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RESPONSE TO THE LAW OF THE BODY BY MEREDITH M. RENDER

E. Richard Gold

In her article, Professor Render does a great service by proposing to unify legal rules relating to the human body through the concept of the “law of the body.” She demonstrates that the law dealing with the body and its components is often ad hoc in nature, sometimes contradictory and not necessarily in alignment with how people generally understand and view the body. She proposes that the law recognize that individuals hold an inalienable right to their living, whole bodies,1 arguing that, with this starting point, we will be in a position to develop consistent and fair legal rules over the uses of the human body (e.g., surrogacy, using one’s skin as advertising, etc.) and its components (e.g., cells, tissues, or organs removed from the body).2

It is uncertain to what extent Professor Render’s proposal to create a new law of the body will actually respond to scientific and technological advances in the life sciences. This should not trouble us for, as Professor Render explains, her goal is more modest: “Clarifying the misapprehensions that have arrested the application of property concepts to the body should clear the intellectual path so that judges, lawmakers, and scholars can begin the work of shaping a ‘law of the body’ . . . .”3 Thus, we should not worry at this point how the creation of such a body of law will work itself out in practice. The goal is simply to provide a solid foundation for future development.

Despite these positive aspects of her article, I put on my critic’s hat and point to three areas in respect of which I would invite Professor Render to either elaborate or simplify her argument. These should be taken as I intend: as constructive criticism of an article that seeks to move into novel space. Nevertheless, a critic must be critical and point to (seeming) contradictions,

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2 Id. at 550–51, 554–55.
3 Id. at 604.
loose thoughts, and, generally, weaknesses in the argument. I divide up my comments as relating to the following: (a) the theoretical foundations of the proposed property right, (b) the practical implications of the definition of the subject matter of the right, and (c) Professor Render’s invocation of social norms in support her argument.

A. Theoretical Foundations

In the process of arguing for the law of the body, Professor Render takes the position that the “bundle of rights” theory of property is incorrect or, at least, significantly incomplete. In doing so, she relies on the work of Thomas Merrill and Henry Smith in which they argue that the bundle of rights theory ignores the in rem nature of property. They argue that property rights, unlike other rights, are limited in the form those rights can take, invoking the civil law notion of *numerus clausus*. This is not the place to question whether the common law is actually as limiting as Merrill and Smith suggest. It is worth noting, however, that Kent Schenkel points to an apparent flaw in Merrill and Smith’s presentation of the argument: a trust actually permits the creation of seemingly unlimited forms of control over goods despite technical limitations on the form of title.

Professor Render is, however, less concerned about the limited number of forms that property can take—in fact, as discussed below, she suggests introducing a new form of property—than the link that Merrill and Smith make

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4 Id. at 562 (“Fortunately, the concept of in rem property rights has in recent years enjoyed something of an intellectual renaissance. Merrill and Smith, in particular, have worked to provide a place for the concept of in rem property rights within property theory writ large.” (footnote omitted)). She relies, in particular, on Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000) [hereinafter *Numerus Clausus*] and Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357 (2001) [hereinafter *Law and Economics*].

5 Merrill and Smith were not the first to make this point. In their article, *Numerus Clausus*, they acknowledge as such. *Numerus Clausus*, supra note 4, at 4. An almost contemporaneous study by Andrea Fusaro makes a similar point about conceptual overlaps between the common law and civil law approaches to limited forms of property. See Andrea Fusaro, *The Numerus Clausus of Property Rights*, in *1 Modern Studies in Property Law* 309, 309 (Elizabeth Cooke ed., 2001).

6 See Kent D. Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 UMKC L. REV. 181, 196 (2009) (“The Achilles’ heel of the *numerus clausus* is that it is based solely on title and completely ignores benefit. As long as title and benefit are separated, then benefit need not follow any predefined form, despite the *numerus clausus*. And yet the value of property depends on the benefit it provides. Title, except to the extent it coincides with benefit, has no value. Taking the benefit is taking the property even though title remains. And in creating different or novel property interests our goal is to achieve a different kind of benefit, not a different kind of title. This is why trusts can be used to achieve benefits not available under the common property forms. The trust thus evades the *numerus clausus* and accomplishes our goals.” (footnotes omitted)).
between the in rem nature of property rights and the fact that the subjects of those rights are “things.” In doing so, however, she reads Merrill and Smith too far, as she equates “thing” with tangibility. She recognizes that Merrill and Smith apply their logic to intellectual property—an intangible object—but departs from them on this point. In doing so, however, she not only moves away from Merrill and Smith, but from the very in rem objection to the bundle of rights theory upon which her argument is premised.

The in rem objection to the bundle of rights theory is that, unlike contractual rights, for example, property rights extend to every person in the jurisdiction without either his or her explicit consent or overt knowledge. That is, the rights extend to anyone who comes into contact with the (tangible or intangible) object of property, whether he or she is aware of the person or persons holding property rights in respect of a good. It is the fragmentation of rights (both in terms of holders and quality of the holders’ rights) that Merrill and Smith argue is solved by accepting that property rights bundles are standardized.

The tangibility (or intangibility) of the subject of property is neither dictated nor helpful for the in rem argument; all that is needed is to follow Merrill and Smith in finding that predefined (and limited in number) bundles of rights solve the epistemic problem of fragmented rights. In fact, the history of the common law should make us eschew any connection with tangibility: after all, the archetypical subject of property, the estate in land, is metaphysical

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7 See Render, supra note 1, at 562 (“By arguing that ‘core’ property rights are in fact in rem rights, and that in rem rights are qualitatively distinct from in personam rights, Merrill and Smith returned attention to the tangibility, the ‘thingness’ of property rights—or at least, as argued here, some property rights—thereby articulating the qualitative line between property rights and other species of entitlements.” (footnote omitted)).
8 Id.
9 Id. at n.60 (“Merrill and Smith actually extended their claims with respect to the in rem character of property rights, and would have included intangible (yet ‘core’) property interests, such as intellectual property interests, within their understanding of in rem rights. This Article, however, deals (for better or worse) only with the concept of in rem rights in tangible objects of property, and the argument presented here departs in this way from the full implications of Merrill and Smith’s position.” (citation omitted)).
10 Cf. Numerus Clausus, supra note 4, at 55 (“In rem rights provide protection against in personam harms, but it is not practical to create an in rem right by bundling together myriad in personam rights that have been individually negotiated with every potential wrongdoer.” (footnote omitted)).
11 Law and Economics, supra note 4, at 359 (“Because property rights create duties that attach to ‘everyone else,’ they provide a basis of security that permits people to develop resources and plan for the future. By the same token, however, this feature of property imposes an informational burden on large numbers of people, a burden that goes far beyond the need for nonparties to a contract to understand the rights and duties of contractual partners. As a consequence, property is required to come in standardized packages that the layperson can understand at low cost.”).
and not the tangible land itself. The description put forward in the famous sixteenth century *Walsingham’s Case* eloquently summarized the difference between the tangible object—land—and the intangible subject matter of the right—the estate: “[T]he land itself is one thing, and the estate in the land is another thing, for an estate in the land is a time in the land, or land for a time, and there are diversities of estates, which are no more than diversities of time . . . ”  

Thus, the common law pays no particular attention to the tangibility of a “thing” and offers it no different a status as far as the in rem argument is concerned. Even the common law division between real property and personal property is defined by the historically created set of remedies available for a breach of a right rather than by the tangible or intangible nature of the subject matter of the right.

Given the above, the statement that “[i]t is only to say that our legal principles assume a special character—an in rem character—in the context of the tangible” is not actually correct. Further, it is not necessary to Professor Render’s argument as I argue next.

Significantly, Professor Render does not need an in rem concept of property to achieve her goal of finding an inalienable right to control one’s body. The bundle of rights theory allows for exactly this form of right and could conceivably accord with it for exactly the set of reasons she gives in her article: to protect an invaluable (perhaps most valuable to human life) good. Whether it would actually do so involves a balancing of considerations, but it, and not the more restrictive vision of limited sets of property forms suggested by Merrill and Smith, is best positioned to achieve her goals.

Professor Render deploys the in rem concept of property in the following way:

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13 Render, *supra* note 1, at 567 n.92 (citation omitted).
14 Avihay Dorfman and Assaf Jacob, who are cited for the link between in rem rights and tangibility, actually do not base their argument that copyright demands a weaker protection than tangible objects on any special in rem character of tangible objects. See Avihay Dorfman & Assaf Jacob, *Copyright as Tort*, 12 THEORETICAL INQUIRIES L. 59, 96 (2011) (“More dramatically, these considerations demand, on pain of glaring inconsistency, a substantially weaker protection for copyright. In pursuing this claim, we have shown that the form of protection of property rights (including rights in tangibles) is, to an important extent, a feature of certain normal, though contingent, facts about the human world.”).
The living human body (and its constituent parts and products) fits squarely within this in rem rights paradigm. As a resource, the human body is finite and unique not only in that there are an exhaustible number of living human bodies, but also in that living human bodies are not fungible. My body is not an adequate substitute or replacement for your body. Each living body serves a unique and nontransferable function, and a person who is separated from her body cannot be made whole with either money damages or a replacement body. Of all the other core property interests, only real property shares this attribute of uniqueness so completely, and real property is the model upon which our in rem understanding of rights is built.\textsuperscript{15}

In making this argument, she relies more on Dorfman and Jacob—who argue that tangible objects have clearer boundaries that are easier to ascertain than are intangibles\textsuperscript{16}—than on any special in rem character of tangible goods or on the \textit{numerus clausus} principle.\textsuperscript{17} Professor Render’s central argument is that for reasons of policy relating to the “unique” character of the living body, courts ought to recognize a property right in respect of it. This concern over policy is the bread and butter of the bundle of rights theory and is easily accommodated by it.

\textbf{B. Practical Implications}

Beyond misgivings over the theoretical foundation of the argument, it is far from clear that Professor Render could achieve her practical goal of using an in rem theory of property to come up with an inalienable property right over the whole, living human body. Such a property right would be an unlikely candidate if, as Merrill and Smith contend, there is only a small set of possible forms of property rights available. The common law does not normally differentiate between whole, living and whole, dead bodies\textsuperscript{18} nor between the body as a whole and its excised components (e.g., organs, tissues, or cells).\textsuperscript{19}

\textsuperscript{15} Render, \textit{supra} note 1, at 574.


\textsuperscript{17} In fact, Dorfman and Jacob, \textit{supra} note 14, at 96–97, rely on neither the in rem nor the \textit{numerus clausus} argument.

\textsuperscript{18} See, e.g., Render, \textit{supra} note 1, at 580 (“[D]eath necessarily transforms the living human body into another kind of entity: a corpse.”).

\textsuperscript{19} See, e.g., id. at 604 (“Because the right to transfer is not an incident of ownership in all contexts (and in no context is it an absolute right), we can assume that existing rules regarding our ability to sell our body parts will not \textit{necessarily} give way to a radical shift in the degree to which our body is available for commercial transfer.”).
Further, the limitation that the right is inalienable runs counter to the general common law value of alienability. In order to accommodate the proposed right, the common law would essentially have to recognize a new standard bundle of rights, one that seems doubtful on Merrill and Smith’s analysis.

This problem is exacerbated by the lack of sustained explanation as to why the common law would choose to define the subject matter of the right as a whole body rather than the physical body (dead or alive) or any bodily tissue, whether in whole or in part. Because Professor Render puts aside any argument based on the sanctity or special character of the human body, it is difficult to understand why she limits the subject matter of the right as she does. Even if the goal were simply to reduce informational uncertainty over who controls the body, it is not clear why dead bodies are not included within the right for which she argues. Further, while the identity of the holder of rights over the components of the body—cells and tissues—may be less clear than for a whole body, it is not a priori obvious why finding the holder of these components would present any greater difficulty than determining the holders of excised tissues and cells from other animals or from plants.

Beyond this, defining the subject of the property rights narrowly is unlikely to help us answer many of the questions about which we care. Even were we to agree with Professor Render that each person has an inalienable and exclusive right to his or her body, this is unlikely to help us in determining whether individuals can hold a property right in the components of their bodies (e.g., spleens, cells, and proteins) because, according to her, these are different things than the whole, living body. While there is obviously a physical relationship between a whole, living body and its components (at least while housed within an intact body), that connection is broken once the organs, tissues, or molecules are removed from the body. It is plausible to argue that the same person who has a property right in the body has a right to that which is extracted from it (in a way similar to rights a landholder obtains in the minerals in the land), but it is equally plausible to argue the contrary (e.g., a

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21 See Render, supra note 1, at 582 (“In other words, in this most literal sense, a human body is obviously an object. That it is also more than a mere object is not disputed here. It is sensible that we should regard the human body as a repository—if not, indeed, the sum—of our personhood, and therefore as a unique and even sacred object in the world. But in addition to whatever metaphysical attributes the human body embodies, it is also an entity in the world that is exceptionally useful and scarce.” (footnotes omitted)).
legitimate invitee who finds an object sitting on someone else’s land has a better right than the landowner).

Furthermore, while a property right over one’s living body may lead to interesting legal debate over uses of the body, such as in surrogacy, it is difficult to see how the recognition of such a right will change the nature of the debate. The law already acknowledges an individual’s exclusive right to control her body—subject to criminal and other laws—in a manner that leaves little, if any, additional role for property law. It is not clear, for example, what advantages one would obtain by adding a cause of action for conversion or trespass to chattels to a claim of battery in respect of physical interference with a body. It is unlikely that, in practice, one will actually see a case decided on the basis of one’s right to one’s living body. If this analysis is correct, why would the common law create such a right?

Most current debates concerning property rights in the body relate to rights over excised body parts, such as spleens, tissue samples, or human genes. It is here, more than anywhere, that we must have the need for a law of the body, but it is precisely here that Professor Render’s property suggestion offers the least guidance. To be fair, one cannot expect her to lay out the consequences of her approach for every property question that may arise; it is enough that she sets a foundation. However, that foundation needs to be closely enough related to the problems that will present themselves in court for it to be relevant. Given that there will be few, if any, cases dealing with an entire human body, there will be little opportunity to broaden the foundation of law that Professor Render seeks to create so as to help answer questions about excised body parts.

C. The Invocation of Social Norms

There is an interesting contradiction lying at the heart of the argument that we ought to recognize an inalienable property right over whole, living human bodies: that we ought to take social norms seriously when it comes to recognizing a property right in the body, but we ought to ignore them when it comes to understanding concerns about equating the body with property.

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22 See, e.g., Moore v. Regents of the Univ. of Cal., 793 P.2d 479 (Cal. 1990) (in bank).
Part I of Professor Render’s article states that one of the benefits of recognizing a property right in a whole, living body is that doing so accords with social norms: “So an understanding of the legal status of the human body that acknowledges explicitly that we have a property interest in our own living body would draw our legal conception of body-ownership closer in line with our conventional conception of body-ownership.” 25

Later, however, in discussing concerns over the incommensurability of the human body with other goods, Professor Render puts aside any concern over social norms. This is most evident in her discussion of the distinction between “persons” and “bodies.” Here, she sharply distinguishes between the legal and social concepts of property and asks us to ignore the social one:

However, in addressing this subject–object concern, as an initial point it is important to be clear that our conventional concept of “person” is distinct from our legal concept of “person.” When the law defines what “counts” as a person, it is not applying our conventional concept. Instead, the law is using the same word to refer to an entirely different concept. Our conventional concept connotes an ontological engagement with the category of personhood: what are the necessary and sufficient conditions to “count” as a person and so forth. The legal concept, in contrast, connotes an engagement with what “counts” as a person in a given legal context. 26

Professor Render cannot have it both ways. If we take social norms seriously—as I would suggest we ought—then we need to account for both the phenomenon that individuals usually say they “own” their bodies with the view that the body ought not be subject to property rights. Fortunately, there is a way to reconcile the seeming contradiction. In the vernacular, “own” is not the equivalent of “property right over,” but is a much more inclusive notion of having the ability to exercise control over a good. In this context, “own” means to “have power or mastery over” rather than to hold legal title. 27

25 Render, supra note 1, at 578; see also id. at 577 (“Thus, to measure by our behaviors, we understand our body to be an entity in the world—perhaps the only entity in the world—over which each of us is solely vested with dominion. We speak and behave with confidence in our body-property, and we have structured our social conventions to enforce these intuitions and thereby regulate relations with others with respect to our body. In other words, both our social practices and our linguistic description of those practices suggest that our conventional concept of “ownership” extends to the human body.” (footnotes omitted)).

26 Id. at 584.

27 Own, MERRIAM-WEBSTER.COM, http://www.merriam-webster.com/dictionary/own (last visited Jan. 12, 2014) (defining “own” as “to have or to hold as property” or “to have power or mastery over”).
With this understanding in mind, the point made in Part I of Professor Render’s article, that individuals instinctively feel that they own their bodies, does not translate, as argued, into a social norm recognizing property rights in the human body. Similarly, it explains why those same individuals continue to express concern over incommensurability in respect of the body. Rather than a property right, the current state of the law, in which the law recognizes one’s mastery over one’s body through intentional torts and constitutional law, better reflects social norms. This may not be the end of the story as the courts or legislatures may have good reason to override social norms. However, we ought to be cautious in doing so, if for no other reason than that legislating counter to social norms is usually ineffective.28

CONCLUSION

Overall, while Professor Render does us a service by taking the bold step of arguing for a law of the body, there remain serious concerns over the particular shape of the law she proposes. At a theoretical level, she locks herself unnecessarily into a constrained version of property law that makes it difficult to justify the particular form of the right she wishes to create. At a practical level, the narrow nature of the right—over a whole, living body—limits the effectiveness of the law of the body in answering fundamental questions at the intersection of biology, technology, and the law. Finally, by not taking seriously social norms related to the human body, her argument fails to fully understand and address concerns over the incommensurability of the body with other goods.