect transgender persons and persons who dress unusually from being excluded from housing. When it comes to this kind of private regulation of rights, a workable way of protecting rights in this private context will of course require a great deal of finesse. One appropriate way to balance the many interests at stake would be to require reasonable accommodation of employee differences in dress in most workplaces and provide statutory exceptions for certain jobs such as modeling or acting.<sup>212</sup>

Protections from sexual orientation discrimination could be conceived of as a means of promoting the right as well, as sexual conduct is certainly in the United States a means of exploring and forming identity through the use of the body.

Finally, we could consider expanding the kinds of bodies we reasonably accommodate in workplaces and schools beyond those currently protected by the Americans with Disabilities Act. Perhaps a body need not be “disabled” to the point of impairment in a “major life function” for us to recognize that it represents a different identity we may want others to interact with and learn from.<sup>213</sup>

Under this framework, persons who choose not to or cannot afford to “upgrade” their bodies through the use of drugs (such as steroids) and other biotechnology could be protected against unjust workplace or educational exclusion through reasonable accommodation of their comparative disadvantages and differences. However, the protections would not necessarily be great—“reasonable accommodation” is, after all, a relatively weak mandate. As a result, those who did not alter their bodies and therefore became less adept at truly core job functions would likely be left unprotected. I choose the weak requirement of reasonable accommodation purposefully as an example of what protecting rights to have a different body in a private sphere such as the workplace might look like.

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211. I have proposed just this in a prior article, *Freedom of Dress*. See Ramachandran, *supra* note 9, at 37–43.

212. *Id.* at 61–64.

213. The Supreme Court has interpreted the Americans with Disabilities Act (“ADA”) such that the protected class of disabled persons it protects is quite narrowly defined. *E.g.*, *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 488–89 (1999) (finding that severely myopic job applicants were not disabled within meaning of the Act because they could use corrective lenses, and therefore received no protection from discrimination by the defendant employer on the basis of the myopia). The ADA was recently amended, however, to clarify that the coverage should be broad. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3553, 3555–56 (codified as amended at 42 U.S.C.A. § 12102 (West 2009)).

This relatively weak protection takes seriously the fact that some degree of coercion over bodies is inevitable. There will likely be economic incentives to take enhancing medication or alter one's body in other ways in the future, just as there are economic incentives to obtain cosmetic surgery that makes one more attractive now, and economic incentives to wear contact lenses or even obtain LASIK surgery. Because this coercion is inevitable, the aim of property and contract regulation to protect rights in the body can never be to provide absolute, substantive equality or absolute "freedom" for different bodies. The aim can only be to soften the effects of capital and other sources of private power on the variety of bodies and identities that become part of our culture—to prevent the consolidation of power over culture through power over bodies.

#### *F. Welfare Law*

With this in mind, we may be faced with body modifications in the future that are so economically valuable we simply cannot accommodate those who do not obtain them. Such accommodation may not be as easy as accommodation of visual or hearing impairments in many professions. For instance, we might be faced with the development of technology that dramatically expands memory or other components of intellectual capacity.

Thus, we might find it simpler at times to just redistribute wealth more dramatically, as a means of ensuring that those without capital retain a degree of material security no matter what they do or do not do to their bodies. This is certainly not strong protection, since all it would likely guarantee is that having an unusual body will not lead to starvation or homelessness. But we might argue that more generous welfare benefits are required for precisely this reason.

It is also worth pointing out that currently, we do not even have protection against starvation and homelessness for persons with unusual bodies, persons who are challenging our social norms. Transgender persons, for instance, are so marginalized under American law that they often become homeless and their very existence essentially criminalized.<sup>214</sup> No welfare system ensures basic material security for transgender persons, as even sex segregated homeless shelters are often unable to provide security.<sup>215</sup>

As another reform of welfare law, we might also provide welfare entitlements to obtain some economically valuable body modifications,

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214. Spade, *supra* note 123, at 751–52.

215. *Id.* at 752–53 (describing how a host of laws, including gender documentation requirements even for driver's licenses, create a lack of access to employment and housing, and unsafe conditions at homeless shelters for many transgender persons).

to ensure that those with fewer financial resources and their progeny are not locked out of future opportunity and cultural participation.<sup>216</sup>

In fact, some prominent members of the “transhumanist” movement have predicted that once extremely valuable technology modifying the body is available, the masses will simply “demand” a dramatic wealth redistribution.<sup>217</sup> This is meant to respond to egalitarian concerns that body modifying or improving technology could widen the gap between poor and rich too far.<sup>218</sup>

While I find this prediction to be overly optimistic, the core point is a fair one—perhaps generous welfare law is a more direct instrument with which to deal with the inequality that social and cultural coercion over bodies inevitably causes. This makes sense once we have recognized that private property rights already threaten persons’ control over their bodies. If that is the case, welfare law, rather than rights to “bodily integrity” or “personhood,” may sometimes be the most effective way of protecting the ability to have a different or unusual body.

### *G. Body Commodification—From Prostitution to Organ Selling*

Are there some sales of the body’s parts or uses that must be prohibited, or that cannot be prohibited? There are some sales of the body or its parts that we might legitimately be concerned with from the perspective of protecting the public interest in cultural velocity. This is because we might legitimately be concerned that those with economic power and other forms of private influence could obtain too much control over culture by obtaining too much control over bodies. On the other hand, not every commodification of the “natural” body need be categorically forbidden, because not every commodification of the natural body impli-

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216. The United Nations Convention on The Rights of Persons with Disabilities represents an important move towards welfare rights to certain aids. Section (g) of Article 4 states an obligation of parties to “undertake or promote research and development of, and to promote the availability and use of new technologies, including information and communications technologies, mobility aids, devices and assistive technologies, suitable for persons with disabilities, giving priority to technologies at an affordable cost.” G.A. Res. 61/106, art. IV, U.N. Doc. A/RES/61/106 (Jan. 24, 2007). Article 20 states that parties “shall take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities.” *Id.* at art. XX. This includes “[f]acilitating access by persons with disabilities to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries, including by making them available at affordable cost.” *Id.*

217. HUGHES, *supra* note 45, at 214–15.

218. *Id.*:

It is unlikely that a future majority of service-providing ‘commoners’ with more free time, communications and democracy than today would tolerate being lorded over by a dynasty of non-working hereditary capitalists. They would vote to change the system. The trend in the social democracies has been to equalize income by raising the standards of the poorest as high as the economy can bear. In the age of robots, that minimum will be very high.

(internal quotation marks omitted) (quoting HANS MORAVEC, *ROBOT: MERE MACHINE TO TRANSCENDENT MIND* 132 (2000)).

cates this concern. But are there any sales of body parts or uses that must be *permitted*, from the perspective of protecting cultural velocity?

### 1. Prostitution

The best example of body commodification that arguably must be permitted under a proper understanding of the relationship of the body to rights is prostitution. Prostitution does not inherently involve pain, nor does it inherently involve indentured servitude or a use of the body that is extremely long in duration. Moreover, the long term physical effects of sexual activity, when engaged in with protections such as condoms, may be less significant than the long term physical effects of other forms of labor we permit, such as repetitive factory work.

Of course, the cultural and social meaning of engaging in sexual activity with another can be very significant, but forbidding all profits from activities that involve identity exploration, or from culturally meaningful acts, is unlikely to “protect” these activities in an otherwise essentially capitalist context. It is more likely to simply disincentivize them. This is why the United States Supreme Court has recognized that forbidding profits altogether from certain kinds of speech is usually an overbroad restriction on that speech.<sup>219</sup> It is also why, when I argued for a freedom of dress, I did not argue that modeling and acting should be outlawed.<sup>220</sup> Thus, it is arguable that not only should we abandon the claim that prostitution violates fundamental rights to bodily integrity, but we should also recognize a fundamental right to engage in prostitution, given the importance of sexual activity to identity formation and culture.

One might ask, does sex really need to be incentivized, the way certain forms of speech need to be incentivized? Do we really need financial incentives for sexual identity formation and exploration? The kind of sex that is culturally “normal” probably needs little additional financial incentive for persons to experiment with it. But some kinds of unusual or culturally challenging sexual experiences will probably happen more often in the United States if prostitution is legalized. For instance, persons with certain disabilities and disfigurements may be more likely to have sexual experiences if prostitution is legalized.<sup>221</sup> Alternately, some of these culturally challenging practices might be made more culturally visible, and actually have some effect on cultural norms regarding sex-

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219. *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 468–70 (1995).

220. Indeed, I proposed categorically exempting these jobs from reasonable accommodation of dress requirements. Ramachandran, *supra* note 9, at 63–64.

221. See Lucas, *supra* note 22, at 253 (“[I]n our nonideal world some individuals may be limited to a choice between commodified sex and involuntary celibacy.”). See generally Elizabeth F. Emens, *Intimate Discrimination: The State’s Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1385 (2009) (including information on state subsidies in some countries for the purchase of prostitution services by persons with disabilities).

uality, if prostitution is legal and more persons can “admit” to having sexual experiences with persons that are culturally disfavored sexually.<sup>222</sup>

Of course, sexual activity can be experienced as a bodily intrusion that affects one’s very identity, even one’s capacity to develop a different identity in the future.<sup>223</sup> Thus, many forms of regulation of prostitution may be wholly appropriate, and because any right to prostitution would not be grounded in “autonomy,” such regulation would not necessarily infringe upon the right. Some examples of appropriate regulation could be laws that seek strong assurance of consent, laws requiring safe practices to prevent disease and pregnancy, laws ensuring the ability of parties to change their minds, and perhaps periodic surveillance or inspection to prevent violence. Even taxing the proceeds of prostitution and using the funds for mandatory counseling or other activities designed to ensure that the identity of the prostitute is not destroyed might be appropriate.

But in the face of arguments from sex workers that the work need not be destructive to identity formation and reformation, and in the face of the fact that we permit adults to take these risks with their physical bodies in the context of unpaid sex, prostitution appears to be a commodification of the body that we ought to legalize under a practical application of the cultural velocity principle, even one that accounts for the importance of sexual practice as a use of the body to identity formation. Arguably, some legal form of prostitution is even required as a matter of fundamental rights.

## 2. Organ Selling

Organ selling, in contrast, is a form of body commodification that involves lasting physical effects on the body. Thus, societies may be rightly concerned that those who sell organs might be selling away an aspect of their very subjectivity, in a manner that could affect their ability to explore many possible identities and cultural affiliations. But this is likely not the case for every organ or organ sale.

Selling one’s eyes, a hand, or another such body part intimately involved in sensory perception or mobility may have lasting effects on one’s identity that the seller regrets. On the other hand, selling a kidney seems less problematic with respect to this public interest in cultural evolution and change. Certainly the loss of a kidney entails future medical risk and even perhaps some experiences of pain that last well into the future. Thus, there are reasons to regulate such sales heavily to ensure

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222. Cf. Lucas, *supra* note 22, at 261 (“Another benefit of commodification would be that . . . prostitutes could openly discuss their work, describe its pros and cons . . . . Customers could frankly discuss their experiences, both in the crass, economic way that commodification critics fear but also in honest terms about . . . what needs they seek to fill.”).

223. See *id.* at 257–58.

fully informed consent. But a categorical prohibition on kidney sales does not appear to further the legitimate public interest in protecting individuals from contracting away their ability to form diverse identities.

On the other hand, there doesn't appear to be any reason to categorically *protect* a right to sell organs under this approach, either. Organ donation is not a particularly culturally salient practice, nor does it seem to involve physical experiences that are part of identity exploration, the way sexual acts arguably do. Moreover, most people donating organs are anesthetized during the process—it is not a bodily experience in which the donor is generally attempting to change or control his or her subjectivity, even temporarily. Thus, it is neither particularly “personal” in the sense of importance to subjective experience, nor particularly “political” in the sense of identity performative.

There may be traditional utilitarian concerns that would lead to bans on organ selling and other commodifications of the body, such as selling blood. The economic stability of a community and public health concerns are two potential reasons. And there may be traditional utilitarian concerns that would lead to *permitting* organ selling or other commodifications such as selling blood—we might want to increase the supply of organs, for instance. But these concerns need not be couched in terms of a fundamental right to bodily integrity, human dignity, or autonomy.

#### *H. Animal-Human and Plant-Human Chimeras*

What about the patenting of animal-human or plant-human chimeras, or transgenic entities,<sup>224</sup> that has raised so much new concern over assigning the legal status of property to persons or their parts?<sup>225</sup>

If an animal-human or plant-human chimera is capable of cultural interaction and affiliation, or of identity group formation and reformation, then it would seem that the cultural velocity principle would require us to forbid patent owners from controlling these entities in these activities.

It is important to note here that because of the way I have grounded the rights we protect under law, I am not requiring these entities to have “human intelligence” or to be capable of full political participation in order to be possessed of rights. Thus, my theory also protects almost all persons with disabilities, including those with mental disabilities. Even if a person with a severe mental disability never develops to the stage of traditional political participation, he is capable of identity performance and cultural affiliation, as well as of social attachments that are instruc-

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224. See Munzer, *supra* note 57, at 124 (providing definitions of these terms).

225. See, e.g., Bagley, *supra* note 2, at 546; see also *supra* notes 50, 60, 62–64, 66 and accompanying text.

tive and useful to society.<sup>226</sup> But some minimal level of “intelligence” or cognitive processing is probably required for a being to attain the kinds of identities or bodily identity performances that could contribute to our cultural evolution.

Although a proper conception of how the body relates to rights may ultimately prevent a patent-holder from exercising control over the beings she creates, the principle I have articulated would not necessarily prevent a patent holder from preventing another person or company from producing identical beings for the duration of the patent. This portion of the patent right does not seem to lastingly affect our interest in cultural evolution or cultural velocity. Thus, a patent holder in an animal-human chimera or transgenic creature might see his or her patent rights diminished, but not destroyed, under a proper conception of the body’s relationship to fundamental rights.

It may seem strange for a company to hold a patent in the method of producing an entity that has intelligence, interacts with others, and is a member of society. But this state of affairs is not without analogy in laws with which we are familiar. Not long ago, children were treated like the property of their fathers.<sup>227</sup> But parents do not exercise absolute dominion over their children. For instance, parents cannot abuse or neglect their children in the United States. And even in the past, fathers had duties of care to their children.<sup>228</sup> Moreover, once children reach adulthood, parents exercise no dominion or control over their children at all. And yet, this recognition that parents should not have total control over their children need not stop us from using property rights to govern control over embryos that parents have contributed to genetically. Allowing a parent to sell an embryo or donate rights in the embryo to another parent is not the same as allowing a parent to exercise dominion over a child.<sup>229</sup>

#### CONCLUSION

The problem of property and freedom of contract threatening fundamental rights is not new. However, the physical merger of humans and non-humans is about to become prominent. Thus, we can no longer subscribe to the fiction that by drawing a sharp line between humans and the

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226. See NUSSBAUM, *supra* note 79, at 99, 129 (describing her “conception of the person as a social animal, whose dignity does not derive from an idealized rationality,” and also “the advantage of understanding humanity and its diversity that comes from associating with mentally disabled people on terms of mutual respect and reciprocity”).

227. See MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 1–13 (1994) (describing the fathers’ custody over children as similar to the master/servant relationship, which involved duties of care, as well as the ability to contract out and profit from a servant’s labor).

228. *Id.* at 12–13.

229. See Dan L. Burk, *Patenting Transgenic Human Embryos: A Nonuse Cost Perspective*, 30 HOUS. L. REV. 1597, 1648 (1993) (“[T]he holder of a patent for a transgenic human being could presumably prevent others from making, using, or selling such a transgenic human being, but this does not mean that the patent holder could impress the patented person into servitude or bondage.”).

rest of the world, and prohibiting the commodification of the human, we have sufficiently protected the need for diverse exercises of human agency against property rights. Property rights and freedom of contract have always threatened to stifle us via our bodies, such as by constructing us as “disabled” rather than “abled,” or by determining whether we will need to perform physical labor to survive.

We must accept that the line between humans and property is being blurred, and that already human self-control can be affected by the distribution of property rights. To deal with threats to physical self-control we cannot rely on the formal sanctity of the human body as separate from property. At the same time, we cannot rely solely on unregulated, autonomy-based, property-like rights in the body. For the same reasons that all forms of property are regulated, and do not entail sole dominion, property-like rights in one’s body should also sometimes be regulated.

We instead need a conception of rights that would simultaneously protect the diverse set of bodily choices that form individuals’ identities and cultural affiliations, while using the regulation of property and contract to protect against a few actors obtaining monopolies over the subjectivities and identities of others. But because we are at least in part products of technology, our rights to control our own subjectivities or to form diverse identities cannot be protected by any kind of neat “right to bodily integrity” or autonomy over the natural, human body.