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Assault and Battery on Property

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ASSAULT AND BATTERY ON PROPERTY

*Gowri Ramachandran**

Both criminal and tort law seek, in part, to respond to the harm inflicted on persons' organic, human, continuous bodies, through hitting, offensive groping, rape, stabbing, gunshots, vehicular homicide, and more. But could there be such a thing as assault and battery on a person's inorganic, non-human, discontinuous body? A battery on one's prosthetic arm, on one's wheelchair, on one's cochlear implant? Even a battery on one's iPhone or computer, which some users have provocatively begun to call an "exobrain"? This Article investigates whether there is any use in employing metaphors such as "exobrain," "battery on a wheelchair," and the like.

It first demonstrates that the metaphors are not entirely fanciful because the social, as opposed to pre-social, body is the body that matters, and the social body extends beyond organic, human, continuous material to inorganic, non-human, discontinuous entities. An assessment of the variables that lead one to decide whether an object is or is not part of the social body yields no clear-cut test.

The Article then explores what is gained, and potentially lost, by calling an iPhone an "exobrain," rather than merely a "very important piece of property." The author concludes that this rhetoric holds the promise of helping us recognize and remedy underappreciated injuries, but that it also bears the risk of reifying a cramped conception of the body, and of what injuries count.

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INTRODUCTION

Consider this intentionally provocative thought experiment: Suppose a man, injured while serving the United States abroad in Afghanistan, has been provided with a state-of-the-art prosthetic arm. The arm is not currently attached to the rest of his body, and he has left the room momentarily. A gang of heartless thugs now smashes the arm to bits in his absence.

Many of us would consider the harm he experienced to be different in kind from the harm experienced if that same group had stolen his television, even a television as expensive and difficult to manufacture as the prosthetic arm. It would not seem to be much of an exaggeration, in fact, to say that these monstrous attackers had essentially committed a battery or assault on the man although he had not even been in the room. Under the common law, the elements of assault or battery may not be satisfied,¹ but it seems quite reasonable to say that this represents a failure of the common law to properly account for the fact that the man's arm happens to be detachable. Indeed, we might imagine a judge using the common law's flexibility to find that, in this case, a battery has in fact

1. A technical flaw in satisfying the elements may be that the arm is not attached to the man, nor even near him, in our hypothetical. See RESTATEMENT (SECOND) OF TORTS § 18 (1965) (defining battery as causing an offensive or harmful *contact* with the person of another) (emphasis added). The person protected by the law of battery may include "anything so connected with the body as to be customarily regarded as part of the other's person and therefore as partaking of its inviolability . . . however slightly or remotely attached to the other's person," but the arm in our hypothetical is not "connected" or "attached." *Id.* § 18 cmt. c; see also *Respublica v. Longchamps*, 1 U.S. (1 Dall.) 111, 114 (1784) (striking French ambassador's cane constituted battery because "anything attached to the person, partakes of its inviolability"); *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (finding battery where defendant snatched plaintiff's plate during a racially discriminatory exclusion because "[t]he plaintiff's interest in the integrity of his person includes all those things which are in contact or connected with it" (quoting PROSSER, LAW OF TORTS 32 (3d ed. 1964))).

occurred,² especially since battery does not require that the victim experience any particular form of pain.³

Now, suppose that instead there are no thugs who smash his arm to bits, but the arm has been rendered useless in another manner. The company that produced the arm and holds the patent on it required the man to sign an end user license agreement (EULA) limiting him to the use of authorized software only. The man wanted to use unauthorized software and felt that he ought to be able to, since it is his arm, after all. He decided to “jailbreak”⁴ the arm in order to run the software, but the next time he installed a software update from the company on the arm it was “bricked”⁵ by the company, in retaliation for his violation of the EULA. Now the arm might as well be a hunk of plastic. Many would consider the issues at stake here to be quite different from those at stake when a company enforces an EULA against the purchaser of a laser printer. It would begin to seem more hyperbolic, but still understandable, to say that the company had essentially retaliated against the man for his breach of contract by committing a battery on him, though it was not even in the room. The law would not permit the non-breaching party to a contract to batter the breaching party, even if those violent measures were spelled out in advance in the contract, in order to deter breach.⁶

2. See RESTATEMENT (SECOND) OF TORTS §§ 13, 16, 18, 19 (1965) (defining battery as causing an offensive or harmful contact with the person of another, or an apprehension of such a contact; defining the requisite level of intent; and defining offensive contact as that which “offends a reasonable sense of personal dignity”). Since the man and others may indeed view his prosthetic arm as part of his person, the underlying purpose of the criminal and tortious battery law would appear fulfilled by outlawing and remedying just this sort of behavior. See *id.* § 18 cmt. c. (“If the actor recognizes any object, however slightly or remotely attached to the other’s person, as being so far a part of the other’s personality that he can accomplish his purpose of offending the other by some contact with it, it is not unreasonable to regard the object in the same light and, therefore, to make the actor liable under the rule stated in this Section.”).

3. *Id.* §§ 13, 16, 18, 19.

4. “Jailbreaking” is a term used to refer to the act, undertaken by a user, of modifying a computer system so that it can run software other than that authorized by the manufacturer. See *iOS Jailbreaking*, WIKIPEDIA, http://en.wikipedia.org/wiki/iOS_jailbreaking (last visited Sept. 6, 2010).

5. “Bricked” is a term used to describe a device that can no longer function in any capacity, and thus, if about the size and weight of a brick, would only be useful for that purpose. See *Brick (Electronics)*, WIKIPEDIA, [http://en.wikipedia.org/wiki/Brick_\(electronics\)](http://en.wikipedia.org/wiki/Brick_(electronics)) (last visited Sept. 6, 2010).

6. Even measures that raise the likelihood of violence, such as self-help and lock-out evictions by landlords are often prohibited, regardless of whether the tenant has breached his or her lease. See, e.g., *McCrory v. Johnson*, 755 S.W.2d 566, 572 (Ark. 1988); *Jordan v. Talbot*, 361 P.2d 20, 24 (Cal. 1961); *Bass v. Boetel & Co.*, 217 N.W.2d 804, 807 (Neb. 1974); *Thomas v. Papadelis*, 476 N.E.2d 726, 728 (Ohio Ct. App. 1984); *Freeway Park Bldg., Inc. v. W. States*

Thus, we could imagine a common-law judge deciding that, analogously, the company's actions are a form of unlawful retaliation for breach of contract and the terms purporting to give the company the right to commit battery are unenforceable.

If we can see how these injuries to the man's prosthetic arm are analogous to injuries inflicted on organic bodies, how far might this take us? We could start, as I have, by saying that it is possible to conceive of something as serious as assault and battery on his *inorganic, discontinuous body*. But once we have an idea of an inorganic or a discontinuous body, or both, that law ought to protect through appropriate regulation, then we could imagine including within that body items much more common than prosthetic arms. We could go so far as to say that smartphones or computers, which are starting quite legitimately to be referred to as our exobrains,⁷ are also part of these more broadly defined bodies. We might then find ourselves referring to the bricking of an iPhone as an assault or battery on the owner's exobrain.

While many readers might react with skepticism to the idea of an entitled iPhone user having suffered an injury to his or her person, many are probably quite concerned with the man and his prosthetic arm, a woman and her wheelchair, or a child and her cochlear implant. Therefore, in this Article, I explore what is gained through these attempts to undermine the notion that our bodies are physically continuous, biologically determined, and organic, as opposed to potentially discontinuous, socially constructed cyborgs made up of both inorganic and organic portions. To put this in everyday language, what is gained by describing a smartphone as an exobrain, a prosthetic arm as part of the user's body, or the destruction of a wheelchair as an assault or battery on the wheelchair's user? I am interested in both what might be the strategic motives behind popular and scholarly uses of this type of vocabulary, and also whether we do

Wholesale Supply, 451 P.2d 778, 781 (Utah 1969) (“[S]ince eviction often led to a breach of the peace, a statute of forcible entry was enacted in 1381 which made it a crime to forcibly evict a tenant. . . . In 1840 the English courts by judicial decision held that a defaulting tenant had a cause of action for assault and battery against a landlord who used force in evicting the tenant.” (citations omitted)).

7. Scott Adams, *Dilbert Pocket*, THE SCOTT ADAMS BLOG (Dec. 10, 2009), http://dilbert.com/blog/entry/dilbert_pocket/; Andrew Sullivan, *The Exobrain Grows More Powerful*, THE DAILY DISH (Dec. 12, 2009), http://andrewsullivan.theatlantic.com/the_daily_dish/2009/12/the-exobrain-grows-more-powerful.html.

in fact gain anything through these analogies, which seek to expand our concepts of the body itself beyond its traditionally understood borders. Do we, through this expansion, in fact enable ourselves to remedy or even prevent injuries?

In Part I, I argue that this rhetoric is not completely fanciful. The line between the forms of harm described in my thought experiment and the forms of harm we recognize as familiar examples of bodily harm are not as clear as we often presume.

In Part II, I consider what might be behind this rhetoric. Why would the advocate for the prosthetic user, in opposing a company's attempt to enforce its EULA on the user, call the arm part of his or her body rather than a very important piece of technology he or she has purchased? What might the advocate think will go unremedied if the prosthetic is viewed as "mere" technology, and what might he or she hope will be remedied if it is viewed as part of the user's body? I argue that two fictions may underlie this rhetoric—the fiction that property rights are absolute, and the fiction that dignitary rights in one's body are absolute. Though lawyers, and likely many laypersons, know that these rights are not absolute, the fiction that they are or ought to be still retains political force.⁸

In Part III, I will explore the possibility that this is more than just a strategic rhetorical flourish. In other words, I will consider what we might gain by talking about legal protection for the prosthetic user in terms of protecting his or her body, rather than simply in terms of regulating property and contract. I will argue that this seemingly hyperbolic vocabulary—exobrain, cyborgs, and the like—may highlight the artifice around the concept of the body itself. In doing so, it may helpfully reorient our focus when we regulate property and contract, so that we may account for all sorts of injuries that we may currently be ignoring. On the other hand, I will consider the risks of using this rhetoric. I will argue that this rhetoric risks reconstituting our current conceptions of the body, with exceptions like prosthetics proving the rule. If a piece of technology must be analogized to an organic human internal body part in order to obtain special legal protection, does this merely reaffirm that, in general, bodies get more protection than everything else?

8. See David Fagundes, *Property Rhetoric and the Public Domain*, 94 MINN. L. REV. 652, 652–57 (2010).

I. THE BODY'S INDISTINCT BORDERS

When a person calls his or her smartphone an exobrain, is there any truth behind this provocative language? In this part, I argue that the truth behind the term exobrain is that persons have more than just organic, physically continuous bodies. What we typically call the body is an organic, continuous entity, which does not properly capture the body that matters—the social body. It is one's social body that is most relevant to one's daily life, and social bodies can include the inorganic and can be physically discontinuous. We could delineate a list of alternate factors that would more accurately help us determine whether something is part of the social body, but it will be clear from the examples I provide that such lists, even if complete, fall far short of a formulaic test. Thus, there is a legitimate argument that smartphones, cars, prosthetic limbs, and the like should be considered part of the body.

A. The Body as a Social Construct

Disability activists and theorists have importantly drawn attention to the fact that the social context in which bodies exist, including the allocation of property rights, can engender important effects on those bodies.⁹ For instance, real estate typically comes with a right to develop and build on the land.¹⁰ If that property right is unregulated with respect to the installation of wheelchair ramps, then how property holders choose to exercise the right will have far-reaching effects on the mobility and lived bodily experience of persons who require wheelchairs to get around. The property owners' refusals to install ramps may not alter the organic, continuous body of a person who uses a wheelchair to get around, but the social body of that person is deeply affected by the decisions. Whether such a

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

10. See 73 C.J.S. *Property* § 2 (2010) ("Property" includes the rights of acquisition, dominion, possession, use and enjoyment, exclusion, disposition, and access.").

person's social body is disabled or not will depend on how those property rights are exercised. And yet, the property holders will have had this effect on others' social bodies without having physically touched, possessed, or used the organic, continuous bodies of the persons using wheelchairs.¹¹

In another example, the allocation of patents on cochlear implants and lifesaving drugs affect price and availability of these technologies, and therefore whether some persons hear, and whether other persons live. Similarly, the decision not to provide welfare rights to mobility devices can affect the lived physical experience of those who would benefit from those mobility devices. And finally, in a twist on the example from the Introduction, a patent holder's ability to impose EULAs on patients who use a pacemaker will affect the patients' use of their bodies.

In other words, we can construct many examples where someone has exercised property-like rights over something other than a person's organic, physically continuous (or "pre-social") body or its parts, yet has entailed significant effects on that person's lived physical experience. The reason we can construct these examples is that bodies, like other objects, have a complex relationship with their environment. Just as failure to provide a neighbor with an easement can affect the neighbor's ability to use his property,¹² failure to install a wheelchair ramp can affect another's ability to use his body.

Of course, it is not just the allocation of property rights and entitlements that affect what our social bodies will be like—disabled, abled, normal, beautiful, inferior, and more. Social norms that are not easily identified as law, such as aesthetic norms, contribute to the construction of our social bodies as well. For instance, we can use scientific instruments to measure and describe differences in hearing ability between persons. Those differences may exist regardless of social context, but would those differences matter in an imaginary world with no social context? And more importantly, *how* would they matter? Would less or more hearing ability be a good, bad, or

11. See Bagenstos, *supra* note 9, at 429.

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

neutral thing? Would we even think to develop tools for measuring these differences in that world?

Even if we can accurately determine certain things about those “pre-social” bodies, such as differences in hearing ability, what we have taken the care to observe, perceive, and measure is itself a product of our social context. We cannot know whether those things would be important in an imaginary context. As a result, the only bodies we actually know anything *important* about are our social bodies—the ones that exist in the context of a complex system of norms, technology, and rules.

To get a better handle on the difference between a pre-social body and a social body, suppose Person A and Person B have different untreated visual acuity. Person A can see 20/20, and Person B can see 20/18 (slightly better). If, as a social matter, we do not place much importance on the difference between A’s and B’s visual acuity, and neither is interested in the sort of job where better-than-average visual acuity would be helpful, then it will not be important to A and B that one has measurably better visual acuity. Indeed, B may not even know that he has more visual acuity than the person considered normal, like A, because he may never have been tested. There are differences between A’s and B’s pre-social bodies, but we may not know it because there are not differences between A’s and B’s social bodies.

Now, suppose we begin treating 20/18 vision as normal. Person A’s teacher starts writing on a blackboard that is farther away, and street signs use a bit smaller font on average. Person A’s social body will now seem different from Person B’s social body. Person A may feel that she needs glasses, contacts, or laser eye surgery to get around easily in the world, while Person B will not feel that way.

If the 20/18 vision standard is applied harshly, and persons with 20/20 vision are treated as deeply inferior, then Person A and others with 20/20 vision may complain that the choice of 20/18 as normal is arbitrary and unjustly harming persons with 20/20 vision. A dispute may arise within the group of 20/20 vision activists over whether they should argue for better treatment on the grounds that they *cannot* change their state of 20/20 vision, or whether they should argue for better treatment on the grounds that they should not *have* to change. Obsessions over how many people have 20/20 vision in a pre-social world may arise, with researchers attempting to measure

the percentage, and others arguing that it is impossible to measure this percentage given that it is not just nature, but also nurture, that determines vision levels.

Suppose a miracle drug is invented that, once swallowed, gives everyone 20/18 vision. If the drug is expensive, Person A and Person B will still have different social bodies. But if the drug is free, widely available, and does not have other long-term effects, Person A and Person B will return to having similar social bodies once Person A takes the drug. We might still be able to detect that she used to have 20/20 vision and that she is one of the people who took the drug to get 20/18 vision, but likely nobody will care. On the other hand, if there was historical and rampant subordination against people with 20/20 vision, perhaps some fringe “visionists” will continue to care who was “naturally” 20/18, and therefore higher in status than those who took the drug to have 20/18 vision.

Alternatively, suppose Person A can use contact lenses to get 20/18 vision, but Person C, also with 20/20 vision, cannot use contact lenses due to astigmatism and must use glasses. Persons A and B will largely have similar social bodies, while C’s body will still be socially different. However, all three of them will have different pre-social bodies.

In other words, the social body is the body that actually matters in our daily lives. When the smartphone user describes her smartphone as her exobrain, she is saying that as a social fact the smartphone functions as an external adjunct to her brain, helping her store all kinds of facts that she either could not store in her brain (everything on the internet), or now need not bother to (commonly used phone numbers). The smartphone may not have been part of her pre-social body, but it functions as part of her social body. In order to distinguish it from her biological brain, and also to highlight some of the differences between the two, she calls it her exobrain. A person using eyeglasses might similarly call them his “prosthetic eyes.” A person using a car to drive to work might call the car her mobility device, since it helps her get from one place to another much more quickly than she could just using her limbs, just as a wheelchair is often called a mobility device. A person using a food processor to grind up her food could call the processor her “exo-molars,” since the food processor substitutes for her not having molars as strong as some animals do or some prehistoric humans did.

B. A Taxonomy of Social Bodies

Is the smartphone user being silly? The eyeglass wearer? The cook using the food processor? In this part, I delineate different variables that may contribute to whether persons perceive various objects and forms of technology as being part of someone's social body or not. In other words, I try to unpack the principles, if any, behind what many tend to perceive as part of the body. I provide examples of objects that differ along these variables, along with what I believe to be popular (though of course often contested) constructions of whether those objects are part of a person's social body.

Some of the clues we can use to try to unearth these constructions are: whether sale of the objects by the person whose body the objects may be part of is considered more or less troubling, as well as whether actual or threatened touching or removal of the objects without consent of the person are considered troubling, in the way battery and assault are considered troubling.

Many readers will feel that the variables could be teased out differently, with some variables combined, some variables further separated into multiple variables, and some variables added that I may have not captured. The purpose of this task is not to come to any fixed conclusion on how the principles would be best articulated. Rather, the purpose of the task is to demonstrate that there is no easy demarcation between what is and is not part of the social body—the body that matters. If there is a line between our bodies and the environment surrounding them, it is a blurry one.

1. From Fully Internal Objects to Fully External Objects

The internality of an object to the corporeal body is one factor that has been cited as influencing, indeed even entirely determining, whether we should think of a body part as protected by alienable property-type rights rather than inalienable privacy-type rights.¹³ This may represent an intuition that parts that are internal to a person are more clearly part of his or her social body than parts that are external, even if they were once internal. The intuition that once

13. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359, 455–56 (2000) (arguing that a principle in accord with our intuitions would allow for property rights in body parts that have been detached from a person, but would not allow for property rights in parts still internal to a person's body).

something is internal to a physically continuous body it is properly thought of as part of that body also seems to give force to fictitious horror scenarios in which artificial organs are repossessed, in bloody scenarios, by heartless corporations.¹⁴

But this factor is not sufficient on its own to capture what is thought of as the social body. For instance, blood, sperm, and eggs are very internal to the physically continuous body, but they are commonly viewed as borderline cases with respect to whether they ought to be considered part of the body or not, with the legality of their sale considered controversial.¹⁵ One suspects, however, that if there were a market for selling urine, this market would be less controversial, even though urine when stored in the bladder is very internal to the rest of a person's corporeal body.

On the other side of the spectrum, teeth are far closer to being external than things like sperm and blood—they reside in an area, the mouth, which opens the body up to the air and environment. Nevertheless, they are generally thought to be uncontroversially part of the body. For instance, shock and outrage were expressed over a recent instance in which a sheriff removed a defendant's teeth jewelry¹⁶ and over attempts by federal prosecutors to seize "grills" (teeth caps with jewels and other valuable parts) as proceeds of crimes.¹⁷ Other factors beyond internality and externality are certainly at work in creating the cultural constructs around what is and is not part of the body. One factor the reader may already be thinking of is considered next—the difficulty of removal.

14. REPO MEN (Universal Pictures 2010); REPO! THE GENETIC OPERA (Lionsgate 2008).

15. The sale of blood is forbidden by statute in the United States, but the sale of plasma is not. The sale of sperm and eggs are narrativized as donation, with payment for services and inconvenience, rather than for the objects themselves. Steven R. Salbu, *AIDS and the Blood Supply: An Analysis of Law, Regulation, and Public Policy*, 74 WASH. U. L.Q. 913, 942 n.163 (1996) (describing the move in the United States towards an all-donated blood supply, as encouraged by FDA regulations).

16. *See Grill Ripped from Man's Teeth at Metro Jail*, WKRN (Mar. 16, 2010, 10:09 AM), <http://www.wkrn.com/global/story.asp?s=12149790>.

17. *See Christine Clarridge, 2 Suspects Keep Flashy Smiles*, SEATTLE TIMES, Apr. 7, 2006, at A1, available at http://seattletimes.nwsources.com/html/localnews/2002916265_grillz07m.html.

2. From Difficult and Painful to Remove Objects to Easily and Painlessly Removed Objects

The examples of bodily fluid, sperm, eggs, and teeth make clear that another factor at work in our social construction of whether objects are part of the body is how difficult it is to remove the object—is it expensive, inconvenient, dangerous, or painful? Teeth, we might suspect, seem more uncontroversially part of the body than blood or urine because it is painful to extract teeth—some anesthetic is typically used. On the other hand, it does not hurt at all for healthy persons to expel urine, and it hurts most persons very little to have blood drawn—no anesthetic is generally used. Eggs are quite inconvenient to remove, requiring medical assistance to make the procedure safe and often involving anesthesia. This is part of why there may be more cultural discomfort around the selling of eggs than the selling of sperm, which is much less expensive to remove and generally not painful.

However, difficulty or ease of removal is not sufficient to explain why hair and fingernails are generally thought to be part of the body. The removal of hair is simple and painless, and the removal of at least parts of fingernails is as well. While there is no controversy around selling these items, touching them in an offensive manner without the consent of the person whose body they are considered part of would be battery.

3. From Physical Continuity to Total Detachment

The examples of hair and fingernails bring to mind a third variable that is at work—whether a body part is physically continuous with the rest of the body. Hair and parts of fingernails are extremely easy to remove, with no pain at all, but they are attached to the rest of the body. Thus, perhaps it is their physical continuity with the body that matters. Indeed, the law of battery tracks this variable quite closely, classifying offensive touching of a cane as a battery if the owner is holding the cane but not if the cane is untouched by the owner.¹⁸ On the other hand, the law of battery aside, persons generally do not describe clothing, canes, and wheelchairs as body parts despite their physical continuity with the rest of the body when worn and used.

18. See RESTATEMENT (SECOND) OF TORTS § 18 (1965).

Of course these constructions are contested: persons with disabilities have described how assistive devices do in fact come to be experienced as part of the body,¹⁹ and feminists have expressed the need for freedom of dress not just in terms of sexual politics but also in terms of bodily freedom.²⁰ With respect to which of these claims cohere best with our current cultural construction of the body, it would seem that prosthetics are a bit more likely to be understood as part of the user's social body than clothes or eyeglasses. In fact, Sarah Jain has explained that the prosthetic has become a trope in writing about the continuity between bodies and technology.²¹ I would venture that perceived ease of removal or detachment is doing part of the work of making the prosthetic an attractive example case for those who argue that there is a blurry line between bodies and other objects.

4. From Replacement of "Normal" Parts to Enhancing Devices

Other factors are also at work in explaining the attractiveness of prosthetic limbs as the example case in writing, like my own, that seeks to demonstrate the blurriness of that border. One is that the prosthetic limb bears some visual and physical similarity to what is characterized as a normal body part, and it appears to be a replacement for a standard arm or leg. In contrast, eyeglasses do not replace normal eyes—they assist and enhance their function. Similarly, canes do not typically replace legs; rather, they assist and enhance them. Perhaps this is why the prosthetic arm seems a more attractive case for being construed as a body part than glasses, even though both items are physically continuous with the body when being used, and even though both help the user perform a basic bodily function that is considered normal—for the prosthetic,

19. See Miho Iwakuma, *The Body as Embodiment: An Investigation of the Body by Merleau-Ponty*, in *DISABILITY/POSTMODERNITY: EMBODYING DISABILITY THEORY*, *supra* note 9, at 76, 78.

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

21. Sarah S. Jain, *The Prosthetic Imagination: Enabling and Disabling the Prosthesis Trope*, 24 *SCI., TECH., & HUM. VALUES* 31, 31 (1999).

holding and picking up objects; for the eyeglasses, seeing well enough to get around. A related factor is that the prosthetic not only appears to replace something we have construed as normal, but also something that is organic and composed of human tissue.

5. From Organic and Human to Inorganic and Not Human

The organic and human nature of an object, an additional factor partially explaining how willing we are to think of it as part of the body, may help us better explain how hair and nails are distinguished from clothes, eyeglasses, and, for some, prosthetics. It may have been the variable the reader thought of first, rather than physical continuity, when faced with the distinction between hair or fingernails and clothes or jewelry.

But this variable, too, cannot fully explain our construction of the body when we recall the importance of the internal/external variable, as well as the difficulty-of-removal variable. Pacemakers, imaginary artificial organs of the future, and ink in a tattoo are often thought of as part of the social body, and they are neither organic nor human. For instance, requiring a prisoner to have a tattoo demonstrating gang affiliation removed would be deemed by many to pose a quite different dilemma than requiring a prisoner to remove his jewelry demonstrating gang affiliation. If a person had a skin graft or organ transplant from an animal or plant, we would also, I believe, expect those objects to be understood as part of the person's body.

6. From Necessities to Luxuries

Another factor that may affect our understanding of what objects make up the body is the importance of those objects to our conceptions of a decent life. Thus, the wheelchair or cane may be more likely to be thought of as part of the body than a smartphone, perhaps in part because the cane is used for a more basic function—physical mobility—while the smartphone is viewed as a bonus on top of a minimally acceptable life. And yet, many items are crucial to survival itself but are not culturally coded as body parts, such as lifesaving medication. Similarly, many would consider screws implanted in patients' backs or hips to reduce their pain to be more part of the body than an insulin pump that a person with diabetes uses to stay alive. This is likely because the screws are very internal

to the body and would be very painful to remove while the insulin pump is attached to the body in a less integrated fashion.

There may be other factors, or alternate formulations of these factors, that might strike the reader as a better articulation of the cultural code around what is and is not considered part of the body. But these examples hopefully serve to show that whatever that code is, it does not yield well to a single-factor test.

II. ARGUING FROM THE BODY: FICTIONS BEHIND THE RHETORIC

If we have accepted that the rhetoric analogizing various technologies to the body—be they eyeglasses, prosthetics, wheelchairs, or smartphones—is not entirely fanciful, is there any reason to use that rhetoric? Is there any reason to broaden our current conceptions of the body? The reader might at this point think that she, too, would like to protect the user of the cochlear implant from the enforcement of an overly aggressive EULA; limit the intellectual property rights of the company that invented the cochlear implant to make it more affordable; or provide a welfare right to the implant for persons with certain disabilities. But she does not need to speak of the implant as part of the person's body in order to do any of these. She can just argue that law should be concerned with the welfare of this person, whether the cochlear implant is part of the person or not. Some of the social justice activists reading this Article might be thinking, "I don't think food and shelter are parts of people's bodies, but I still believe in a welfare right to basic food and shelter."

This is valid. It should not really matter to us whether the cochlear implant is part of someone's body or not. We should not have to explain the difference between a pre-social and a social body, and then start talking about harms to social bodies, in order to get at the harm to a cochlear implant through law. Whether we think of the implant as part of the body or not, it is something that matters a great deal to the person who uses it or would like to use it. This alone could justify government provision of the implant to those who cannot afford it, or contract regulation to protect the user of the implant from bad bargains she made with respect to the implant.

However, many employ the rhetoric of the body (and what is or is not a human body) in order to promote one view or another of how to resolve these questions. For instance, the "embodiment" of human

persons and their associated “vulnerability” is argued to be the “ethical foundation of human rights” and then used to argue that corporate persons should not have certain kinds of legal rights.²²

In another example, many argue that propertizing the body by permitting it to be commodified violates human dignity. This is part of the justification provided for prohibitions on organ selling²³ and prostitution.²⁴ On the flip side, major proponents of the transhumanist movement, which supports the use of technology to make humans “better than well,” have used the rhetoric of owning one’s body to argue for their positions.²⁵

In a related debate over how to allocate rights in technology that creates transgenic species, the discussion about whether to grant property rights in such technology often focuses on whether something should be thought of as a person or part of a person by asking, for instance, if it contains human genetic material.²⁶ Instead, the focus could be on what set of rights and regulations would be

22. Anna Grear, *Challenging Corporate Humanity: Legal Disembodiment, Embodiment, and Human Rights*, 7 HUM. RTS. L. REV. 511, 520 (2007).

23. E.g., U.S. DEP’T OF HEALTH & HUMAN SERVS., ORGAN TRANSPLANTATION: ISSUES AND RECOMMENDATIONS 96 (1986); Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, in PROPERTY RIGHTS 259, 261 (Ellen Frankel Paul et al. eds., 1994) (describing the Kantian human dignity argument as applied to organ sales).

24. E.g., Susan Estrich, *What I Couldn’t Teach Spitzer at Harvard Law*, REAL CLEAR POL. (Mar. 13, 2008), http://www.realclearpolitics.com/articles/2008/03/what_i_couldnt_teach_eliot_spi.html (“I really believe it is none of my business, as a member of the public or the media, if a political or business leader has an affair. I don’t sit in judgment of other people’s marriages or their private lives. But prostitution isn’t just sex. Prostitution objectifies the women who engage in it, dehumanizes sex and sexuality, and turns both into commodities with a price tag.”); see also Ann Lucas, *The Currency of Sex: Prostitution, Law, and Commodification*, in RETHINKING COMMERCIALIZATION 248, 248 (Martha M. Ertman & Joan C. Williams eds., 2005) (“[M]ost objections to prostitution are commodification-based.”).

25. JAMES HUGHES, CITIZEN CYBORG: WHY DEMOCRATIC SOCIETIES MUST RESPOND TO THE REDESIGNED HUMAN OF THE FUTURE 207, 229 (2004) (arguing that “[o]nly beings with personhood are exempt from being property, since we each own ourselves and can’t be alienated from ownership of ourselves,” and noting, with approval, “disparate movements, like transgender rights, [which are] working to radicalize our control over our own bodies”); see also Nick Bostrom, *In Defense of Posthuman Dignity*, 19 BIOETHICS 202, 210 (2005) (“A liberal democracy should normally permit incursions into morphological and reproductive freedoms only in cases where somebody is abusing these freedoms to harm another person.”).

26. As an example of this approach, the U.S. Patent and Trademark Office initially rejected a patent application for a “human-animal” chimera, because it “could embrace a human being,” arguing that the Thirteenth Amendment would prohibit such a patent. Gregory R. Hagen & Sebastien A. Gittens, *Patenting Part-Human Chimeras, Transgenics and Stem Cells for Transplantation in the United States, Canada, and Europe*, 14 RICH. J.L. & TECH. 1, 35 (2008). For further discussion on the request and issuance of patent protections for human-animal chimera, see Margo A. Bagley, *Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law*, 45 WM. & MARY L. REV. 469, 502, 511–12 (2003).

best, regardless of whether some piece of technology happens to contain what we conceive of as a person's body part.²⁷

There are two fictions that may explain why there is so much concern over what is or is not the body. These fictions may explain why an advocate might find a rhetorical advantage in calling the cochlear implant a part of the user's body. The first fiction is that property rights are largely absolute in the owner.²⁸ The notion is that if the makers of the implant retain some intellectual property rights in the implant, the law will fail to limit those rights for social good. In other words, if the implant inventors have a patent on the implant, we would not be able to, through law, create limits on those rights in order to promote something other than the enrichment of the patent owners.²⁹

Lawyers know that, in truth, property rights of owners are constantly being regulated and limited in order to account for the welfare of persons other than the owner. Real property owners are subject to easements, environmental regulations, and limits on their rights to exclude trespassers, all for the welfare of others.³⁰ "[F]air use . . . is not an infringement of copyright,"³¹ and some have proposed a similar type of fair use doctrine in the area of patent law.³² But the popular fiction of property rights as close to absolute is a rather stubborn one,³³ frequently leveraged by those it suits. Thus, there may be a kind of fear that calling the implant property will prevent us from focusing the law on anything except the wishes of the person who owns the implant in the first instance—the seller and patent holder.

27. In 2006, Cardozo Law School hosted an entire two-day conference on the legal, moral, and policy implications of patenting human DNA, human-animal hybrids, and other biotechnological innovations. Numerous law professors, government patent lawyers, and others presented arguments at this conference, at which Bagley was the keynote speaker. See Margo A. Bagley, Keynote Address at the Benjamin N. Cardozo School of Law Patenting People Conference (Nov. 12, 2006) (I attended the conference as a fellow). Patents on cochlear implants or prosthetics were not a major concern of the speakers, even though the allocation of control over this sort of technology may impact people's lives as much as control over technology that happens to contain human genetic material.

28. Fagundes, *supra* note 8, at 675–76.

29. *Id.* at 670–72.

30. *Id.* at 681–83.

31. 17 U.S.C. § 107 (2006).

32. See Maureen O'Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177 (2000).

33. See Fagundes, *supra* note 8, at 652–57.

Aspects of this fear appear even among some scholars. For instance, David Fagundes has argued that some resist the analogy between intellectual property and real property, on the theory that such an analogy would generally lead to greater protection for copyright holders and less consideration of the public values associated with the First Amendment, like vibrant cultural exchange and public access to information.³⁴ Angela Riley, Sonia Katyal, and Kristen Carpenter have critiqued scholarly resistance to the recognition of cultural property rights that argues that such rights could diminish the circulation and exchange of culture. They argue that such resistance subscribes to a descriptively inaccurate, absolutist ownership model of property.³⁵

The second, related fiction is that rights in the body are absolute, whether those rights are alienable, like property, or some kind of inalienable dignity rights. Lawyers know that, in truth, rights in one's body are not absolute. One can be stopped from doing all sorts of things with one's body—such as committing violence or speaking fraudulently—in the interest of protecting others. The right to abortion can be limited, and the theory on which this is justified is *not* that abortion is not a fundamental right, but that there are countervailing interests in fetal life and even the health of the woman who wants to have the abortion.³⁶ These interests have been held to justify limits that are quite severe before viability and can rise to total prohibition after viability.³⁷

Despite the progress of disability rights activists in breaking down the illusion of bodies as independent of their context, the fiction of a human body that could be made totally free from intrusion or given complete “integrity”³⁸ under the law continues to retain a great deal of purchase. While some progress has been made in demonstrating that our bodies rely on their surrounding social and legal context, which means that we could never have unlimited rights

34. *Id.* at 667–73.

35. Kristen A. Carpenter, Sonia K. Katyal & Angela R. Riley, *In Defense of Property*, 118 *YALE L.J.* 1022, 1027–28, 1041–46, 1065–79 (2009).

36. *See* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 869 (1992).

37. *Id.* at 885–87, 879 (upholding mandatory twenty-four hour waiting period pre-viability and permitting total prohibition after viability with life and health exceptions).

38. DONNA J. HARAWAY, *A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century*, in *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 149, 150 (1991); Jain, *supra* note 21, at 43.

in our bodies, we still often hear the stubborn refrain, “It’s my body, so I can do what I want with it.”

For instance, those who oppose taxes on beverages with large amounts of sugar have leveraged the idea of a right to put what one wants in one’s own body.³⁹ This is despite the fact that one uses all kinds of objects with one’s body that are taxed, from cars to makeup to clothing.⁴⁰ Similarly, objections to prostitution are often put in terms of commodification of the body—“it’s her body, so we *can’t* let her sell it”—even though all kinds of labor constitute use of one’s body in exchange for money,⁴¹ sometimes in ways that are permanently injurious.⁴² For instance, teachers move air in and out of their lungs to lecture,⁴³ while workers in factories perform tasks with their bodies that can lead to injury.⁴⁴ We choose whether to regulate these injurious uses of one’s body, and, if so, how much to regulate them.

Thus, some of the impetus behind saying that the cochlear implant is part of the user’s body may be a belief that by saying this the law will *have* to privilege the user over the makers of the implant in any disputes. The idea is that one’s rights in one’s own body are absolute, so the law simply could not force one to abide by the terms of an EULA that purports to control what one does with one’s body. But just as thinking of the implant as property need not inexorably lead to enforcing the EULA, thinking of the implant as part of the body does not inexorably lead to the EULA’s unenforceability.

39. *Americans Oppose Tax on Soft Drinks, Poll Reinforces Nationwide Sentiment*, BEVNET (June 3, 2010, 2:12 PM), http://www.bevnet.com/news/2010/6-3-2010-Americans_oppose_soda_tax_new_poll.

40. *See generally* INSTITUTE ON TAXATION AND ECONOMIC POLICY, <http://itepnet.org/> (last visited Sept. 6, 2010) (providing information and news on tax policy, including information about vehicle excise taxes, gasoline taxes, and more).

41. *See generally* Lucas, *supra* note 24, at 252–55 (discussing the persistent but incomplete commodification of work).

42. *See* Jain, *supra* note 21, at 34, 36–37 (discussing Henry Ford’s vision of the workforce).

43. Martha C. Nussbaum, “*Whether from Reason or Prejudice*”: *Taking Money for Bodily Services*, 27 J. LEGAL STUD. 693, 704 (1998) (constructing this example).

44. Jain, *supra* note 21, at 34 (quoting HENRY FORD WITH SAMUEL CROWTHER, *MY LIFE AND WORK* 108 (Doubleday, Page & Co. 1922)).

III. ARGUING FROM THE BODY: THE BENEFITS AND RISKS

A. Benefits

If this rhetoric is all rooted in these fictions, what do enlightened people gain, if anything, from its use? In this section, I argue that even if the rhetoric plays on fictions of absolute rights, it may not be useless. Rather, it can be a helpful way of mentally reminding ourselves that there is not a sharp distinction between bodies and everything else, and that we should not rest comfortably if we have prevented injuries to pre-social bodies, but not to anything else. It simply reminds us of very real injuries that law ought to be attempting to prevent and remedy—injuries that, as a political matter, we tend to ignore.

While disability activists have done a great deal to highlight these sorts of injuries, there is obviously still a great deal of work to be done, and we may have an opportunity to make great strides on this front. In the face of new biotechnology that has already begun to result in very obvious physical mergers of human and non-human parts and entities, it may be harder to subscribe to the fiction that by protecting imagined pre-social bodies we have done enough to protect real social bodies. For instance, in the case of a pacemaker or a robotic arm, humans have merged with inorganic property of the sort that is routinely and uncontroversially commodified.⁴⁵ In the case of merging plant genetic material with human genetic material, humans may merge with property that is organic but that is nevertheless still routinely commodified.⁴⁶ In the case of merging human and animal genetic material—transplanting an animal organ into a human or growing a human organ inside an animal—humans may merge with organic property that is legally, but controversially, commodified.⁴⁷ In some ways this merger is nothing new.⁴⁸ As I

45. *E.g.*, Brian Mockenhaupt, *Rebuilding: Bryan Anderson*, *ESQUIRE MAG.*, Mar. 1, 2008, at 184, 184.

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

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

argued above, very common forms of property such as real estate can have significant effects on the lived physical experience of our own bodies. Moreover, developments in biotechnology are making this fact more visible. In the long run, as these mergers between what we have called “the body” and “property” become more common, sustaining different formal legal statuses for the inorganic and the organic, for the “human” and the “non-human,” or for the internal and the external, may appear more and more arbitrary.

A prosthetic arm may not be a person, but pretending that, as a legal matter, it is just like a television fails to protect the body of the person who would benefit from the prosthetic. This is of course true of all sorts of important pieces of property, like wheelchairs and other assistive technology, but it is about to become more obvious due to increasingly striking mergers of organic, physically continuous persons with inorganic, external property.

Perhaps we can better protect people from very real injuries if we deconstruct the border between bodies and everything else. Why? While failure to install ramps may entail no direct injury to what we have conceived of as the body of a person in a wheelchair—no injury of the kind that law would traditionally call a “battery”—there is an injury nevertheless. The injury is to the person’s mobility and, importantly, to the person’s ability to participate fully as a member of society. Speaking of the wheelchair as part of the person’s body may remind us that the injury exists, and may therefore affect our political decision about what, if anything, to do about it. The language of the body may remind persons without disabilities—whose privilege would otherwise interfere with their ability to empathize—of physical pain they have experienced in their own lives. This can be true even if we recognize that whether or not the wheelchair is part of the body should not, on its own, place any *legal* limits on the political choice of whether and how to respond to the injury.

Perhaps even the rhetorical flourish of “my iPhone is my exobrain” can be useful. The more we recognize that the line

48. Some argue that humans are “embodied in an extended technological world,” rather than existing as “distinct beings in an antagonistic relationship with their surroundings.” Robert Pepperell, *The Posthuman Manifesto*, KRITIKOS (Feb. 2005), <http://intertheory.org/pepperell.htm>; cf. HARAWAY, *supra* note 38, at 150–51 (attempting to disrupt the naturalization of the human body and of gender, but without seeking to be innocent or transcendent of the systems of power and coercion that socially construct gender and the body).

between property and bodies has been blurred, perhaps the better we can recognize that the interests we have in protecting people from coercion and harm are present in many arenas—not just when someone seeks to sell an organ, but also when a property owner seeks to build a flight of stairs, or when an IP owner seeks the law’s assistance in limiting the use of IP by another. Injuries to non-owners occur throughout the world of property law. Perhaps collapsing what we think of as property rights and what we think of as bodily rights will help us take account of both types of injuries. In the end, we need not give iPhones or prosthetics some non-property status, but thinking of them as parts of our “inorganic bodies” might remind us that shot throughout property and contract regulation ought to be a consideration of the injuries that can result to have-nots.

B. Risks

On the other hand, are there risks to using this rhetoric? If I have trouble empathizing, due to my privilege, with a person who is badly injured by a particular choice about how to regulate property and contract, are there risks to leveraging the body in persuading me?

There is a risk here, which is that we might reify conceptions of what kinds of injuries count or matter. If we must make a metaphor between injuries to a prosthetic arm and injuries to what I conceive of as my body, such as my “normal” arm, then in order to obtain legal protection, persons with disabilities and other persons may be forced to analogize harms they seek protection from to harms to organic, human, internal, “normal” body parts.

In some cases, the analogies may be effective where they do not push too heavily on the code underlying our construction of what the body is. The case of the prosthetic arm represents a good prospect for an effective analogy. Though it is inorganic, it can be conceived of as a replacement for something organic, human, and “normal.”

But this may not be the case with respect to other technologies and other injuries. Applying the same analogy to wheelchair users may not be so successful, and too much reliance on analogies to the body may cause us to discount more unusual sorts of injuries even more heavily. We may also find ourselves ignoring the social costs and benefits of property rights in technology that is unconvincingly described as a body part, but that nevertheless is very important to a decent life. For instance, metaphors between internet access and

bodies are unlikely to be compelling, but private monopolies over internet access may have quite important negative impacts on those who are shut out, in the context of a society where the vast majority of persons is not shut out.

In short, the risk of using the rhetoric of the body is that we will reify the idea that bodies, as we have conceived of them until now, receive more protection than everything else, no matter how important everything else is to a good life. A few devices like prosthetics and exobrains may simply become the exceptions that prove the rule.

CONCLUSION

Our constructions of the body—what is a person’s body and what is not—are complex and messy, lacking formulaic principles. The lack of principles is about to become prominent, with impending and readily perceivable mergers of the internal, hard to remove, organic, human, physically continuous, and “normal” with the external, inorganic, non-human, physically discontinuous, and new, or even luxurious. We must accept that the line between bodies and everything else is indistinct, and that to deal with threats to persons, we cannot rely on the formal sanctity of the human body as separate from property. If we accept that the line is blurred, these mergers provide us with a great opportunity to better recognize and remedy injuries that are unfamiliar to many, such as injuries that persons with disabilities face. Rhetoric that seeks to expand the conception of the body to include technologies may help us recognize these different kinds of injuries. On the other hand, such rhetoric poses a danger: If the conception of the body is only expanded marginally to include a few special devices such as prosthetics, this rhetoric may in fact reconstitute the privileged status that some injuries—those that we view as harming “bodies”—have over others.