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EXPRESSIVE MINIMALISM AND FUZZY SIGNALS: THE JUDICIARY AND THE ROLE OF LAW

MICHELE GOODWIN*

The majority impliedly [find] three “reasons to doubt” that Moore retained a sufficient ownership interest in his cells . . . The majority’s first reason is that “no reported judicial decision supports Moore’s claim, either directly or by close analogy.” Neither, however, is there any reported decision rejecting such a claim. The issue is as new as its source—the recent explosive growth in the commercialization of biotechnology.

—Justice Mosk¹

The present decision, it may well be apprehended, will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes which the people of the United States had in view when they adopted the recent amendments of the constitution, by one of which the blacks of this country were made citizens of the United States and of the states in which they respectively reside, and whose privileges and immunities, as citizens, the states are forbidden to abridge.

—Justice Harlan²

INTRODUCTION

Over sixty years ago, Judge Charles Clark wrote that the function of courts “cannot be limited to a mere blind adherence to precedent.”³ He

* Everett Fraser Professor of Law, and Professor of Medicine and Public Health, University of Minnesota. I am especially grateful to Lori Andrews for convening this important symposium and pushing participants to think beyond traditional definitions of life and encouraging authors to meet the challenges of responding to the intersection of law, biotechnology and society. I am also grateful to Sarah Malkerson for outstanding research assistance. This essay builds on a previous work that examines formalism in the judicial context. See Michele Goodwin, *Formalism and the Legal Status of Body Parts*, 2006 U. CHI. LEGAL F. 317. This essay evolves the theoretical framework presented in *Formalism* to explore the tensions that arise from excessive formalism, including the “fuzzy signaling” that distorts any clear messages from courts to legislative bodies. The cases and studies presented are largely consistent with the previous work.

1. *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 506 (Cal. 1990) (Mosk, J., dissenting).
2. *Plessy v. Ferguson*, 163 U.S. 537, 560 (1896) (Harlan, J., dissenting).
3. *Spector Motor Serv., Inc. v. Walsh*, 139 F.2d 809, 814 (2d Cir. 1943). See also BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 56–80 (1924) (charting the evolution of decision-making from

cautioned fellow jurists against what scholar Martha Nussbaum might refer to as “lofty formalism.”⁴ Clark warned that judges should avoid clinging to precedent simply for the sake of it and “artfully” dodging new doctrine.⁵ Clark recognized the value of judges fully exercising their mental powers and “discovering and applying” new trends in law as the technology and policies of the time demanded.⁶ Clark’s pragmatic advice to his colleagues on the bench remains timeless.

To be sure, the burden of crafting judicial responses to nascent technology is a formidable process. Courts not only struggled with what the differences between horse/buggy and car/train meant in the application of tort law, but also in contract, and even property law. Most importantly judges defined what those assignments would mean for people harmed by the technology. Judges were not blind to the economic dynamics of technology nor the political landmines associated with allowing tort law to serve as a social insurance of sorts to address harms resulting from locomotive technology.⁷ As a matter of efficiency, it surely would have been less time consuming to simply apply the same rules and logic that governed the use of horses and wooden carts to that of engines, metal, and rubber tires, but doing so would have been both a mistake and lazy.

Contemporary conflicts in biotechnology mimic those of the locomotive era where science, industry, and the urge of social progress converged on roads without guardrails and train crossings without lights, whistles, and signals. The socio-legal questions and problems emanating from sexy new technologies ranging from face transplants, outlandish plastic surgeries (to resemble a cat or dog),⁸ the capabilities—with the aid of science—to select

pure adherence to precedent to a less rigid and more flexible approach commonly associated with shift from naturalism to pragmatism).

4. Martha C. Nussbaum, *Foreword: Constitutions and Capabilities: “Perception” Against Lofty Formalism*, 121 HARV. L. REV. 4 (2007).

5. *Spector*, 139 F.2d at 814.

6. *Id.*

7. As Harlan pointed out in his dissent in *Plessy*, public opinion may interfere with the courage of the bench to respond appropriately and meaningfully to the law. *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting). When race supremacy, according to Harlan, was the epicenter of U.S. identity, “many localities [were] dominated by the institution of slavery” and thus it “would not have been safe to do justice to the black man” and “so far as the rights of blacks were concerned, race prejudice was, practically, the supreme law of the land.” *Id.*

8. Cat man, Dennis Avner, gained notoriety for countless plastic surgeries to achieve a “cat-like” appearance. The transformation included having all teeth removed to implant fang-like appendages.

Dennis Avner, who goes by his Native American name, Stalking Cat, is known around the world as the Catman. Over the past 25 years, Stalking Cat, 47, has received so many surgical and cosmetic procedures he’s lost count. And he says all of them — from full-face tattoos to fanged dentures to steel implants for detachable “whiskers” — have been done to achieve oneness with what he calls his totem, the tiger.

special traits for embryos,⁹ or to become a the mother of septuplets or octuplets,¹⁰ urge a reexamination of those challenges which judges confronted decades ago in the shift from the horse and buggy era to the mechanized automobile.

Crafting juridical responses to both the ownership of an idea and liability for the harm that the technology causes are not wholly new challenges; they are the children of the old, more weathered and tested jurisprudence. During the early decades of the twentieth century, the legislature was not always swift in making legislative adjustments to fit the unique qualities of automobiles instead of horses on the road. The motivations for that can perhaps be explained by a legislative bias to promote industry and encourage the flourishing of technology. But the role of judges is especially and uniquely different than that of their peers in the legislature. Judges must be concerned not only with the rule of law, but also the role of law and the supremacy of reasonable public policy.

Many scholars agree that legislators signal most expressively through the rules and legislation that they craft. However, the role of judges as agents of communication may be underappreciated. Not for the fact that judges are communicators of the law, but the fear of what judicial action (*read sometimes as activism*) signifies or destabilizes when they engage in robust expression. Expectations that judges act as neutral, positivists, bowing to legislative action, and rejecting activism, ignores a profound truth: Judges are quintessential expressionists, explicating the law, sending signals, creating new trends, and shaping norms through the behaviors they seek to modify. It would seem unreasonable to offer that the function of courts is limited to executing legislative will, without regard to legislative malfunctions, context, public policy, and the integrity of the bench. The dangerous tendency in expanding the function of courts is that by means of judicial interference the democratic process will be undermined and the

See Vanessa Renée Casavant, *Catman's Transformation Raises Concerns Over Extreme Surgery*, SEATTLE TIMES, Aug. 16, 2005, http://seattletimes.nwsourc.com/html/localnews/2002441727_catman16.html.

9. Dennis R. Cooley, *Deaf by Design: A Business Argument Against Engineering Disabled Offspring*, 71 J. BUS. ETHICS 209, 211 (2007).

10. The recent birth of octuplets to a mother of six has sparked considerable controversy and is forcing a dialogue in the medical ethics community. See Meredith Reynolds et al, *Trends in Multiple Births Conceived Using Assisted Reproductive Technology, United States, 1997–2000*, 111 *Pediatrics* 1159 (2003) (suggesting that as “more women delay childbearing into their late 30s and 40s” greater complications arise and infertility increases. The authors note that among the problems arising with increased maternal age is “the risk for multiple birth among naturally conceived pregnancies”). *Id.* at 1159; Stephanie Saul, *Birth of Octuplets Puts Focus on Fertility Clinics*, N.Y. TIMES, Feb. 12, 2009, <http://www.nytimes.com/2009/02/12/health/12ivf.html>.

will of the people may be compromised or ignored altogether. Yet, this fear must not obscure nor dampen the zeal by which judges take to the mish-mash of rules (if there are any) to interpret and fashion the role of laws.

Judicial actions carry meanings¹¹ but unlike their peers in the legislature—for better or worse—the wisdom of most judicial opinions is not always subject to challenges at the ballot box. Certainly, there is no referendum on how judges should vote in a particular case. The public speaks to judges through special interest groups who bother to write amicus briefs that sometimes may be considered by judges, but not always. One could argue that judges benefit from being shielded from public opinion.¹² Yet, public attention—and sometimes the need for it—is not lost on judges. State and local courts can be heavily influenced by politics and increasingly judicial campaigns rival that of their peers in the legislatures.¹³ In 2007, judges and those campaigning to hold judicial offices spent nearly \$35 million on advertising, some of which was so bitter it made national and international news.¹⁴

Political messages are sent from courts by cases that are not adjudicated. The Supreme Court's decision to grant or deny certiorari sends a message as to the state of the law or the importance of an underlying dispute. As well, judges signal in their opinions and dissents. Dissenting opinions serve the expressive function of forecasting, leaving some predictions about the law to come or markers on how to get there.

Justice Harlan's lone and derisive dissent in *Plessy v. Ferguson* per-

11. See Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

12. In a forthcoming paper, Tom Colby, a scholar at Georgetown Law Center argues that judges should be more aware of public sentiment and that the public should be engaged in the judicial review process by submitting materials for judges to consider so that they make well-guided decisions.

13. The politicized nature of judicial elections is highlighted by the 2008 Supreme Court election in Wisconsin. In what one headline described as "Big money, nasty ads highlight Wisconsin judicial race," race, small town versus big city experience, political ideology and party loyalty were central to who would earn a 10 year placement on the state's highest court. In the end, Justice Louis Butler, a long-time judge and incumbent on the Wisconsin Supreme Court, was unseated by Judge Michael Gableman after a series of attack ads (some sponsored by third parties) depicting Butler as too lenient on crime and on the extreme left. The New York Times and Money, *Nasty Ads Highlight Wisconsin Judicial Race*, <http://www.cnn.com/2008/POLITICS/03/31/wisconsin.judicial.race/> (last visited Feb. 12, 2009).

14. *Id.* According to the Brennan Center at New York University, the impartiality of courts is at stake in politically fueled judicial elections. According to authors James Sample, Lauren Jones, and Rachel Weiss, television ads appeared in ten of eleven states holding contested Supreme Court elections in 2006. In the report, Sample and his colleagues suggest that judicial elections are now fueled by partisan politics and special interest groups. JAMES SAMPLE ET AL., *THE NEW POLITICS OF JUDICIAL ELECTIONS 2006: HOW 2006 WAS THE MOST THREATENING YEAR YET TO THE FAIRNESS AND IMPARTIALITY OF OUR COURTS—AND HOW AMERICANS ARE FIGHTING BACK* (2007), available at http://brennan.3cdn.net/49c18b6cb18960b2f9_z6m62gwji.pdf.

fectly signals in this regard. Harlan, himself a former slave owner, warns the Court, that in the view of the Constitution, and “in the eye of the law, there is in this country no superior, dominant, ruling class of citizens.”¹⁵ As Harlan omnisciently noted, the opinion by the majority would become aligned with other pernicious cases, like *Dred Scott v. Sanford*.¹⁶ The Constitution, as he cautioned, has no room for majoritarian politics masquerading as state laws that would seek to undermine its most fundamental tenets and Amendments. Harlan’s dissent is courageous for what it meant at the time and brilliant for what it forecasts and imparts in the soil of constitutional law and Supreme Court jurisprudence. Harlan deftly lays out the challenge to the majority’s holding as he declares that the Constitution is colorblind, respects civil rights, and that equal protection is a robust doctrine, not satisfied by perfunctory, weak accommodations.

The signaling at both ends in *Plessy* proved transformative, including the holding itself—that there was only one dissenter became a powerful artifact of the case. If the Court represents an unfettered moral compass, then one lone dissent in a case testing the equal protection muscle of the Constitution signaled that the Fourteenth Amendment would be asleep for a while. The majority rejected the idea that separate facilities imposed by Louisiana law translated into a sense of inferiority in blacks in violation of the Fourteenth Amendment. But whether blacks would “feel inferior” or not, was not a constitutional law question. The majority’s ruling sent a message to states that federalism would not be suppressed if legislatures saw fit to truncate the rights, privileges, and accommodations afforded to blacks by the Constitution and its Amendments, which emerged out of rigorous legislative debate. The Constitutional challenge, as Harlan so deftly articulated was that a class of citizens, perceiving themselves as superior, would assume to “regulate the enjoyment of civil rights, common to all citizens, upon the basis of race.”¹⁷

Not surprisingly, the ruling in *Plessy* ushered in the Jim Crow era, a time marked by the dramatic rise in white supremacist organizations coupled with lynchings and aggressive state legislating to promote segregationist policies and effectively roll back the Fifteenth Amendment voting protections.¹⁸ Harlan’s apprehensions cannot be overlooked; “[t]he present

15. 163 U.S. at 559 (Harlan, J., dissenting).

16. 60 U.S. 393 (1856).

17. *Plessy*, 163 U.S. at 563 (Harlan, J., dissenting).

18. 2500 black men and women were lynched between 1885 and 1900 during Reconstruction. See Richard Delgado & Jean Stefancic, *Images of the Outsider in American Law and Culture*, in CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR 170, 171 (Richard Delgado & Jean Stefancic eds.,

decision,” he noted, “will not only stimulate aggressions, more or less brutal and irritating, upon the admitted rights of colored citizens, but will encourage the belief that it is possible, by means of state enactments, to defeat the beneficent purposes” of the Fourteenth Amendment.¹⁹ Equally, however, Harlan’s dissent proved essential for the democratic process as, half a century later, blacks rallied around the principles he laid down in *Plessy*. The clear signaling from Harlan proved significant then not only for citizens, but also for later courts, like the Court in *Brown v. Board of Education*, as the language and imagery of a colorblind constitution guided the jurists.²⁰

There are also times when judges choose to quiet their signals, or engage in *expressive minimalism* (lest their actions be perceived as activist or progressive). In those instances, judges may rely on precedent, ignore social movements and trends, and disregard custom that seemingly conflict with the rule of law in an effort to demonstrate neutrality or weakly signal to the legislature. To be sure, there is considerable disagreement on the role of judges and how expressively they *should* or *should not* signal. In his widely acclaimed book, *One Case at a Time*, Cass Sunstein²¹ argues that judicial minimalism may be a more enlightened approach to juridical decision-making, because fundamental issues are better resolved though the

1997). That terror escalated during the Jim Crow period. In total, it is estimated that between 1885 and 1951, at least 4700 racially motivated lynchings occurred in the United States. ROBERT L. ZANGRANDO, *THE NAACP CRUSADE AGAINST LYNCHING, 1909–1950* (1980); See, e.g., Leon F. Litwack, *Hellhounds*, in *WITHOUT SANCTUARY: LYNCHING PHOTOGRAPHY IN AMERICA* 8 (James Allen et al. eds., 2000); *A DOCUMENTARY HISTORY OF THE NEGRO PEOPLE IN THE UNITED STATES 1910-1932* (Herbert Aptheker ed., 1973); PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 113 (1984) (quoting Fannie Barrier Williams that at the turn of the twentieth century, black women had “no protection against the libelous attacks on their characters, and no chivalry generous enough to guarantee their safety against man’s inhumanity to women.”); *FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA* (Charles J. Ogle-tree, Jr., & Austin Sarat eds., 2006).

19. *Plessy*, 163 U.S. at 560 (Harlan, J., dissenting).

20. *Brown v. Board of Education*, 347 U.S. 483, 490 n.5 (1954). The Court embraces the ethic of Harlan’s dissent:

What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race—the right to exemption from unfriendly legislation against them distinctively as colored—exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race.

Id. (quoting *Strauder v. West Virginia*, 100 U.S. 303, 307–08 (1880)).

21. CASS SUNSTEIN, *ONE CASE AT A TIME* (1999).

democratic process and judges are often unable to anticipate the long-term consequences of their actions.

Sunstein's analysis is thoroughly compelling, particularly on issues of social justice. He suggests that Taney and his peers overreached in *Dred Scott*, spinning the nation into civil war. To him, the now infamous *Dred Scott* opinion would have been a mere footnote or unimportant case in American jurisprudence had the court not attempted to be the moral compass for the nation. On the other hand, Sunstein suggests that the court proceeded appropriately when it ruled that the Virginia Military Institute could not exclude women, but declined to speak to the broader issue of single-sex institutions. The concern voiced by Sunstein and echoed throughout the past century by Justice Holmes and other renowned scholars and jurists alike, is the "possible unreliability of moral judgments from the court" and the preempting of the judicial process.

But how democratic is the judicial process? With the exception of elected judges, most people might answer that the judicial process lacks the democratic values that are typically associated with the legislature. However, in his resignation letter from the Supreme Court, Justice Stephen J. Field articulated a different vision of the Court. To him, the Court was the "most Democratic" feature of a Republican government. He expounded, "Senators represent their States, and Representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people, and for the people.'"²² It was in this negative power, which Field referred to as "the power of resistance," that was the only "safety" of popular government.²³

The proper role of courts engenders significant debate. Yet, what seems better settled is the principle that courts are the place at which the common law is developed. Its genesis and modifications evolve out of the juridical process and when that process becomes encumbered or deferred to the legislature the role of the judiciary is called into question. This essay makes the case that expressive minimalism too often governs the common law judicial approach to biotechnology. The cases visited in this domain test our capacity to understand whether life is appropriately described as being beyond the definition of property, as well as the disputed assumptions about life being commodifiable, patentable, destroyable, and con-

22. *Talamini v. Allstate Ins. Co.*, 470 U.S. 1067, 1071 n.9 (1985) (Stevens, Brennan, Marshall, Blackmun, JJ., concurring) (quoting Letter of Resignation of Justice Stephen J. Field, 168 U.S. 713, 717 (1897)).

23. *Id.*

scriptable. There are also the circumstances that demand secondary or third party response depending on judicial expression, including what to do when life is stolen, misappropriated, or fraudulently acquired.

In part, expressive minimalism, or low-level signaling by the court, in the realm of biotechnology, might be driven by three factors: limited information; ambivalence; or an expectation—hope really—that Congress will demarcate the appropriate boundaries and conduct for biotech actors. But expressive minimalism is an action; as an action it has communicative force, even if it becomes misunderstood as ambivalence.

My hypothesis, then, is that rather than motivating legislative action, or imbuing the bench with greater wisdom or information, expressive minimalism in the context of biotechnology will likely send fuzzy signals. Fuzzy signals will not be clear messages to the legislature. To the contrary, fuzzy signals, like those transmitted across cell phones and televisions, discombobulate messages, distort pictures, and ultimately, are difficult to read. In most cases, when signals from televisions or cell phones become fuzzy, people change the channels or reboot the systems. Rarely is there incentive to listen through fuzzy noise. The false presumption relied on by those who regard judicial minimalism (or fuzziness) as directly signaling the legislature is that legislative bodies are inclined, motivated, or incentivized to listen.

If this is correct, expressive minimalism will not result in legislative action. Worse yet, fuzzy signals from the judiciary will not promote the development of responsive public policy in the immediate cases or those to come. The claim here is not that legislators lack the capacity to shape public policy without judicial guidance. Rather, it is that judges do not serve two lords: the voter and the donor (at least by degrees far less than legislators). Because there are times that the legislature will be captive to collective action, pressured by special interest, and responsive to their economic interests, their attention will be difficult to capture and catalyzing action over morally sensible, but politically unpopular issues will be impossible.

The lesson from *Brown v. Board of Education* is exactly that. When legislative bodies malfunction because of biases, courts can intervene to correct the breakdown in the political process. Courts have the capacity to articulate principles that acknowledge minority interest when the legislature is captured by majoritarian interests. Where legislators see and respond to risk by avoidance, courts can intervene without the threat of harm, including removal from office.

If this assumption is correct, expressive minimalism in the courts will undermine the legitimacy of timely, equitable claims initiated by plaintiffs.

By that, this essay suggests that expressive minimalism will be understood as denying the ripeness of some claims, or as implying that current law does not fit the futuristic-type problems common in biotech cases. Instead, defaults will be created whereby fuzzy messages will tend to absolve—or at least give a pass to—rogue biotech actors.

To be sure, robust expressionism and clear messages will not always communicate what some actors and institutions desire to hear. Nor is it guaranteed that those messages will be responsive to social minorities or political non-elites. In the context of civil rights and racial equality claims, the vigorous judicial expressionism in *Dred Scott* and *Plessy* communicate quite clearly a political disaffection and disregard for African Americans. But that notwithstanding, it was the robust messaging in both cases that motivated legislative action, and not timid, fuzzy, minimalism. Thus the question is not whether robust expressionism from courts will get it wrong some of the time. Rather, in the instances of mistakes, can the cart be righted? The prediction here is that robust judicial expressionism will further democratic action, by promoting transparency, invigorating the political process, and awakening the legislature. To the extent that the legislature's authority in a particular sphere becomes undermined by judicial action or the legislative body becomes dissatisfied with a legal ruling, the political process can right the cart.

Fuzzy signaling will also affect behavior. The function of expression, after all, is to communicate a message. When the message is fuzzy it will nonetheless communicate about a legal rule and shape behavior, even by default. So how will bad actors read fuzzy messages? If under the cloud of fuzzy messages, bad actors will tend to “get away” with behaviors that are normatively deemed as “bad,” then bad actors will continue to engage in harmful behaviors. Bad actors will not be risk averse as a general rule. Indeed, there will be no incentive to engage in risk aversive behavior if courts decline to send that message and legislatures are silent. Indeed, bad actors acting badly will likely serve as a signal to other actors as to what the law tolerates.

This essay unpacks three concepts in the body. It engages the reader in several intellectual thought experiments. In Part I, I argue that fuzzy signaling dominates judicial responses to questions of nomenclature in the human body. This section urges that market realities already exist in the human body and the judiciary's intentional ignorance of that will not signal legislative action, nor will it create structural incentives for bad actors to behave differently. In Parts II through IV, I lay out three intellectual thought experiments and in each section scrutinize the value and risk of expressive mi-

nimalism to the claims upon which the sections are developed.

In Part II, I flesh out what fuzzy signaling means in the context of tort cases involving physician misappropriation of human body parts. Part III examines presumed consent measures, arguing that the compulsory aspect of the regulations makes these forced donations problematic. Forced use of non-consenting individuals' tissues is justifiable only if the donation is viewed as a form of civic duty, or if our bodies are property of the state. Part IV addresses tort liability in body part transplant cases, suggesting that the mishmash left behind from formalistic rule making (*see* Parts II and III) indicates that the status of the body can change from one handler to the next. Part V argues that entrenched minimal expressionism in a rapidly expanding biotechnological world will undermine the natural maturation and evolution of the common law. Part VI concludes this essay.

I. ASSIGNING THE BODY

Nowhere is fuzzy signaling more apparent than how and for what purposes courts define the body. Mostly courts have been reluctant to acknowledge or assign property interests in the body (for plaintiffs), perhaps in an effort to acknowledge prior judicial ambivalence to antebellum slavery, or demonstrate respect for "personhood," or perhaps a combination of both. Nevertheless, market realities in the body already exist²⁴ and judicial failure to recognize this has its own perverse consequences, including a sorely lacking and undeveloped nomenclature, the exploitation of human subjects,²⁵ a loosely monitored but robust market in buying and selling purloined human tissues,²⁶ and an expanding, conflicting common law.²⁷ The rapid growth of biotechnology produces considerable demand and uses

24. Medical researchers, for example, partake in the market of human tissues when they obtain authorization for medical tests and samples that later result in patenting of cell lines or other similar financially beneficial medical products. *See, e.g.*, Donna Dickenson, *Consent, Commodification and Benefit-Sharing in Genetic Research*, 4 DEVELOPING WORLD BIOETHICS 109 (2004) (focusing on disadvantaged populations both in the developing world and in First World countries). In addition, a rather robust market in human eggs exists and is well-publicized and documented. *See, e.g.*, Kenneth Baum, *Golden Eggs: Towards the Rational Regulation of Oocyte Donation*, 2001 BYU L. REV. 107, 107–12 (2001) (discussing an infertile couple's solicitation of female students attending prestigious universities for oocyte donation and a website advertising auctions for oocytes and sperm, and documenting the resulting media coverage).

25. For a thorough discussion of exploitation of disadvantaged populations in medical research, *see* Dickenson, *supra* note 24.

26. Purloined tissue cases have cropped up in New York, Philadelphia, New Jersey, Florida, and other states. *See* Robert Smith, *Four Indicted in Case of Tissue Theft* (National Public Radio broadcast Feb. 23, 2006), *available at* <http://www.npr.org/templates/story/story.php?storyId=5230544>.

27. Even the state of the law governing the transfers of human eggs (a rather common occurrence among couples facing infertility) is conflicting. *See* Baum, *supra* note 24, at 123–34.

for human body parts.²⁸ Human tissue, bones, and cartilage, now captured for biotechnological purposes, in a prior generation were considered human waste and thus discarded by doctors, hospitals, and clinics.²⁹ That medical and market reality has changed. There is a market in body parts, and physicians, hospitals, and patients have come to rely on their availability. How human “parts” are acquired may be more troubling than the fact that black markets exist. Acquisition occurs through coercion and fraud (in other words, tissues donated for altruistic purposes, but later sold by the recipient),³⁰ funeral homes and crematoriums desecrating and selling body parts,³¹ and misappropriation from some physicians, scientists, and researchers.³²

Notwithstanding a rather robust human biologics industry, some scholars conclude that to place a financial value on the body is to diminish its personhood and pollute our otherwise essentialized understanding of its legal, social, and moral status.³³ To scholars like Margaret Radin, the human body is a sacred entity, and its status as such is violated by any associ-

28. OFFICE OF TECHNOLOGY ASSESSMENT, U. S. CONGRESS, *NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS* 23 (1987). The report stated that:

Over the past decade, however, technological advances have resulted in new, enhanced methods for studying and using human body parts—particularly tissues and cells Human samples are not only an integral part of the biomedical research process, but they are now also used as a component of (or in the production of) a variety of commercial products ranging from drugs and vaccines to pregnancy test kits.

Id.

29. One of the seminal cases regarding pecuniary gain from material otherwise considered to be medical waste occurred in 1990. *Moore v. Regents of the Univ. of Cal.* 793 P.2d 479 (Cal. 1990). A leukemia patient underwent treatment at UCLA’s Medical Center. After removing the patient’s spleen as part of his treatment, one of the doctors who treated the patient used his cells to develop and patent a profitable cell line. *Id.* at 480–82.

30. See Michele Goodwin, *Commerce in Cadavers is an Open Secret*, L.A. TIMES, Mar. 11, 2004, at B15 (discussing litigation in state and federal courts involving the black market sale of body parts taken from cadavers donated by family members); Charles Ornstein & Monte Morin, *UC Got Body Parts Warning a Year Ago*, L.A. TIMES, Mar. 16, 2004, at A1 (discussing the alleged black market sales of donated cadavers by UCLA employees).

31. See Jeff Nesmith, *Funeral Home Thefts: Body Parts May be Tainted—Patients Tested as ‘Ripple of Fear’ Reaches Atlanta*, ATLANTA J.-CONST., Apr. 23, 2006, at A1; Paul Harris, *Raising the Dead*, OBSERVER, Apr. 2, 2006, at 20, available at <http://www.guardian.co.uk/world/2006/apr/02/usa.features>; see also *Jackson v. Biomedical Tissue Servs.*, No 06-CV-1323 (D. N.J. complaint filed Mar. 30, 2006) (plaintiff alleging that hepatitis was contracted through purloined body parts sold in the donor market).

32. See *Moore*, 793 P.2d at 480–81 (involving a UCLA Medical Center physician who concealed from his patient that additional cells were being removed from the patient in order to conduct profitable research); Dickenson, *supra* note 24, at 110 (discussing one researcher’s misrepresentation to a certain population in New Guinea that she wanted blood samples to check for insects, when she actually wanted the samples to enhance research in pursuit of a patent, and another set of researcher’s misrepresentations to Chinese villagers that they would receive medical care in exchange for DNA samples).

33. See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1865 (1987) (arguing that economic analysis is morally wrong when applied to the human body).

ation with financial evaluations and market terms and conditions.³⁴ An extrapolation of Radin's theory is that the body should remain an inalienable vessel, without regard to the uses governments and private entities find for it, lawful or not.³⁵ Legal and social commentators invoke the horrific slave experience in the United States to buttress their claim and to demonstrate in graspable, bare terms the significant consequences of placing financial value on human beings.³⁶ To suggest that their concerns are less relevant to contemporary biotechnology invites remonstrance from varied ideological corners wedded to an anticommodification, incommensurability perspective. Their reasons for avoiding overdue dialogues about what ultimately involves the reach of biotechnology into intimate spaces are not altogether difficult to understand, even if slightly naive.

Ultimately, the fear of speculating about or even contemplating the body in any legal terms other than our late nineteenth century understanding, based on the possibility we will cross *into* the bounds of slavery or based on excessive formalism limits the potential for robust, informed, meaningful, contemporary dialogue and debate on a critical topic of our times.³⁷ Furthermore, this apprehension undermines scholars' ability to credibly engage in policy debates on the reach and normative positioning of biotechnology within the law. Biotechnology can, will, and has run amok amid this indeterminacy. Such fears might actively serve to deflect race, gender, and class issues, but in doing so, also leads to the dodging of substantive inquiry and analysis of markets that already exist and affect racialized bodies.

II. THE RESEARCHED BODY

Part II illuminates three conceptions of the body and identifies the fuzzy signaling in each case. The first conception is the *Moore* Model, based on a case read in Torts and Property classes during law school. The

34. *Id.*

35. *Id.*

36. Robert Arnold et al., *Financial Incentives for Cadaver Organ Donation: An Ethical Reappraisal*, 73 *TRANSPLANTATION* 1361, 1366 (2002) ("It is also important to note that our society does not permit its capitalistic system to operate in certain commodified exchanges because they are considered to be intrinsically wrong.")

37. Years ago, the question of body part ownership might have been construed as an academic exercise, something otherwise theoretical, with no real-world implications. Or simply fiction. That would be a misconception in today's marketplace. The question of body part ownership has practical implications and consequences for everyone, including almost 99,000 patients waiting for organs. *See, e.g.*, STEPHEN WILKINSON, *BODIES FOR SALE: ETHICS AND EXPLOITATION IN THE HUMAN BODY TRADE* 136, 174, 207–09 (2003) (comparing paid surrogacy, DNA patenting and slavery).

other two conceptions are slightly more obscure. Most obvious in these thought experiments is that a wrong has occurred. Defining what that wrong is, in light of contemporary formalistic jurisprudence, fuzzy signaling and legislative silence, is another matter.

A. The Give Me “Moore” Model: Body Part as Intellectual Property

Model A:

If G (physician) persuades M to have his spleen removed (under pretense of imminent death), and M complies, but is unaware that G has pre-established pecuniary and organizational interests (established business relationships) in exploiting the spleen and cells, and G and his associates actively exploit the cells, and G withholds this information from M, including notice of a patent derived from the use of M’s spleen, sperm, and blood, has there been a violation of M’s rights? If so what kind? Can a claim be made for which relief is available?

Model A(2):

X, clueless, kept raw diamonds in his pocket, but was convinced by Y (his lawyer) to remove the diamonds to save his life, and X complied. Y conspired to and did obtain the diamonds after X removed the diamonds from the pocket. Three years later, the newly polished, cut diamonds are ready for the market and Y successfully transfers them to new owners for millions of dollars. Has there been a violation of X’s rights? If so what kind? Can a claim be made for which relief is available?

Model A, based on *Moore v. Regents of the University of California*,³⁸ is perhaps the most recognized body part appropriation case. On October 8, 1976, Dr. David Golde, an employee of the University of California at Los Angeles Medical Center, informed Mr. Moore “that he had reason to fear for his life, and that the proposed splenectomy operation . . . was necessary to slow down the progress of his disease.”³⁹ Moore consented to the operation. If taken as true that Moore’s life depended on the surgery, we are left to wrestle with the legal and moral implications of the physician-patient relationship at the time of the operation and later. Golde’s conduct prior to the operation rightfully draws scrutiny as possibly conflicting—or giving the appearance of conflicting—with his fiduciary obligations to Moore’s (if

38. 793 P.2d 479 (Cal. 1990).

39. *Id.* at 481 (internal quotation marks omitted).

the doctor's financial motivations were alive at the time of the operation).

Yet, this view is not shared by all. For some, the moral questions are rendered less significant by the necessity of Moore's operation. To some audiences, the necessity that dictated Moore's operation served to immunize the physician from subsequent liability. From this view, so long as the operation was necessary, the physician did not cause any additional or unnecessary harm to Moore. What might have been incinerated became a valuable research tool and resource, which ultimately benefited patients.

However, the moral and legal questions are not easily resolved, even if one were to accept the necessity and urgency of Moore's initial operation with Dr. Golde. Within days of the meeting with Moore, Dr. Golde and Shirley Quan, a researcher at UCLA, formed a partnership with the intent of making "arrangements to obtain portions of [Moore's] spleen following its removal and to take them to a separate research unit."⁴⁰ Over the next few years, Golde subjected Moore to additional tests (extracting blood, sperm, bone marrow, and other fluids), fraudulently inducing him to commute to Los Angeles from Seattle under the pretense of medical necessity.⁴¹ Nearly three years later, according to the court record, "Golde established a cell line from Moore's T-lymphocytes."⁴² In 1981, the Regents applied for a patent on the cell lines and listed Quan and Golde as "inventors,"⁴³ the royalties and profits from which would be shared by the inventors and Regents. It is estimated that billions of dollars have been recouped from the exploitation of Moore's spleen and other tissues.

Without an appreciation for "what" the legal status of Moore's cells, sperm, and spleen were, the California Supreme Court justices were ill-equipped to define what the legal remedy should be. The court, finding that there was no other judicial or legislative guidance that would treat Moore's spleen and the cell line as property, dismissed his conversion claim.⁴⁴ To

40. *Id.* (internal quotation marks omitted).

41. *Id.*

42. *Id.* The particular lymphocyte derived from Moore's spleen is described as "a type of white blood cell. T-lymphocytes produce lymphokines, or proteins that regulate the immune system. Some lymphokines have potential therapeutic value. If the genetic material responsible for producing a particular lymphokine can be identified, it can sometimes be used to manufacture large quantities of the lymphokine through the techniques of recombinant DNA." *Id.* at 482 n.2.

43. *Id.* at 482.

44. *Id.* at 488. Moore's original complaint raised thirteen causes of action. The court observed, "[e]ach defendant demurred to each purported cause of action. The superior court, however, expressly considered the validity of only the first cause of action, conversion." *Id.* at 482. The court reasoned that the other causes of action were defective. The other claims included: (1) lack of informed consent; (2) breach of fiduciary duty; (3) fraud and deceit; (4) unjust enrichment; (5) quasi-contract; (6) bad faith breach of implied covenant of good faith and fair dealing; (7) intentional infliction of emotional distress; (8) negligent misrepresentation; (9) intentional interference with prospective advantageous eco-

suggest, as the court did, that his biological materials were *sui generis*, addresses only Moore's health condition, but provides little guidance as to the plaintiff's legal status. The court incorrectly suggests that there was no possessory interest in Moore's cell line. In fact, Dr. Golde possessed an interest protected by law. But why didn't Moore?

If "clueless" man, X, can have an interest in the diamonds in his custody, how can we deduce that one lacks an equal interest in his spleen, cells, sperm, and other biological materials? The distinction seems arbitrary; crafting a rule where skin is the barrier to ownership seems absurd. In other words, diamonds external to the skin (in one's pocket) is a possession for which there is a rule of ownership, but that which is within the skin has no ownership value? Or that which has external value, has no value if it is trapped within the body? If Moore had swallowed valuable gemstones such as diamonds, would the value of the goods have been lost because they were no longer external?

Consider also that X's recovery is not limited to his awareness or ability to *guess* the value of the diamonds. Even the shamelessly ignorant plaintiff is entitled to relief.⁴⁵ If the diamonds were worth five million dollars, but the shamelessly ignorant owner guessed their relative value at five dollars, the law refuses to be punitive towards him or punish him for his ignorance, by limiting his recovery to five dollars.⁴⁶ To do so would unjustly enrich Y, his lawyer, and provide an incentive for lawyers to defraud their clients.

As between the two models above, the California Supreme Court would have no difficulty divining the remedy for someone coerced out of his diamonds by his lawyer and sending a robust signal. Scholars should not be comfortable with the fact that the court would be blind to an equally hostile action, involving a doctor secretly obtaining his patient's cell line and exploiting it for his financial interests.

In Model A, G, the physician and his collaborators, were likely in the best position to honestly describe the value of Moore's body parts. They were aware of the value that could be derived from isolating particular products from his cell line. They understood the nature of the market's demand for the products they could derive. G and his collaborators also

onomic relationships; (10) slander of title; (11) accounting; and (12) declaratory relief. *Id.* at 482 n.4.

45. See, e.g., *Childs v. Haussecker*, 974 S.W.2d 31 (Tex. 1998).

46. See *id.* at 38 ("[P]ermitt[ing] the cause of action of a 'blamelessly ignorant' plaintiff to accrue before he or she could possibly have been aware of the injury would be unjust."); see also Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CAL. L. REV. 965 (1988).

understood their unique market advantage; securing a patent on Moore's cell-line gave them a legal monopoly on all its derivatives. Nevertheless, the court in *Moore* deflected, dismissing virtually all of Moore's claims, and rejecting the concept of *self*-ownership in one's body.⁴⁷ The court cautioned that Moore had no interest in his cell-line after the patent was created. But the court missed the point of Moore's claim, that he had a protected legal interest in his cells, tissues, and blood before the unauthorized use by his doctors occurred and before the patent was issued. The timing of the patent is a false timestamp and mistakenly applied by the court; a patent does not cut off past interest, or according to Justice Mosk, present or future rights.

III. THE PRESUMED BODY

A. *Presuming Consent: Body Part as State Good*

Model B: The Good Samaritan:

B dies of sudden infant death syndrome (SIDS). D, a hospital staff member, removes B's corneas pursuant to a statute intended to increase the supply of corneas in the state. B's parents later learn of the extraction and file a lawsuit, claiming the statute is unconstitutional because it fails to provide notice and an opportunity to object. Is the statute unconstitutional? Has a constitutionally protected right been breached?

Model B represents the presumed consent scheme, which acknowledges that the body has value as a source of transplantable goods. However, that value is gifted to the state absent notification to the state that the gift is revoked.⁴⁸ First enacted in Maryland,⁴⁹ presumed consent laws op-

47. *Moore*, 793 P.2d at 488 (holding that the tort of conversion does not apply to his "biological materials"). However, the holding in *Moore* does not signify that harm has not occurred nor that an injury has not been sustained. Rather, the court does indicate that damages might be difficult to calculate.

48. UNIF. ANATOMICAL GIFT ACT § 4 (1987).

49. See MD. CODE ANN., EST. & TRUSTS § 4-509.1 (2005). The statute sets forth the following framework for determining when a corneal may be provided for transplant:

(a) In any case where a patient is in need of corneal tissue for a transplant, the Chief Medical Examiner, the deputy chief medical examiner, or an assistant medical examiner may provide the cornea upon the request of the Medical Eye Bank of Maryland, Incorporated . . . under the following conditions:

- (1) The medical examiner has charge of a decedent who may provide a suitable cornea for the transplant or research;
- (2) An autopsy will be required;
- (3) No objection by the next of kin is known by the medical examiner;

erate much like conscription or substituted judgment, whereby one's choice to pursue or not to pursue a particular course of action with her body is usurped by the state.⁵⁰ Pursuant to statutory authority, medical examiners, coroners, and their designated personnel are authorized to extract corneas, heart valves, and other tissues from cadavers without first obtaining consent from the "donor" if the donor has not declined a donation.⁵¹ The illusory opt-out provision veils the fact that such laws are more like conscription measures and less like an option or "choice." Where, after all, is one to "opt-out?" How do the dead opt-out? How can the uninformed relative opt-out? Indeed, studies demonstrate that most people, even local legislators such as aldermen and city council members, are relatively ignorant about presumed consent (in their own states) and possess a limited understanding of what the term signifies or what the law authorizes.⁵²

Presumed consent statutes are compulsory measures that obligate individuals to donate. The legislation authorizing this type of body part con-

(4) No religious objection made by the decedent before death is known by the medical examiner; and

(5) Removal of the cornea for transplant will not interfere with the subsequent course of an investigation or autopsy or alter the postmortem facial appearance. . . .

(c) The Chief Medical Examiner, the deputy chief medical examiner, an assistant medical examiner, and the Medical Eye Bank of Maryland, Incorporated . . . are not liable for civil action if the next of kin subsequently contends that authorization of that kin was required.

50. UNIF. ANATOMICAL GIFT ACT § 4 (stating that "[t]he [coroner] [medical examiner] may release and permit the removal of a part from a body within that official's custody").

51. ARIZ. REV. STAT. ANN. §§ 36-851, 36-852 (West 1989); ARK. CODE ANN. § 12-12-325 (2005); CAL. GOV'T CODE § 27491.46-.47 (West 2006); COLO. REV. STAT. § 30-10-621 (2005); CONN. GEN. STAT. ANN. § 19a-281 (West 2005); DEL. CODE ANN. § 29-4712 (West 2004); FLA. STAT. ANN. § 765.5185 (West 2006); GA. CODE ANN § 31-23-6 (1985); HAW. REV. STAT. ANN. § 327-4 (2004); IDAHO CODE § 39-3405 (2005); ILL. ANN. STAT. § ch. 110 1/2, § 351-354 (Smith-Hurd 1983); KY. REV. STAT. ANN. § 311.187 (2001); LA. REV. STAT. ANN. § 17:2354, 33:1565 (West 2005); MD. CODE ANN., EST. & TRUSTS § 4-509.1 (2005); MASS. ANN. LAWS ch. 113, § 14 (Law Co-op Supp. 1989); MICH. COMP. LAWS ANN. § 333.10202 (West 2005); MISS. CODE ANN. § 41-61-71 (1989); MO. ANN. STAT. § 58.770 (West 2006); MONT. CODE ANN. § 72-17-215 (2005); N.C. GEN. STAT. § 130A-391 (2003); N.D. CENT. CODE § 23-06.2-04 (1989); OHIO REV. CODE ANN. § 2108.60 (West 2005); OKLA. STAT. ANN. § 63-944.1 (West 2006); R.I. GEN. LAWS § 23- 18.6-4 (2001); TENN. CODE ANN. § 68-30-204 (1989); TEX. HEALTH & SAFETY CODE ANN. § 693.012 (Vernon 2005); UTAH CODE ANN. § 26-4-23 (2005); WASH. REV. CODE ANN. § 68.50.280 (2006); 2005 WIS. LAWS § 157.06; W. VA. CODE § 16-19-4 (2005).

52. Ralph Frammolino, *Harvest of Corneas at Morgue Questioned*, L.A. TIMES, Nov. 2, 1997, at A1 (investigating over 570 cases of nonconsensual cornea harvesting during a 12-month period, and explaining that families "were shocked that they had not been asked or told"). See also, Michele Goodwin, *Organ Transplant Survey Analysis* (Feb. 16, 2000) (unpublished, on file with the author). This survey was administered in Lexington, Kentucky, with the assistance of Janet Givens, special assistant to former Mayor Pam Miller. Participants consisted of administrators in the Mayor's Office and members of the City Council of Lexington, Kentucky. Only one of fifteen government officials surveyed (or 6.6%) in this group was aware of the term "presumed consent," although Kentucky had authorized legislative consent over ten years prior to the survey.

scription operates pursuant to mandatory autopsy statutes.⁵³ Thus, the only bodies to which presumed consent applies are victims of homicide or catastrophic deaths requiring a medical investigation. Disproportionately, in some states, blacks and Latinos are the overwhelming majority of the presumed consent donors.⁵⁴ In California, in June 1997, for example, over 80% of presumed consent donors were black and Latino.⁵⁵ In effect, in the California cases of misappropriation, the state presumes that blacks and Latinos would have agreed to donate were they alive and able to make the choice.

But if compulsory exploitation of bodies is permissible, why not forced sex? The compulsory aspect of the regulations makes these donations problematic. Forced use of non-consenting individuals' tissues is justifiable only if the donation is viewed as a form of civic duty, or if our bodies are property of the state. Donation as a civic duty is a laudable concept, though not supported by social custom or an American legal tradition. Our common law tradition abjures the duty to rescue doctrine, and more pointedly warns, "rescue at your own risk."⁵⁶ That the emptied bodies of blacks and Latinos belong in service to the state cannot be justified by the ways in which we organize labor, medicine, or our system of justice. Marx's concept of a communitarian society, operating for the common good of man and woman, no matter how commendable, is not a philosophy that constitutional framers or the subsequent generations of electorate adopted. This notion of compelled altruism belies the reality that only 20% of Americans carry donor cards—a more realistic reflection of their affir-

53. See, e.g., Fred H. Cate, *Human Organ Transplantation: The Role of Law*, 20 J. CORP. L. 69, 84 (1995) (noting that presumed consent "laws generally provide that a coroner or medical examiner may remove the corneas from a cadaver in the course of a legally-required autopsy").

54. See Gabriel Escobar, *Deaths Pose Continuing D.C. Mystery; City Carries Hundreds of Undetermined Cases, Muddying Vital Statistics*, WASH. POST, Dec. 22, 1997, at A1 (commenting on the rise in urban violence in the 1980s and remarking that many of the deaths of black urban Americans from that era remain unsolved); Glen Loury, *The Impossible Dilemma*, NEW REPUBLIC, Jan. 1, 1996, at 21 (noting that the murder rate among black youths (under age 20), which was already three times that of white youths in 1986, doubled in the five years between 1986 and 1991, while the white rate remained unchanged); see also Darryl Fears, *Urban Spotlight: Is Atlanta the Next Detroit?*, ATL. JOURNAL-CONSTITUTION, Dec. 18, 1994, at D1 (pointing out that in the early 1980s, the homicide rate soared). Fears reports that between 1983 and 1987, more than 700 people were slain each year. On No Crime Day in Detroit—a 1986 event sponsored by basketball star Isaiah Thomas to prove his city was still safe—a police officer was shot dead. *Id.*

55. Frammolino, *supra* note 52. See also *The Late Edition: Crime in the U.S. is Discussed* (CNN television broadcast Oct. 24, 1993); Eric Lichtblau, *Reporter's Notebook: Going beyond Line Scores of Gang Carnage*, L.A. TIMES, Nov. 25, 1990, at B3 (noting that during a one month time span there were over 300 gang-related killings in Los Angeles County); *Larry King Live: Spying on Neighbors—The New Drug-War Strategy* (CNN television broadcast Aug. 15, 1990).

56. See *Yania v. Bigan*, 155 A.2d 343, 346 (Pa. 1959) (refusing to impose liability on defendant for failure to render aid in a drowning death).

mative intent to donate.

Model B raises questions about duty, notice, appeal, and due process. In *Georgia Lions Eye Bank, Inc. v. Lavant*,⁵⁷ parents of an infant (dead as a result of SIDS) filed suit against the eye bank that was authorized by the state medical examiner to remove their son's corneas. The parents were not consulted and therefore had not authorized the removal. Essentially, the parents were denied the opportunity to object to the extraction.⁵⁸ The trial court held in favor of the parents, opining that the imposed consent statute violated due process in that it deprives a person of a property right in the corpse of her next of kin, and fails to provide notice and an opportunity to object.⁵⁹ Their complaint relied on a common law duty to properly bury and dispose of the deceased imposed by ecclesiastical courts on the next of kin of deceased persons.⁶⁰ Over time, this duty became interpreted and litigated as a "right" to dispose in any "appropriate" and "decent" manner afforded by the relatives.⁶¹ Despite its own common law tradition upholding quasi property right interests in the dead for the next of kin, the Georgia Supreme Court reversed, ruling that parents have no interest in the body of their dead children.⁶²

The ruling in *Georgia Lions* belied the status of dead bodies within the common law on the point of quasi property right interests. Previously, Georgia courts, as have other U.S. courts, fashioned a "quasi property" right out of the duty to bury. Quasi property right interests in the dead were affirmed by a Georgia court in the 1937 case, *Pollard v. Phelps*,⁶³ which established that "the courts of civilized and Christian countries regard respect for the dead as not only a virtue but a duty, and hold that, in the absence of testamentary disposition, a quasi property right belongs to the husband or wife, and, if neither, to the next of kin."⁶⁴ Thus, if quasi property rights represent a substantive liberty, then it would seem that a violation of those interests occurs when a state encroaches upon those spindles of

57. 335 S.E.2d 127 (Ga. 1985).

58. *Id.* at 128.

59. *Id.*

60. *Id.* See also *Rivers v. Greenwood Cemetery*, 22 S.E.2d 134, 135 (Ga. 1942) (The Georgia Supreme Court held "that a dead body is quasi property over which the relatives of the deceased have rights which the courts will protect.").

61. Kathryn E. Peterson, Note, *My Father's Eyes and My Mother's Heart: The Due Process Rights of the Next of Kin in Organ Donation*, 40 VAL. U. L. REV. 169, 186 (2005) (arguing that the "next of kin have a right to bury the body of a decedent in an appropriate manner").

62. *Rivers*, 22 S.E.2d at 134.

63. 193 S.E. 102 (Ga. Ct. App. 1937).

64. *Id.* at 106.

“rights” without due process, even in a utilitarian system designed to benefit a public purpose.

“Quasi property” rights diminish in their perceived value unless such interests can be protected from arbitrary state action. The *Georgia Lions* court’s assertion that statutory enactments naturally trump common law rules is correct only in instances when the statute itself does not violate constitutional protections.⁶⁵ *Brown v. Board of Education*, which provided that all provisions of state laws and regulation must yield to the principle that racial discrimination is unconstitutional, as well as *Skinner v. Oklahoma*,⁶⁶ which overturned state mandated sterilization of persons considered “habitual criminals,”⁶⁷ demonstrate a well-established principle that legislation is subject to judicial scrutiny and more importantly constitutional protections. These cases are persuasive reminders that regulations crafted from legislative authority are neither absolute nor immune from constitutional scrutiny.⁶⁸

Thus, in the transplantation context, whether presumed consent laws pass constitutional muster deserves serious judicial scrutiny, not fuzzy signaling. Because presumed consent procurement is triggered by homicide deaths in most states rather than all deaths, the line of proscription becomes arbitrary as the statute requires only those whose deaths resulted from murder or catastrophic injury to surrender body parts. And although limited in scope, this rule is not narrowly tailored to achieve its stated goal. Rather, a narrow tailoring here might advisedly involve mechanisms for consent and refusal to donate despite the laudability of body part donation.

65. *Newman v. Sathyavaglswaran*, 287 F.3d 786, 797 (9th Cir. 2002) (explaining that “Although the underlying substantive interest is created by ‘an independent source such as state law,’ federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim or entitlement’ protected by the Due Process Clause”) (quoting *Memphis Light, Gas and Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).

66. 316 U.S. 535 (1942).

67. *Id.* at 536. Oklahoma’s Habitual Criminal Sterilization Act, OKLA. STAT. ANN. tit. 57 §§ 171–95 (1935), defined a “habitual criminal” as

a person who, having been convicted two or more times for crimes ‘amounting to felonies involving moral turpitude’ either in an Oklahoma court or in a court of any other State, is thereafter convicted of such a felony in Oklahoma and is sentenced to a term of imprisonment in an Oklahoma penal institution.

Skinner, 316 U.S. at 537. The statute required that all men and women who were “habitual criminals” submit to sterilization. Men were to receive vasectomies and women salpingectomies. The legislature was convinced that such operations could take place (for the health and safety of the community) without being a “detriment to his or her general health.” The legislature, however, took pains to make clear that “offenses arising out of the violation of the prohibitory laws, revenue acts, embezzlement, or political offenses, shall not come or be considered within the terms of this Act.” *Id.* at 536–37.

68. *See id.* at 535 (overturning Oklahoma’s Habitual Criminal Sterilization Act that provided for the sexual sterilization of individuals convicted of three or more felonies of moral turpitude).

Crafting a donor pool that draws primarily from homicide victims can exacerbate class and race distinctions.⁶⁹ But most importantly, the rule burdens only one classification of the deceased.⁷⁰ Effectively the law distinguishes the right to bury and even *donate* by mode of death. Yet constitutional rights are neither so arbitrarily defined nor abridged.

If legislators truly believe that Americans support presumed consent policies, why not require babies to surrender one kidney at birth? Only one kidney is needed for a full and healthy life. It is conceivable that the burdens and risks associated with this type of procurement process could be justified by the benefits inured to others. Harvests could be done at the time of vaccination. Doctors could monitor the healing process. Parents would be more informed participants. Relatives, in town for the birth, could provide support and comfort the parents and child. For the baby, the scars would heal seamlessly and more importantly, a life would be saved or extended, at least, for ten to fifteen years. Every child in the United States would be part of a plan to “gift” life to another. This would surely cure the organ shortage. But alas, Americans are not so generous; nor as a nation have we embraced this type of horrific altruism.

To be sure, there is a lesser expectation of personal privacy for public health initiatives that guard against diseases, such as compelled vaccinations,⁷¹ than for policies requiring individuals to surrender their bodies so that vital parts may be plucked out to benefit the common good. The line is not fine. To the contrary, vaccinations reasonably serve an interest that most Americans are inclined to support. However, even with this lesser expectation of privacy in vaccination cases or testing for AIDS and HIV, there is powerful and persuasive dissent in the public sphere, which indicates that Americans are deeply concerned about their personal privacy, religious freedom, quality of life, autonomy, and the desire to be “free”

69. See Frammolino, *supra* note 52 (noting the overwhelming primary pool of presumed consent donors in Los Angeles were black and Latino homicide victims); Michele Goodwin, *Deconstructing Legislative Consent Law: Organ Taking, Racial Profiling, & Distributive Justice*, 6 VA. J. L. & TECH. 2 (2001).

70. If the objective of saving lives through transplantation were a compelling enough function for the state, which justified ignoring privacy, religious freedom, due process, and eliminating a principle right to bury, why limit the compelled donor pool to homicide victims or those who die by catastrophic circumstances? Doing so places the body part supply burden on a narrow population already aggrieved by the unanticipated loss.

71. See *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (upholding the constitutionality of a compulsory smallpox vaccination on the ground that it had a real and substantial relation to public health and safety); *McCormick v. Stalder*, 105 F.3d 1059 (5th Cir. 1997) (finding constitutional a policy to forcibly vaccinate prisoners against tuberculosis).

from government interference or intrusion on their bodies.⁷² That the statutory provisions on which presumed consent laws are implemented rely upon surreptitious planning and clandestine operations in coroners' offices or during autopsies with medical examiners—usually without the consent of relatives—indicates their statutory weakness.

IV. BODIES OF PARTS

A. *Blood Shield Law Model: Body Part as a Service*

Model C: Buyer Beware:

P, a college student, receives a knee implant (a tendon) from tissues bought from TB. The implanted tissue is later found to be contaminated with bacteria typically found in the human bowel. P becomes gravely ill and dies four days later. His estate, learning that TB was aware of the contamination prior to selling the tissues, sues under a theory of product liability. Does the estate have a claim for which relief can be granted?

Few courts have ruled on the issue as to the status of a commercialized body part or whether the purchasers of such parts have recourse when the body parts are defective or contaminated. Those that have, as in the *Cryolife, Inc. v. Superior Court*⁷³ and *Condos v. Musculoskeletal Transplant Foundation*⁷⁴ cases, relied on fuzzy signaling to arrive at arbitrary conclusions. In both cases the courts ruled that bone tissues sold for transplantation were not actually products or goods (although arguably property of their sellers), but rather services.⁷⁵

Such rulings leave duped purchasers without a cause of action and tissue banks free from liability. The rulings indicate that the status of the body can change from one handler to the next. Both cases expose a problematic public policy. Now, to be sure, the courts in these cases recognized the

72. See *Hill v. Evans*, No. 91-A-626-N, 1993 U.S. Dist. LEXIS 19878, at *17 (M.D. Ala. 1993) (finding unconstitutional an Alabama law authorizing HIV testing of "high risk" patients); Michael Lasalandra, *BU Expert Faults CDC for Vaccine Backlash*, BOSTON HERALD, Feb. 8, 2003, at A4; Joan Lowy, *Vaccination Backlash Worries Doctors*, PITTSBURGH POST-GAZETTE, May 9, 1999, at A3; Katherine Seligman, *Vaccination Backlash: There's a Small But Stubborn Faction of Parents Who Don't Vaccinate Their Children. Are There Risks?*, S.F. CHRON., May 25, 2003, at 8; Dan Olmsted, *The Age of Autism: Christian's Mom Speaks*, UPI, Apr. 12, 2006, http://www.upi.com/Health_News/2006/04/12/The-Age-of-Autism-Christians-mom-speaks/UP1-64061144862113/ (highlighting an influential parent's campaign to propose and implement alternatives to mandatory vaccinations).

73. *Cryolife, Inc. v. Superior Court*, 110 Cal. App. 4th 1145 (Cal. Ct. App. 2003).

74. *Condos v. Musculoskeletal Transplant Found.*, 208 F. Supp. 2d 1226 (D. Utah 2002).

75. *Cryolife*, 110 Cal App 4th at 1159; *Condos*, 208 F. Supp. 2d at 1230.

ownership interest or property interests in body parts. The relevant question remains: who is the possessor or owner of body parts in the stream of commerce? One way to interpret these transactions that seems fairly consistent with the holdings is that the patient owned the tendon he purchased. The tissue banks “owned” the tissues prior to selling them. However, it appears from the logic of *Cryolife* that as soon as the good leaves the warehouse of the tissue bank, the body part becomes a “service.”⁷⁶ Thus, the cases illuminate inconsistent treatment vis-à-vis the status of body parts. For example, commercial exploiters of human tissues buy, process, and sell the biological materials to patients via doctors and hospitals. Yet, the *Condos* and *Cryolife* rulings conclude that tissue banks should not be held liable for placing contaminated tissues into the stream of commerce even if their products cause the deaths or illnesses of consumers.

The contaminated tissue cases on which Model C is based represent a third class of litigation explored in this essay that involve minimal expressionism by courts. The model is based on the tragedy of Brian Lykins. His life was cut short after a routine knee operation. According to one of the lawyers involved in the litigation, Brian needed only the equivalent of a pin to be placed into his knee. Brian was healthy and an outgoing twenty-three year-old engineering student.⁷⁷ He was a self-taught musician and very close to his family.⁷⁸ The operation he required was a routine, out-patient knee surgery.⁷⁹ What Brian received was more than he bargained for; Cryolife, the company that sold the tendon to transplant into Brian’s knee, processed it from a cadaver, which remained unrefrigerated for nineteen hours.⁸⁰ The cadaver from which the allograft was acquired had been rejected by other tissue processing companies.⁸¹

Despite Cryolife’s tests on the cadaver, which revealed infection, the company sold the tendon at a tremendous mark-up to the hospital where the

76. *Cryolife*, 110 Cal. App. 4th at 1145.

77. See M.A.J. McKenna, *Tissue Transplant Firm Linked to 14 Infections*, ATLANTA J.-CONST., Mar. 15, 2002, at A1 (discussing the death of Bryan Lykins, a student in Minnesota, who died of bacterial infection as the result of his knee surgery).

78. *Cryolife Litigation, Brian’s Bio*, available at <http://www.cryolifelitigation.com/bio.asp> (last visited May 1, 2009).

79. See Robert Pear, *FDA Delays Regulation of Tissue Transplants*, N.Y. TIMES, May 14, 2003, at A18 (noting that Brian Lykins died after undergoing a “routine knee surgery”); Amanda Gardner, *U.S. Strengthens Rules Governing Tissue, Organ Transplants*, HEALTH DAY, Nov. 19, 2004, <http://news.healingwell.com/index.php?p=news1&id=522463> (describing Brian Lykins’ surgery as “routine”).

80. Gardner, *supra* note 79.

81. See Sandra Blakeslee, *Lack of Oversight in Tissue Donation Raising Concerns*, N.Y. TIMES, Jan. 20, 2002, at A1 (noting that “[i]n many parts of the country, tissue banks that have contracts with for-profit companies will accept donors other tissue banks have rejected as unsafe for use.”).

operation took place.⁸² On November 7, 2001, Brian's new tendon was implanted.⁸³ Within hours, his condition rapidly deteriorated.⁸⁴ By the evening of the operation he was extremely ill.⁸⁵ In four days, he was dead.⁸⁶ He died November 9, 2001 as a result of an allograft which had been contaminated with bacteria from the bowel of the cadaver from which parts were processed and sold by Cryolife.⁸⁷

Several problems attend human tissue transplantation and the reconstitution of body parts beyond the question of ownership. First, are warranties appropriate for reconstituted, processed or restructured body parts? Second, should recourse be granted for purchasers who unwittingly buy insalubrious tissues? Third, how do we frame remedies for injured plaintiffs—through tort or contracts law? Some of these problems are illuminated in disturbing narratives, including those of Bonny Gonyers, Ken Alescu, Sydney Steinberg (a five year-old who died from a heart valve infection possibly linked to Cryolife, the supplier of the body part that she received), and similar cases.⁸⁸ In each instance, plaintiffs suffered injuries connected to the implantation of infected human tissue. Severe injuries and even deaths occurred not as a result of the surgical malfeasance, but due to diseased tissues spreading deadly bacteria within the transplant hosts' bodies. Thus, the issues in dispute with relation to the cases were less about the cause of the injuries, but rather whether remedies exist for these injuries.

The question as to remedies becomes all the more relevant given the significant demand for body parts and the growth of the tissue transplantation and genetic bioprospecting industries.⁸⁹ This technology is useful, but imprecision and mistakes are likely to occur at many stages. And it seems likely that the frequency of these issues arising will increase exponentially in years to come. According to one reporter, tissue transplants, "fueled

82. *But see Transplant Medicine*, IMMUNOTHERAPY WEEKLY, Sept. 11, 2002, at 13 (noting that Cryolife allegedly failed to test for the germ that caused the deadly infection).

83. *See Tissue Banks: The Dangers of Tainted Tissue and the Need for Federal Regulation: Hearing Before the US Senate Committee on Homeland Security and Governmental Affairs, Senate Committee on Governmental Affairs*, 108th Cong. 6 (2003) (testimony of Steven and Leslie Lykins, parents of Bryan Lykins) available at http://hsgac.senate.gov/_files/shrg108110tissuebanksreg.pdf (last visited Feb. 7, 2008) (hereinafter *Lykins Hearings*).

84. *Id.* at 8.

85. *Id.*

86. *See* David McNaughton, *CryoLife Tries to Bounce Back; Tissue Recall by FDA Spawns Losses*, ATL. JOURNAL-CONSTITUTION, Aug. 28, 2003, at D1 (noting that Brian Lykins died from "[c]lostridium sordelli, a bacteria that spreads from the intestine to the rest of the body after death").

87. *Id.*

88. *See* Sandra Blakeslee, *Recall is Ordered at Large Supplier of Transplant Tissue*, N.Y. TIMES, Aug. 15, 2002, at A1 (discussing the FDA's order for Cryolife to recall all soft tissues it had sold).

89. Rebecca Skloot, *Taking the Least of You*, N.Y. TIMES, Apr. 16, 2006 (Magazine), at 38.

largely by demand for tissue for spine surgery . . . has become a billion-dollar industry.”⁹⁰ In 2004, “there were about a million tissue transplants in the United States.”⁹¹ That figure represents nearly a three-fold increase in one decade.⁹² To the extent that treatments are now available for worn-out knees and joints and defective or blocked heart valves, doctors will continue to recommend these types of elective treatments for their patients. Their failure to do so might be actionable itself; failure to enhance, even by chance, a patient’s health outcome can result in civil liability in a growing number of jurisdictions.⁹³

Nevertheless, problems are unresolved, even with the Center for Disease Control’s (CDC) investigations revealing the numerous problems at tissue bank laboratories, and the very direct links between the deaths and illness of consumers and cadaver sources used by the companies that processed and sold the body parts that they purchased. Recent jurisprudence unwisely places the burden on patients and doctors to guard against implanting contaminated body parts.⁹⁴

With this type of fuzzy guidance from courts, how are patients, often the least informed, to police this process?⁹⁵ Patients, and even their doctors, are simply uninformed and it would seem unreasonable to expect them to acquire health and lifestyle information about the cadavers from whom the body parts are harvested.⁹⁶ Certainly courts can appreciate that tissue banks are in the best position to do that research and indeed are obligated to

90. Renie Schapiro, *Banking on the Gift of Tissue*, MILWAUKEE J. SENTINEL, May 2, 2005, at G1.

91. *Id.*

92. *Id.*

93. Margaret T. Mangan, *The Loss of Chance Doctrine: A Small Price to Pay for Human Life*, 42 S.D. L. REV. 279, 290 (1997) (“Most courts which have had an opportunity to decide upon the loss of chance doctrine recognize a cause of action for loss of chance in medical malpractice actions.”); see also *Delaney v. Cade*, 26 F.3d 991, 991 (10th Cir. 1994) (concluding that Kansas recognizes loss of chance); *LaRose v. Wash. Univ.*, 154 S.W.3d 365, 370-72 (Mo. Ct. App. 2004) (upholding jury award of damages against physician whose failure to diagnose cancer in patient reduced her chance of survival).

94. See *Condos v. Musculoskeletal Transplant Found.*, 208 F. Supp. 2d 1226, 1230 (D. Utah 2002); *Cryolife Inc. v. Super. Ct.*, 110 Cal. App. 4th 1145, 1154–60 (Cal. Ct. App. 2003); *Johnson v. Super. Ct.*, 101 Cal. App. 4th 869, 886–89 (Cal. Ct. App. 2002) (limiting the recovery of parents seeking damages because sperm bank failed to disclose that purchased sperm came from a donor with a history of kidney disease, which their daughter later inherited); *Lenahan v. Univ. of Chi.*, 808 N.E.2d 1078, 1087 (Ill. App. Ct. 2004) (“Plaintiffs failed to allege facts sufficient to show that the defendants knowingly and voluntarily participated in a common scheme to commit any tortious acts in relation thereto.”).

95. See *Law Firms File Suit on Behalf of Transplant Patient Who Allegedly Received Illegally Harvested Body Parts; Suit Alleges That Untested Bones in Transplant Led to Positive Hepatitis Test Results*, BUS. WIRE, Mar. 23, 2006, http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20060323005497&newsLang=en.

96. See *id.*

do so. Warning labels on sealed packages, containing tendons and human bones, serve to limit the liability of tissue banks, but do not rectify the information deficit.

Recent controversy involving the pillaging of body parts from funeral home cadavers in New York and New Jersey further illuminates this point. In February 2006, the Brooklyn District Attorney Charles Hynes charged four grave pillagers with “medical terrorism.”⁹⁷ Hynes claimed the body-robbing scandal was “unique in its utter disregard for human decency.”⁹⁸ It was the latest horrific episode in the ongoing tissue transplant industry saga. The indictment alleged that a New Jersey dentist, Michael Mastromarino, and codefendants robbed over a thousand bodies of bones, ligaments, heart valves, organs, and other valuable tissues.⁹⁹ The defendants stuffed the bodies with plastic tubing to deceive relatives.¹⁰⁰ Detectives and investigators unmasked their furtive scheme, but only after thousands of body parts, some from diseased corpses, were sold for transplantation to hospitals, doctors, and patients throughout the United States¹⁰¹ and internationally.¹⁰² Tissue, similar to blood transfusions, can transmit hepatitis, HIV, mad cow disease, bacteria, and various other communicable diseases to the unsuspecting transplant recipient.¹⁰³

That patients and their doctors are at a practical disadvantage seems clear.¹⁰⁴ Both parties lack information about the cadavers’ lifestyles, sexual habits, prior illnesses, and whether the “donors” smoked, drank, or used drugs. Surgeons, though skilled, are not microbiologists and lack the exper-

97. Tonya Maxwell, *4 Charged With Stealing Bones Implanted Locally*, CHI. TRIB., Feb. 24, 2006, §1, at 3.

98. Anthony M. DeStefano, *The Body Snatchers: Funeral Home-Based Ring Charged*, NEWSDAY, Feb. 24, 2006, at A3.

99. *Id.*

100. *Id.*

101. *Id.*

102. Daryl Passmore, *The Body Business*, THE SUNDAY MAIL (Australia), July 1, 2006, at 57.

103. Mastromarino subsequently pled guilty to numerous charges of enterprise corruption, reckless endangerment and body stealing in New York. Alan Feuer, *Dentist Pleads Guilty to Stealing and Selling Body Parts*, N.Y. TIMES, Mar. 19, 2008, at B6. In Pennsylvania, he pled guilty to charges involving his business arrangement with three Philadelphia morticians. Joseph A. Slobodzian, *Body-parts Mastermind Pleads Guilty*, PHILA. INQUIRER, Aug. 29, 2008, at B01.

104. In the spring of 2006, I was interviewed along with two surgeons for a nightly news program in Chicago, Illinois. The doctors had transplanted possibly insalubrious tissues in patients here in Chicago. The tissues were processed from a tissue bank now closed and under investigation by the attorney general’s office in New Jersey. The discovery that the tissue bank purloined body parts from a funeral home was disclosed only after the surgeons implanted tissues from cadavers that may have carried diseases or from individuals who died from cancer. Patients across the United States are now being tested for hepatitis and other communicable diseases. Several lawsuits have been filed. *See Chicago Tonight* (PBS television broadcast Feb. 2, 2006).

tise, resources, and luxury (at the time of surgery) to perform sophisticated microbial analyses on heart valves and tendons. Equally, anesthetized patients are unprepared to test or know that they should test the products purchased from tissue banks before or during surgery and implantation. Thus, placing the onus on patients and their physicians to be the gatekeepers to these industries is simply unreasonable for purposes of public policy, particularly given that tissue banks are in the best position to test their own products before placing them into the streams of commerce. Further, that many tissue banks, including Cryolife, the source of much litigation,¹⁰⁵ are for-profit, truly distinguishes the industry from not-for-profit blood processors such as the Red Cross.¹⁰⁶

It is here that the story of tissue giant, Cryolife, its litigation history, clients' narratives, and setbacks are instructive for public policy analysis. Despite lawsuit settlements against Cryolife, the Court of Appeals of California determined in 2003 that Cryolife and arguably other tissue banks are immune from liability for the body parts they place into the stream of commerce.¹⁰⁷ According to the Court of Appeals of California, Cryolife's immunity from placing insalubrious tissues in the marketplace arises from the fact that buying, collecting, processing, storing, and selling body parts are collectively and essentially a "service" and that the parts sold are not "goods."¹⁰⁸

The *Cryolife* holding invites scrutiny as to how body parts should be classified and what their legal status ought to be. In facts similar to Model C, Alan Minvielle sued the tissue bank after the allograft he received was

105. See, e.g., *Cryolife Inc. v. Super. Ct.*, 110 Cal. App. 4th 1145, 1154–55 (Cal. Ct. App. 2003) (holding that tissue bank provided a service and not a product by collecting, storing, and selling body parts); *Talton v. Arnall Golden Gregory, LLP*, 622 S.E.2d 589, 592–93 (Ga. Ct. App. 2005) (concluding that injured patient failed to show that lawyers for Cryolife ever intended for their advice regarding tissue warning labels to be disclosed to or relied on by third parties, or that, when lawyers consulted with client corporation, they were "actually aware" that patients would rely on such confidential advice); *In re Cryolife, Inc. Sec. Litig.*, No. 1:02-CV-1868-BBM, 2003 U.S. Dist LEXIS 26170, at *36–38 (N.D. Ga. 2003) (finding stock purchasers sufficiently alleged securities fraud by alleging that, after a transplant recipient died from contaminated tissue provided by a corporation, the corporation misrepresented its quality standards and compliance with regulations).

106. The Food and Drug Administration (FDA) does not require companies to be a registered member of a certified tissue bank association, such as the Tissue Bank Association of America (TBAA). Rather, each company selects its own method for testing tissues, determining whether it will test and treat tissues at all, and whether it will inform patients and physicians about the results of those tests. Linda Bren, *Keeping Human Tissue Transplants Safe*, FDA CONSUMER MAG., May–June 2005, available at http://www.fda.gov/fdac/features/2005/305_tissue.html (last visited May 1, 2008).

107. See *Cryolife*, 110 Cal. App. 4th at 1155 (concluding that the California Health and Safety Code "provides statutory immunity from strict liability to tissue banks subject to regulation").

108. *Id.* ("By expressly deeming such activities to constitute a service, the Legislature must have intended a tissue bank to be immune from strict liability, just like a pharmacy.").

found to be contaminated by deadly bacteria.¹⁰⁹ The court's conclusion that body parts are a *service* rather than the *performance of a service* precluded his recovery and is a striking feature of the case.¹¹⁰ It is a conclusion that is hard to support; arguably few people would consider his or her knee, heart, hip, or spine a service. Likewise, of course, tissue banks leery of litigation are equally reluctant to treat knees as goods, which will expose them to liability when contaminated cadaver tissues are placed into the stream of commerce. This tension and incoherence in the law exposes the need for a common lexicon and understanding of the legal and social status of cadaver body parts and tissues. Arguably, in the changing function and use of body parts, our common understanding of the parts' post-harvesting classification should also evolve. In other words, what Cryolife *processes* describes its service; what it *produces* through that processing is a good or product for which it receives value.

The relevance of this point proved significant to the court's analysis of the case and whether the plaintiff could pursue a strict liability claim for punitive damages against the tissue bank. Ultimately, the Court of Appeals of California was not persuaded by the plaintiff's charge that *Cryolife* did not fit within the legislative exemption provided for blood banks.¹¹¹ California and a majority of states enacted blood shield immunity statutes during the 1950s and throughout the subsequent two decades to shield organizations that collected and processed blood from strict liability claims.¹¹²

CryoLife contended that the Health and Safety Code provisions of California, which define the status of tissue banks, barred plaintiffs from strict liability claims against tissue banks.¹¹³ The statute, however, does not explicitly provide such an exemption or immunity to tissue banks. Rather, section 1606, the codification of the blood shield law, provides in pertinent part:

The procurement, processing, distribution, or use of whole blood, plasma, blood products, and blood derivatives for the purpose of injecting or transfusing the same, or any of them, into the human body shall be construed to be, and is declared to be, for all purposes whatsoever, the rendition of a service by each and every person, firm, or corporation participating therein.¹¹⁴

109. *Id.* at 1148.

110. *Id.* at 1154–55.

111. *Id.* at 1153–54.

112. *Id.* at 1153.

113. *Id.* at 1153–54; *see also* CAL. HEALTH & SAFETY CODE § 1635.2 (West 2007).

114. CAL. HEALTH & SAFETY CODE § 1606.

The public policy rationale for blood shield laws was to promote an adequate blood supply, particularly as most surgeries requiring blood are not elective, but rather a matter of life and death. Thus, the policy militates against liability in the absence of a negligent or intentional tort. Yet, whether the same rationale should hold true for tissue banks is a different matter.

Ultimately, the court agreed with CryoLife's nuanced definition of its business. The tissue bank claimed that its business status, although for-profit, is similar to that of blood banks—which traditionally have been not-for-profit—within the definition of the blood shield immunity law.¹¹⁵ Both sections of the law (1606 and 1635.2) describe the banks as providing services, however, only the blood shield statute provides an immunity provision—and only for blood banks.¹¹⁶ Despite the “difference in language of section 1606 and section 1635.2,”¹¹⁷ the court held that the legislature must have intended to shield tissue banks from strict liability claims.

The court's analysis leaves much to be pondered considering its leap is not supported by any legislative history or legislative comment, nor does the court point to comment sections from the Health and Safety Code. Instead, the court offers that the legislature (in 1991) should have known or predicted that in 2003 “tissue banks are paid for their activities in connection with providing human cadaver tissue for medical use” and thus must have “intended tissue banks to be immune from strict liability.”¹¹⁸ The court errs here as the legislature instead would have been aware of the 1984 National Organ Transplantation Act, which prohibits the buying and selling of body parts, including human tissues.

However, the court's effort to be guided by the legislature is undermined by fuzzy signaling.¹¹⁹ To explicate, the court extends immunity protection to tissue banks when the statute that it relies upon fails on its face to grant that type of protection to the industry.¹²⁰ By attempting to express minimally, relying on settled law for blood banks—the court reaches into its dusty handbag and unfolds a drape of immunity for tissue banks. The court gives a new and unusual interpretation of the tissue bank statute, which does not provide any immunity language, without an effort to investigate or explain if the legislature actually intended for tissue banks

115. *Cryolife*, 110 Cal. App. 4th at 1150.

116. CAL. HEALTH & SAFETY CODE § 1606.

117. *Cryolife*, 110 Cal. App. 4th at 1155.

118. *Id.*

119. *See id.* at 1153–55.

120. *See id.*

to be immune from strict liability lawsuits. It is more common to look at the legislative history, or at least to examine the record of the legislative committee enacting the statute, when a case is under de novo review. Had the court examined the legislative history of the blood bank statute and the later tissue bank regulations, it might have discovered that the public policy rationales for blood bank immunity were quite unique to that industry.¹²¹

Unlike blood suppliers, tissue banks are a different business and social concept. While some tissue banks supply heart valves, others focus on cosmetic services, such as products to enhance lips, penis size, cheekbones, and other non-essential elective medical products. Moreover, the technology is available for highly sophisticated testing of tissues before they enter the stream of commerce, unlike the developing science of blood testing in the 1950s (when immunity statutes were first drafted). The *Cryolife* court's fuzzy rule-making leads one only to guess what other industries would qualify for immunity simply because they provide a medical service. The court too easily dismissed the plaintiff's claim that he received a defective product and not a service. Minvielle's surgeon successfully implanted a contaminated body part. The service received was perfectly fine. The product was the problem. The court made a significant error in expanding the protection of blood shield statutes (promulgated over forty years prior)¹²² to an industry neither so altruistic, nor anticipated by state legislatures in the 1950s and 60s. Ironically, the court concludes its dismissal of the plaintiff's strict liability claim against a tissue bank by quoting from an earlier blood shield law case, *Hyland Therapeutics v. Superior Court*,¹²³ to support its rationale that the California legislature intended for blood banks to be free from fault:

We concur in the perception that "legislatures have determined that the production and use of human blood and its derivatives for therapeutic purposes should be encouraged; and for this purpose those who provide these products, and who are themselves free from fault, should not be re-

121. Blood banks in the 1950s were mostly not-for-profit and often connected with hospitals. Legislatures treated the collection, processing, storage, and administration of blood as a service and not as a sale subject to warranty because blood banks were organized around altruistic principles, which were consistent with their not-for-profit status. The legislative intent was to promote the procurement of blood and protect blood banks from the possibility of frivolous (and more serious) lawsuits. Blood supply was vital as a domestic and military issue given cold war aggressions and wars in Korea and later Vietnam. Blood banks were not in the position to warrant the quality of blood that donors provided despite the fact that they processed, transported, and administered blood; they were limited by the available science at the time. Nor was the technology available to perform sophisticated blood analyses. Thus viruses transfused through blood were often undetectable during this era.

122. See PAUL SCHMIDT, *THE NATIONAL BLOOD POLICY: A STUDY IN THE POLITICS OF HEALTH*, (2004), available at <http://www.hhs.gov/bloodsafety/presentations/NationalBloodPolicyStudy.pdf>.

123. 175 Cal. App. 3d 509 (Cal. Ct. App. 1985).

quired to bear the economic loss which might otherwise be imposed under the rules of strict liability which are applicable to sellers of cial products generally.”¹²⁴

V. WHO OWNS THE BODY

Courts have seemingly left the rapidly expanding field of biotechnology and the relevant legal questions resulting from its enormous grasp to be decided by narrow past holdings that predate the scientific revolution of the past fifteen years. Expressive minimalism on the bench offers no guidance as to how we should understand the body or its legal status. There are several by-products of this unresponsiveness. First, there is a stunted lexicon in how society comes to define biotechnology and its interactions with it. Incompatible concepts and misleading jargon describe new and distinctively different practices. Surely when a hospital sells a placenta to a cosmetic company it is not a “donation” from the mother, nor is it a “gift” from its biological “parent” or the third party hospital.

Second, our failure to effectively grapple with supply issues in biotechnology has hurt our ability to adequately supply the resources in great demand, especially organs. Congress remains wedded to the notion that organs are only to be altruistically acquired. It is no wonder then that nearly 99,000 Americans wait for organs on transplant waitlists. Over seven thousand will die this year, while on the US transplant lists.

Lastly, how do we make sense of the human body when it has been commodified? Here, we need not imagine the future, but simply deal with the reality in front of us. Each year there are over one million allograft surgeries performed in the United States. However, when bones are harvested from cadavers and sold to biotech companies, which later resell the refurbished bone to hospitals and dentists, how should we refer to these tissues and transactions? Are they licensed goods, stolen goods, property, products, possessions (borrowed vessels belonging to the state or god), life estates, or a service? Or combinations? Each term has meaning and implies social values, cultural understandings and legal statuses, each of which is significant to judicial interpretation.

Historically, the body has been contested as property. That history is well documented from a socio-historical perspective, and more recently by the brilliant work of Harriet Washington as a matter of medical inquiry and interpretation. If the body were to be redefined as property, it might con-

124. *Cryolife*, 110 Cal. App. 4th at 1156.

flict with a broader social understanding that the body is a sacred, inalienable object.¹²⁵ For some scholars the question posed might be a false one—the property interest they might suggest is not in the body itself, but in the right to the body. In other words, some scholars contend that we do not own our bodies; we simply have a right to use them while we live. And some scholars, like Lior Strahilevitz, consider the question moot altogether—they are more concerned with more novel questions, including the right to destroy, limit, and exhaust. For them, perhaps we are already over the threshold of the post-commodification and absolute property world.

Equally, without a legal status, the body is also vulnerable to the unremedied exploitation of others.¹²⁶ You can steal a body part—Michael Mastromarino who engineered a mafia-like organization that purloined body parts from thousands of cadavers has proven that. But is a body part, such as a bone, still stolen after its implantation? Giving a tendon back to its rightful owner or her estate might seem an uncomplicated question. Some economists might view it as wealth-maximizing to simply allow the new possessor to “keep it.” But does the possessor truly own it? If gold was unwittingly and nonconsensually extracted from one patient’s mouth and implanted into another, would there not be a financial remedy and possibly criminal penalty? If this question were expanded to other valuable considerations, such as cars and homes, the answers would be far more obvious and much less dubious.

The assumptions that crowded our understandings about the human body, including that it lacked value, no longer make sense because those conceptions are no longer true, valid or grounded in fact. What we now know are simply inconvenient truths; a human cadaver is worth over \$250,000. It matters not that its owner must negotiate with others to realize that value as the same is true each time an estate is prepared for probate and auction. For example, tendons have a financial value, as do bones, heart valves, and corneas. It would be inconvenient to remove a purloined tendon from its new host, but we risk promoting fiction if we describe such an implant as a gift or donation. But more importantly, legal scholars and judges will fail to anticipate second and third generation policy questions

125. See Radin, *supra* note 33, at 1851 (“In conceiving of all rights as property rights that can (at least theoretically) be alienated in markets, economic analysis has . . . invited us to view all inalienabilities as problematic.”).

126. See, e.g., Judith D. Fischer, *Misappropriation of Human Eggs and Embryos and the Tort of Conversion: A Relational View*, 32 *LOY. L.A. L. REV.* 381, 381 (1999) (noting that “[a]s technological breakthroughs change the world, old legal theories may seem inadequate to address new legal problems.”).

by pretending that the human body lacks value and failing to develop the contours of a new approach to defining the human body.

Maybe, as property, a legitimate claim of ownership can be made, and the ability to redress nonconsensual appropriation is better established.¹²⁷ If the body exists only for the purpose of carrying our souls and it is violated, it would seem that whatever cause of action that might exist is not one to be adjudicated in courts of law.

A determination of whether the body is property might influence the outcome of several cases currently in litigation or offer a compelling challenge to those recently decided, including whether heart valves and tissues used for donation are products, whether universities have a property claim or proprietary interest in research subjects' DNA and tissues, the constitutionality of body part conscription laws, and whether causes of action can be sustained for wrongful implantation, directed implantation, and likely a host of other foreseeable and also unimaginable problems. This determination will be a significant factor in future product liability claims.

The models discussed in this essay demonstrate that entrenched minimal expressionism in a rapidly expanding biotechnological era will undermine the growth and meaningful development of common law jurisprudence on the ownership, dispensation, and remedies involving body parts. Without judicial adaptation to an evolving society in which litigation involves body parts, plaintiffs will never prevail.¹²⁸ A common element of the three very different scenarios presented in the above models is that absent a finding that deems the body as self ownership or "property," plaintiffs will be barred from recovery—even in the more disturbing cases that involve the most egregious breaches of medical trust and ethics.

CONCLUSION

Formalistic rule making will run counter to reasoned, evolved decision-making. By taking the paths of least resistance, courts will undermine the legitimacy and integrity of the bench by failing to acknowledge and respond to shifting cultural norms, trends, social behaviors, and biotech-

127. *Id.* at 402–03 (advocating a torts conversion remedy for patient-victims in order to make them whole again).

128. *See, e.g., Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 480 (Cal. 1990) (a case of first impression, rejecting conversion claims for nonconsensual use of cells to develop a valuable patent). The majority pointed out that Moore failed to cite a decision supporting his argument that the excised spleen and cell line were property. *Id.* at 489 n.28 ("No party has cited a decision supporting Moore's argument that excised cells are 'a species of tangible personal property capable of being converted.'").

nology.¹²⁹ More importantly, the presumption that legislatures are actively watching, planning, and responding to fuzzy signals does not pan out in the cases presented, or as a general rule. Courts have the capacity to intervene when the democratic process becomes captured by majoritarian or minoritarian interests. Formalistic rule-making, according to the Honorable Mary Schroeder, is to devise “pontifical formulas which relieve [courts] of the burden of reasoned decisionmaking.”¹³⁰

Judges tend to view biotechnology cases involving body parts episodically and not collectively.¹³¹ They value the risks of reoccurrence, and make two incorrect assumptions. The first assumption is that the tortuous conduct in these instances is isolated. The second false assumption is that legislatures will provide the equitable remedies for plaintiffs in biotech disputes. What is missed in the latter assumption is that plaintiffs’ litigation would more than likely be settled outside of the judiciary process if legislators were paying attention to these issues.

Judicial minimalists necessarily ignore exogenous sources, instead choosing to concentrate on adhering to traditional norms,¹³² lest they be viewed as unmindful of their role, radical or even judicially activist. In essence, judges do not believe it is their role to *change* the law to respond to biotechnology. Yet, rather than clarifying the law, a fuzzy picture develops. Intuitively, even the least sophisticated judges realize that contemporary landscapes in biotechnology do not match or correspond to valleys and fields of yesteryears. The minimalists’ pallet constricts them to paint desert

129. As even *Moore* illuminates, what was previously considered medical waste and ordered to be incinerated (even by state statute) is now a patentable good. *See id.* at 491.

130. Hon. Mary M. Schroeder, *Appellate Justice Today: Fairness or Formulas The Fairchild Lecture*, 1994 WIS. L. REV. 9, 9–10.

131. *See Georgia Lions Eye Bank, Inc. v. Lavant*, 335 S.E.2d 127, 129 (Ga. 1985) (opining that “[c]ertainly, the General Assembly has it within its power, in the interest of the public welfare, to authorize this procedure, which yearly benefits hundreds of Georgians.”). For an explanation of the *Georgia Lions Eye Bank* decision, see *Welch v. Welch*, 505 S.E.2d 470, 472 (Ga. 1998). In addition, the Georgia Supreme Court’s decision in *Georgia Lions Eye Bank* has been cited by numerous courts. *See, e.g., Brotherton v. Cleveland*, No. 91-3316, 1992 U.S. App. LEXIS 15947, at *9 (6th Cir. June 30, 1992); *Perry v. Saint Francis Hosp. & Med. Ctr.*, 886 F. Supp. 1551, 1563 (D. Kan. 1995); *Moore v. Regents of the Univ. of Cal.*, 215 Cal. App. 3d 709 (Ct. App 1988); *State v. Powell*, 497 So.2d 1188, 1194 n.4 (Fla. 1986); *State v. Moseley*, 436 S.E.2d 632, 634 (Ga. 1993); *Schneider v. Susquehanna Radio Corp.*, 581 S.E.2d 603, 608 (Ga. Ct. App. 2003); *Bauer v N. Fulton Med. Ctr., Inc.*, 527 S.E.2d 240, 243–44 (Ga. Ct. App. 1999); *Alternative Health Care Sys., Inc. v. McCown*, 514 S.E.2d 691, 695 (Ga. Ct. App. 1999). The *Georgia Lions Eye Bank* has also been cited by courts in a number of dissenting opinions. *See, e.g., Brotherton v. Cleveland*, 923 F.2d 477, 483 (6th Cir. 1991); *Jackson v. State*, 430 S.E.2d 781, 788 (Ga. Ct. App. 1993). Criticized in *Newman v. Sathyavaglswaran*, 287 F.3d 786, 796 (9th Cir. 2002); *Mansaw v. Midwest Organ Bank*, No. 97-0271-CV-W-6, 1998 U.S. Dist. LEXIS 10307, at *15 (W.D. Mo. July 8, 1998).

132. Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2115 (2003).

scapes for water-drenched valleys and gardens where there are now toxic landfills.

Minimalists would argue that it is the legislature's role to introduce *new* meaning to the law; the courts simply sort out the statutory "mish-mash."¹³³ Guido Calabresi suggests that the formalist approach "does not contemplate the introduction of new or modified values into the scheme as part of the[ir] role."¹³⁴ Thus the court's function to hear the new biotechnology cases with an objective ear is usurped not by judicial indifference to plaintiffs, but rather a defense "of the values it finds embedded in the system."¹³⁵ In strictly adhering to minimal expressionism, judges ignore the independence of the bench and its secondary function, which is to sort out the mishmash. Obsequious loyalty to doctrine necessarily inures heightened blindness to external factors, and in the face of biotechnological harms to plaintiffs, may undermine the perception of the judiciary as an independent, fair, and competent arm of the government.

Although Calabresi suggests that today's formalists "make a bow to exogenous values,"¹³⁶ Models A–C (and there are many more) do not support that conclusion. Rather, the refusal to tamper with almost biblically derived notions of the body by introducing new values, recognizing alternative paradigms and hermeneutics, suffocates the law. Thus, while the law of body parts could be a robust representation of nuanced thinking on a very complex issue, instead it appears weak, ragged, and arbitrary.

Courts should not abstain from pushing into new territory or fashioning new law "simply because another court has not yet so held or because the Legislature has not yet addressed the question."¹³⁷ Judicial action is neither preconditioned nor proscribed by the behavior of the legislature, especially where constitutional rights are at stake, nor by prior precedent in other jurisdictions. In the common law system, the primary instruments for clarity and expression are the courts. Precedent is often a sound guide; however, the common law need not be hostage to its past.

133. See, e.g., *Moore*, 793 P.2d at 493 (noting that "it is inappropriate to impose liability for conversion based upon the allegations of Moore's complaint [because] problems in this area are better suited to legislative resolution").

134. See Calabresi, *supra* note 132, at 2115–16 (explaining four dominant legal schools of thought: doctrinalism or autonomism, "law and . . .", legal process school, and law and status).

135. *Id.* at 2116.

136. *Id.* at 2117.

137. *Moore*, 793 P.2d at 507 (Mosk, J., dissenting).

