Mercer Law Review

Volume 74
Number 3 *Lead Articles Edition*

Article 8

5-2023

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I. INTRODUCTION

How do law's narratives construct one of its central objects: the human body? This essay explores legal constructions of the human body: both in its idealized form, and in the negative ontological spaces of injury, disability, death, and dehumanization that surround that ideal.

Bodies are "the very 'stuff' of law."[1] There are few areas of law where the human body does not, somewhere, require definition.[2] For instance, without a concept of the body, there can be no consequent constructions

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1. Laura Pritchard-Jones, *Unspoken and Unthinkable: The Older Disabled Body in Judicial Discourse*, 68 INT'L. J. L. & PSYCHIATRY 1, 2 (2019) (quoting Kirsty Keywood, *More Than A Woman? Embodiment and Sexual Difference in Medical Law*, 8 FEMINIST L. STUD. 319, 319 (2000)).

2. *See* E.R. Squibb & Sons, Inc. v. Bowen, 870 F.2d 678, 682 (D.C. Cir. 1989) (federal drug approval); Buel v. State, 80 N.W. 78, 81–82 (Wis. 1899) (homicide); Commonwealth v. Gamby, 283 A.3d 298, 325–26 (Pa. 2022) (criminal sexual assault); Mem'l Prop., L.L.C. v. Zurich American Ins. Co., 46 A.3d 525, 530 (N.J. 2012) (harvesting remains); Sandifer v. U.S. Steel Corp., 571 U.S. 220, 227–28 (2014) (citing 29 U.S.C. §§ 201–19 (1938)) (meaning of "clothing" in labor law); Lenhart v. Hanna, 14 Ohio App. 182, 187 (1920) (health codes) ("[T]he human body is but a reservoir for the accumulation of disease . . . .").

of personhood,[3] nakedness,[4] state intrusion,[5] injury,[6] disability,[7] duty of care,[8] aging,[9] or the moment of death,[10] to name only a few.

The multitude of legal definitions of the body render a "patchwork" of context-specific constructions, tailored to policy objectives.[11] Just as there is no unitary *body of law*, there is no unitary *body in law*. However, rules of construction are observable across context. In this essay, we describe these rules as *truisms*, in reference to their asserted self-explanatory quality.

Law is a social institution that uses language to develop constructs of reality, defined by consensus from within the legal community about how a "closed linguistic system should best reflect the outside world."[12] However, in law, the body is rarely just a biological object. Contrary to cultural beliefs that the body is "the unchanging anchor of identity,"[13] in the law it is frequently used as an extended, multi-definitional and multi-dimensional *conceptual domain*, which we refer to in this essay as THE BODY.[14]

There are layers to THE BODY in law. Sometimes, the term is used with precision, to describe the life-sustaining structure of cellular and

3. *See* Morton v. W. Union Tel. Co., 41 S.E. 484, 485 (N.C. 1902).

4. *See* Kingsley v. Regents of the Univ. of N.Y., 360 U.S. 684, 692–93 (1959).

5. *See* Schmerber v. California, 384 U.S. 757, 767 (1966); United States v. Montoya De Hernandez, 473 U.S. 531, 534–35 (1985); Missouri v. McNeely, 569 U.S. 141, 159 (2013) (all pertaining to searches of the body).

6. AIU Ins. Co. v. McKesson Corp., No. 20-cv-07469, 2022 U.S. Dist. LEXIS 64242, at *21 (N.D. Cal. Apr. 5, 2022) ("[B]odily injury means harm to the corporeal body[.]").

7. *See* Fiona AK Campbell, *Inciting Legal Fictions: 'Disability's' Date with Ontology and the Ableist Body of the Law*, 10 GRIFFITH L. REV. 42, 43–44 (2001).

8. *See* Dent v. West Virginia, 129 U.S. 114, 122–23 (1889).

9. *See* Pritchard-Jones, *supra* note 1, at 1 ("Rarely has academic discussion about old age and the law focused on bodies.").

10. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 343 (1990); *see also* W.F. Gorman, *Medical Diagnosis Versus Legal Determination of Death*, 30 J. FORENSIC SCI. 150 (1985).

11. Meredith M. Render, *The Law of the Body*, 62 EMORY L. J. 549, 549 (2012); *see also* DONALD L. HOROWITZ, THE COURTS AND SOCIAL POLICY (1977) (role of courts in policy).

12. Jeffrey M. Lipshaw, *Metaphors, Model, and Meaning in Contract Law*, 116 PENN. ST. L. REV. 987, 991 (2012).

13. Rosemarie Garland-Thomson, *Integrating Disability, Transforming Feminist Theory*, 14 NWSA J. 1, 20 (2002).

14. Using the linguistics convention of identifying conceptual metaphoric domains with small capital letters, indicating that the term may not occur in language exactly as such, but represents a taxonomy of related expressions. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); ZOLTÁN KÖVECSES, METAPHOR: A PRACTICAL INTRODUCTION 162 (2d ed., 2010).

extracellular materials,[15] tissues,[16] organs,[17] systems,[18] and other functions[19] that make up *our bodies*.[20] Elsewhere, it is subtly extended as metonym, to describe a human organism's *shape*,[21] *appearance*,[22] *reputation*,[23] or other normative qualities.

Further into representational abstraction, THE BODY may be used to describe a material vessel containing the essence of *life*, *soul*, *consciousness,* and *personhood*,[24] or to describe the ultimate *private*

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15. *See, e.g.*, Immunex Corp. v. Sandoz Inc., 395 F. Supp. 3d 366, 376–77 (D.N.J. 2019) ("The extracellular portion of the TNFR [protein superfamily] . . . is the portion that 'protrudes outside the cell' . . . . [S]cientific evidence pointed to at least two . . . expressed by the human body[.]").

16. *See, e.g.*, Ledergerber Med. Innovations, L.L.C. v. W.L. Gore & Assocs., No. 07-C-1593, 2009 U.S. Dist. LEXIS 11556, at *2 (N.D. Ill. Feb. 17, 2009) ("[W]hen surgeons insert implants into the human body, scar tissue would form over and around the surface of the implant.").

17. *See, e.g.*, Ordahl v. Forward Tech. Indus., 301 F. Supp.2d 1022, 1024 n.1 (D. Minn. 2004) ("The inferior vena cava . . . is the largest vein in the human body, and returns blood to the right atrium of the heart from the lower body parts.").

18. *See, e.g.*, Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n, 375 S.W.3d 464, 496 (Tex. App. 2012) (interpreting 22 TEX. ADMIN. CODE § 75.17(b)(4) (2009)) (current version at 22 TEX. ADMIN. CODE § 78.1(a)(5) (amended 2018)) ("The rule . . . defines 'musculoskeletal system' as the 'system of muscles and tendons and ligaments and bones and joints and associated tissues and nerves that move the body and maintain its form.'").

19. *See, e.g.*, ADA Amendments Act, 42 U.S.C. § 12102(2)(B), (4)(D)–(E) (2008) (describing "major bodily functions" as "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.").

20. *See* ALEXANDRA VILLA-FORTE, INTRODUCTION TO THE HUMAN BODY (2022) ("The human body is a complex, highly organized structure made up of unique cells that work together to accomplish the specific functions necessary for sustaining life.").

21. *See, e.g.*, Tex. Tech Univ. Health Scis. Ctr.-El Paso v. Niehay, 641 S.W.3d 761, 769 n.2 (Tex. App. 2022) (citing *Body Habitus*, THE FREE DICTIONARY, bit.ly/3uzSAbx (last updated 2012)) ("Body habitus is defined as 'Build, physique, and general shape of the human body.'").

22. *See, e.g.*, Farrer v. State, 2 Ohio St. 54, 60 (1853) ("In person, [the accused] is remarkably ugly. The eyes encroach on the space proper to the brain. Her head, in shape rather than in size, is unfavorable to the usual presumption of sound mind and full capacity.").

23. *See, e.g.*, *Kingsley*, 360 U.S. at 692–93 (quoting D. H. LAWRENCE, PORNOGRAPHY AND OBSCENITY 241 (1929)) ("Pornography is the attempt to insult . . . the human body . . . ."); Smith v. Milburn, 17 Iowa 30, 35–36 (1864) ("If . . . she voluntarily submits [her body] to the [sexual] connection, the law affords . . . no remedy. Nor can she be said to be thus deceived . . . if she has already lost the priceless jewel of the virtuous woman?").

24. *See Cruzan*, 497 U.S. at 343 (Stevens, J., dissenting) ("[T]he constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein."); Madrid v. Gomez, 889 F. Supp. 1146, 1261 (N.D. Cal. 1995) ("[H]umans are composed of more than flesh and bone . . . . mental health is a need as

space,[25] or the hereditary and social links *between* body-subjects,[26] or as a metaphor for the function of *groups of persons*, like societal and political *bodies*.[27] In such cases, THE BODY shifts from a biomedical *object* of inquiry to a sociopolitical *subject* of rights discourses.[28]

Thus, as a construct, THE BODY appears in everything from banal applications of bodily knowledge in the administrative state to rousing rights discourses.[29] In legal English, THE BODY carries a heavy load.

II. THE BIOMEDICAL BODY

Entire essays could be, and have been, written on topics pertaining only to *where the material body begins and ends in law*. For instance: when are prosthetics part of the body?[30] To what extent is a person's mind an extension of their body in conceptualizing harm?[31] Which bodily

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essential . . . as other . . . demands our bodies . . . make for shelter, warmth or sanitation."); *see also* KÖVECSES, *supra* note 14, at 123–26 (*body as a container* metaphors).

25. *See* Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890); *Schmerber*, 384 U.S. at 770; Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J. L. & HUMANITIES 195 (1995).

26. *See, e.g.*, *Ex parte* Agnello, 72 N.Y.S.2d 186, 191 (N.Y. Sup. Ct. 1947) ("[C]onnecting links of direct kinship—blood, flesh and bone—are not to be lightly torn asunder[.]"); *see also* William R. Schroeder, *John Paul Sartre: Being and Nothingness*, 4 CENTRAL WORKS OF PHILOSOPHY 170 (John Shand, ed., 2016) (within the conception of human beings as body-subjects, "people are *internally* related to each other; the mode in which they exist (object or subject) depends on the mode in which others exist[.]").

27. *See, e.g.*, Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 312 U.S. 287, 301–02 (1941) ("Freedom to speak and write . . . is as important to the life of . . . government as is the heart to the human body."); *Ex parte* Wilson, 125 P. 739, 744 (Ok. Crim. App. 1912)) ("[P]arty association [is] . . . to the organs of government . . . what the motor nerves are to the muscles, sinews, and bones of the human body.") (citing JAMES BRYCE, THE AMERICAN COMMONWEALTH (1888); *see also* THEODORE R. SCHATZKI & WOLFGANG NATTER, THE SOCIAL AND POLITICAL BODY 1 (1996) (describing Plato's human-social "body" analogy in popular use).

28. *See* Jonathan Crowe, *Explaining Natural Rights: Ontological Freedom and the Foundations of Political Discourse*, 4 N.Y.U. J. L. & LIBERTY 70, 71–72 (2009) (describing the centrality of "ontological freedom" in natural rights discourses).

29. *Compare* Olmstead v. L.C., 527 U.S. 581, 609 (1999) (Stevens, J., concurring) ("For a substantial minority . . . deinstitutionalization has been a psychiatric *Titanic*. Their lives are virtually devoid of . . . 'integrity of body, mind, and spirit.'"); *with* Gly Constr. Co. v. Davis, 483 A.2d 1330, 1333 (Md. Ct. Spec. App. 1984) ("100 percent loss of use, [such that] the hand be no more than a useless piece of flesh . . . attached to the arm only as a decoration[.]").

30. *See, e.g.*, State v. Schaffer, 48 P.3d 1202 (Ariz. Ct. App. 2002) (discussing whether a prosthetic limb in an aggravated assault case is a body part or an aggravating instrument).

31. *See, e.g.*, Ware v. ANW Special Educ. Coop. No. 603, 180 P.3d 610 (Kan. App. 2008).

features or excretions constitute transactionable private property?[32] This essay takes a larger view of THE BODY, but the biomedical body is still the natural starting point.

Societal knowledge of the material body grows daily,[33] and that body can now be *peered into*, by both medicine and law, in ways once unthinkable.[34] As a result, courts—in conversation with legislatures—are increasingly faced with deliberating highly specialized, microscopic, and submicroscopic topics related to the human body. Such things as genetics,[35] the microbiome,[36] particulate absorption,[37] and the electromagnetic fields produced by human bodies,[38] to name only a few.[39]

The historical common law contains countless instances of judges acknowledging the limits of their understanding of the biomedical body's internal mysteries[40] and relying on experts for accounts of causation

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32. *See* Render, *supra* note 11, at 550 ("People have begun to sell their skin. This is not meant euphemistically . . . . [P]eople have begun to sell their actual skin tissue as advertising space.").

33. *See generally* DANIEL LIEBERMAN, THE STORY OF THE HUMAN BODY: EVOLUTION, HEALTH, AND DISEASE (2014).

34. *See Montoya De Hernandez*, 473 U.S. at 543 (x-rays in search and seizure); Planned Parenthood v. Casey, 505 U.S. 833, 997 n.7 (1992) (Scalia, J., concurring in part and dissenting in part) (discussing ultrasound visual preview of fetus in abortion).

35. *See, e.g.*, Ortiz v. City of San Antonio Fire Dep't, 806 F.3d 822 (5th Cir. 2015) (interpreting Genetic Information Nondiscrimination Act, 42 U.S.C. § 2000ff(1)).

36. *Bowen*, 870 F.2d at 682 ("[I]t is questionable whether a drug that acts only upon non-human organisms that . . . reside within the human body can properly be understood as affecting the 'body of man' . . . .") (interpreting 21 U.S.C. § 321(g)(1)).

37. *See In re* Welding Fume Prods. Liab. Litig., No. 1:03-CV-17000, 2010 U.S. Dist. LEXIS 146067 (N.D. Ohio June 4, 2010).

38. Pub. Serv. Co. v. Van Wyk, 27 P.3d 377, 387 (Colo. 2001) ("Electromagnetic fields are produced by every living thing . . . . [T]he human body itself is a producer of electric fields because all cells in the body maintain, across their outer membranes, large natural electric fields[.]").

39. Developments like human cloning, organ sale, and surrogacy also uniquely challenge prior bodily regimes. *See, e.g.*, McKenzie v. Corzine, 934 A.2d 651, 662 (N.J. App. 2007) (considering New Jersey Stem Cell Research Bond Act of 2007, 2007 N.J. Laws 117) (cloning); R. R. Kishore, *Human Organs, Scarcities, and Sale: Morality Revisited*, 31 J. MED. ETHICS 362, 362 (2005) (organ trafficking); Warren Cty. Dept. of Soc. Servs. *ex rel*. Glenn v. Garrelts, 862 S.E.2d 65, 67 (N.C. Ct. App. 2021) (paternity in artificial insemination and surrogacy).

40. *See, e.g.*, *Dent*, 129 U.S. at 122 ("[The medical profession] has to deal with all those subtle and mysterious influences upon which health and life depend, and . . . the human body in all its complicated parts, and their relation to each other . . . ."); Almond v. Nugent, 34 Iowa 300, 304 (1872) ("[M]any laws of nature, applicable to the administration of remedies for the diseases of the human body, are not fully understood . . . ."); Hamil v. Bashline, 392 A.2d 1280, 1285 (Pa. 1978) ("[C]omplexities of the human body place questions as to the cause of pain or injury beyond the knowledge of the average layperson.");

therein.[41] However, it also contains many instances where judges take a more active role, viewing the biomedical body through the distorted prism of the cutting-edge sciences of their day,[42] often with infamous results.[43]

Defamed sciences of the body linger in the minutiae of jurisprudence longer than they do in the fields that developed them.[44] Whereas scientific fields are premised on falsification,[45] law is premised on quite different, even antithetical, principles of adherence to precedent.[46] As once put: "attempts to change the course of judicial decision, under the pretext of correcting error, are like experiments by the quack on the human body."[47]

As such, science and law make "uncomfortable bedfellows."[48] Law's aim of producing consistent rules yielding predictable outcomes is

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Taylor v. Fletcher Allen Health Care, 60 A.3d 646, 649 (Vt. 2012) ("[T]he human body and its treatment are extraordinarily complex.") (quoting Noyes v. Gagnon, 945 A.2d 926, 926 (Vt. 2008)).

41. *See, e.g.*, Halvorson v. Sentry Ins., 757 N.W.2d 398, 400 (N.D. 2008) ("[W]hen the causal relationship between a condition affecting the human body and a [negligent act] is not a matter within the common . . . comprehension of a layperson, the party bearing the burden of proof must present expert medical testimony establishing that relationship.").

42. *See, e.g.*, Orleans Navigation Co. v. Mayor, 2 Mart. (o.s.) 10, 11–12 (La. 1811) (applying miasmata theory before germ theory was known); Farber v. Olkon, 254 P.2d 520, 522 (Cal. 1953) (prefrontal lobotomy and electroshock therapies in "incompetent persons"); Dugan v. United States, 147 F. Supp. 674, 674–75 (D.D.C. 1956) (similar).

43. For example, the Supreme Court's evolving treatment of the heritability of criminal genetic traits. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough."); Skinner v. Oklahoma, 316 U.S. 535, 545 (1942) (Stone, J., concurring) ("Science has found and the law has recognized that there are certain types of mental deficiency associated with delinquency which are inheritable."); Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (rejecting "Mr. Herbert Spencer's Social Statics.") (Spencer was considered a founder of Social Darwinism); HERBERT SPENCER, PRINCIPLES OF BIOLOGY 469 (1864).

44. *See, e.g.*, Matt Saleh, *Falling Away Into Disease: Disability-Deviance Narratives in American Crime Control*, 95 ST. JOHN'S L. REV. 1037, 1044–45 (2021) (discussing the lingering appeal of scientific atavisms in describing professedly causal relationship between cognitive traits and crime); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997); Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21 (2013).

45. *See generally* KARL R. POPPER, *Science as Falsification*, *in* CONJECTURES AND REFUTATIONS (1963).

46. Evident in the common law principle of *stare decisis*, constitutional originalism, etc.

47. South's Heirs v. Thomas' Heirs, 23 Ky. 59, 62 (1828).

48. Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 SETON HALL L. REV. 1379, 1385–86 (2008).

couched in a language of empiricism.[49] But its multiple, intertwining constructions of THE BODY raise concerns that autonomy is threatened where judges rely on their own "rudimentary knowledge of the human body,"[50] substituting a series of detached constructs for the individual.[51] Next, we ask: what rules of bodily construction are *rudimentary* in law?

III. BEING, UNBEING, AND THE BODY

"Scratch a great legal problem and you are likely to find a great philosophical problem."[52] One theme of this essay is that constructions of THE BODY in law are often definitionally unsound, frequently butting up against—or meeting head-on—core problems of Western philosophy.

We noted above that THE BODY exists in law as a multidimensional construct of layered meanings. The legal dimensions wherein material bodies are constructed might include *polarities* or *spectrums* like: healthy or unhealthy, abled or disabled, safe or unsafe, private or un-private, innocent or guilty, free or unfree, equal or unequal. [53]

Some of these normative, bodily *states of being* are less discrete than others. Some may have greater interdependency, or more complicated internal conditions.[54] Some may be more amenable to binary, categorical, or continuous conceptualization[55] or to phenomenological relativism.[56]

One *state of being* does mark a starting point in law's rules of bodily construction. A body is either alive or not alive. Much has been written

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49. *See, e.g.*, Johnson v. United States, 576 U.S. 591, 606 (2015).

50. *Montoya De Hernandez*, 473 U.S. at 543.

51. *See* KRISTIN BUMILLER, THE CIVIL RIGHTS SOCIETY: SOCIAL CONSTRUCTION OF VICTIMS (1977); JOHN BRIGHAM, MATERIAL LAW: A JURISPRUDENCE OF WHAT'S REAL (2009).

52. Lawson v. Management Activities, 69 Cal. App. 4th 652, 662 (1999).

53. Note that we leave out *states of mind* in these examples (*e.g.*, *competent* or *incompetent*, *sound* or *unsound*, *intentional* or *unintentional*). We discuss later that problems of mind are uniquely situated.

54. *See, e.g.*, *Gamby*, 283 A.3d at 326 (Wecht, J., dissenting) ("[N]o objective line . . . can be drawn between what is private or personal, and what is not. What is personal or private is unique to each individual, predicated upon the many differing sociological factors.").

55. For instance, some argue that the "medicalization" of disability creates a false dichotomy, reducing natural human trait diversity to a normative framework of *difference*. *See* MICHAEL OLIVER, THE POLITICS OF DISABLEMENT: A SOCIOLOGICAL APPROACH (1990); PETER CONRAD & JOSEPH W. SCHNEIDER, DEVIANCE AND MEDICALIZATION: FROM BADNESS TO SICKNESS (1992).

56. *See* ANTONIA FELIX, SONIA SOTOMAYOR: THE TRUE AMERICAN DREAM 223 (2010) (quoting former Supreme Court Justice Sandra Day O'Conner: "A wise old man and a wise old woman would reach the same conclusion in deciding cases.").

about the law's treatment of the human body at the bookends of birth[57] and death.[58] This disproportionate emphasis is not necessarily surprising, as these "life cycle events," more than any others, define the biologic and symbolic order of human experience.[59]

Accordingly, one of the few relatively clear distinctions the law draws in its constructions of THE BODY is the difference between a living and nonliving one.[60] A threshold rule of construction, or truism, is thus:

> *A living body is legally distinct from a nonliving one*.[61]

Let's call this the *Animate* rule. The law mostly succeeds in distinguishing an animate body from a corpse.[62] It also mostly distinguishes a completely hypothetical birth from one where an organism in a state of fetal *bodily development* exists.[63] Yet, even in this simplest of rules, THE BODY's peculiar, nonliteral status is apparent. It exists as a material object before-and-after it is legally *alive*. It has a *transitive* quality. The legal person *passes through it*.[64]

This transitivity is the source of threshold definitional problems. In theory, *aliveness* and *not-aliveness* are discrete values in law. Courts are clear that biologically nonliving bodies do not have *rights* in the traditional sense.[65] However, at the edges of these values, courts are

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57. *See, e.g.*, Isabel Karpin, *Legislating The Female Body: Reproductive Technology And The Reconstructed Woman*, 3 COLUM. J. GENDER & L. 325 (1992); DAVID W. MEYERS, THE HUMAN BODY AND THE LAW: A MEDICO-LEGAL STUDY (2d ed. 1990).

58. *See, e.g.*, GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW (1957); NORMAN ST. JOHN-STEVAS, LIFE, DEATH & THE LAW: LAW AND CHRISTIAN MORALS IN ENGLAND AND THE UNITED STATES (1961).

59. *See* Joseph R. Gusfield & Jerzy Michalowicz, *Secular Symbolism: Studies of Ritual, Ceremony, and the Symbolic Order in Modern Life*, 10 ANN. REV. SOC. 417, 417–18 (1984).

60. *Morton*, 41 S.E. at 485.

61. *See* Matos Rodriguez v. E. Airlines, Inc., 108 D.P.R. 217, 217 (1978) ("[I]t is not our task to weigh . . . metaphysical questions on the nature or value of a human body already dead.").

62. *See* Gray v. State, 114 S.W. 635, 641 (Tex. Crim. App. 1908) ("At common law . . . no property in a dead human body [exists] . . . it becomes a part and parcel of the ground[.]").

63. Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972).

64. *See Morton*, 41 S.E. at 485; *Cruzan*, 497 U.S. at 292–93 (Scalia, J., concurring).

65. Litteral v. Litteral, 111 S.W. 872, 873 (Mo. App. 1908) ("The only rights (if we may call them rights) left to the dead are . . . that of decent sepulture; to . . . [be] decently covered and consigned to earth from which it sprung . . . .").

mired in controversy related to pinpointing the precise moment the *legal person* or "life" passes from *not-aliveness* to *aliveness*,[66] or vice versa.[67]

This is most apparent, of course, in the competing phenomenologies evinced in jurisprudence in the seemingly disparate contexts of abortion[68] and withdrawing care.[69] Such cases give rise to confusing circumstances where a human organism may be simultaneously *alive*, in a biological sense, and not, in a legal sense.[70] They raise *personhood* and *mind-body* dilemmas, making them well-known sources of moral and bioethical controversy.[71]

There are other, less well-known, definitional issues at the edges of bodily *aliveness* and *not-aliveness*. While biologically nonliving bodies are never *persons*, at times they do have *persona*, representing a different type of vessel imbued with legal status (*somethingness*) called "societal interests."[72]

There are also examples of bodies that are indisputably biologically *and* legally alive yet—under limited conditions like capital punishment and legal slavery—slide down the spectrum toward practical

66. *See* Jeter v. Mayo Clinic Ariz., 121 P.3d 1256, 1268 (Ariz. App. 2005).

67. *See* ELIZABETH HURREN, *The Condemned Body Leaving the Courtroom*, *in* DISSECTING THE CRIMINAL CORPSE 7 (2016) (describing "contemporary concern about whether . . . the condemned could survive capital death . . . . In medico-legal circles . . . a confusing vocabulary [emerged] . . . 'half-hanged,' 'dead-alive' . . . "); Miller v. Comm'r, Ala. Dep't of Corr., No. 22-13136, 2022 U.S. App. LEXIS 26689 (11th Cir. Sep. 22, 2022).

68. *See* Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2344 (2022) (Breyer, J., dissenting) ("Human bodies care little for hopes and plans.").

69. Schindler v. Schiavo (*in Re* Schiavo), 780 So.2d 176 (Fla. Dist. Ct. App. 2001); Bush v. Schiavo, 885 So.2d 321 (Fla. 2004).

70. *See* STEVEN ANDREW JACOBS, BIOLOGISTS' CONSENSUS ON 'WHEN LIFE BEGINS' 1–2 (2018) ("Americans disagree on ['']When [does a human's] life begin[ ][?]['] . . . . [T]he question is. . . . subject to . . . [ambiguity from] Hume's . . . *is-ought* problem[.] [There are] two . . . interpretations: . . . descriptive . . . (*i.e.*, 'when *is* a fetus classified as a human[?]') and. . . . normative (i.e., 'when *ought* a fetus be . . . worthy of ethical and legal consideration[?]').").

71. *See also* Washington v. Glucksberg, 521 U.S. 702, 779 (1997) ("[T]he . . . physician is not just a mechanic of the human body whose services have no bearing on a person's moral choices[.]"); Sarah McCammon, *Two Months After the Dobbs Ruling, New Abortion Bans Are Taking Hold*, NPR, (Aug. 23, 2022), bit.ly/3VbO52o.

72. Often, these signify hypothetical legal persons (who do not yet have bodies of their own). *See, e.g.*, *Jeter*, 121 P.3d at 1268 ("[T]here are important societal interests which help fuel the current discussion concerning when life should be considered to begin."); *In the Interest of* Doe, 319 Ga. App. 574, 577, 737 S.E.2d 581, 584 (2013); Poe v. Gerstein, 517 F.2d 787, 795 (5th Cir. 1975).

nothingness;[73] or "civil death."[74] In such instances, the material body exists in a living form but is *dehumanized* (stripped of its personhood). As the common law is cumulative, self-referential, and "vestigial,"[75] we argue in later sections that such examples—even where historical or repealed—are meaningful.

All considered, we cannot assert that *aliveness* and *somethingness* are fully, definitionally correspondent in law, nor are *not-aliveness* and *nothingness*. However, we can assert that law generally ascribes significantly different value states to biologically alive and not-alive bodies. Knowing this, we turn to our next question: what is the *value* of a living body in law?

IV. THE VALUE OF LIFE

Between the bookends of birth and death, life happens. The vast majority of public and private lawsuits involve living persons or affected parties.[76] As such, it is the *living* body—not the unborn or the dying body—that is most often the subject of judicial discourse.

Moving inductively outwards, we next consider law's efforts to ascribe a generalizable *value* to a living body. Such a value would provide the underlying rationale for THE BODY's sanctum, its legal protection in public and private spaces, and its remediation when that sanctum is infringed by private individual, organization, or the state.[77]

Although American law recognizes a valuable *private life* within THE BODY,[78] it does not regard the human body as private property.[79] This is evident in state restrictions on the *conveyance* or *sale* of THE BODY or its

73. *See* U.S. CONST., amend. V, § 4; Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

74. *See* Austin v. Medicis, 21 Cal. App. 5th 577, 592 (2018); *see also* ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY (1982).

75. Swartz v. U.S. Steel Corp., 304 So. 2d 881, 882 (Ala. 1974) ("[T]he old doctrine . . . was retained as a vestigial appendage in the body jurisprudence.").

76. *See* CIVIL JUSTICE INITIATIVE, THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS iv (2015) (stating that only 7% of state civil litigation involves torts); *Caseloads of the Courts of Washington*, WASH. COURTS (2022), bit.ly/3VGpH9p (stating that only 1% of criminal cases involve wrongful death).

77. Think of the metaphoricity of *make whole* remedies in the common law when applied to nonpecuniary losses of the body or livelihood. *See, e.g.*, Darby's Lessee v. Anglin, 5 Tenn. 244 (1817); Farish & Co. v. Reigle, 52 Va. 697 (1854).

78. *See* Leon Green, *The Right of Privacy*, 27 ILL. L. REV. 237, 237 (1932).

79. *See* Lori B. Andrews, *My Body, My Property*, 16 HASTINGS CTR. REP. 28 (1986).

parts,[80] and in the extent to which courts reject an *explicitly quantitative* hedonic calculus (life-body valuation)[81] in considerations of damages.[82]

In other words, gradations of bodily value are mostly avoided if the prior conditions of *aliveness* are met.[83] In law, the value of a baseline, living human body is presumptively *qualitative* and *non-finite*—larger than any possible number. The common law asserts—in what we'll call a *quasi*-proprietary sense—that a living body is *so* valuable, in fact, its value "cannot be estimated."[84] This brings us to a second truism:

> *In relation to nothingness, a living human body is "priceless."*[85]

Let's call this the *Pricelessness* rule. Those reading this likely agree with the underlying premise that having a living body is preferable to not

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80. In a literal sense. *See, e.g.*, National Organ Transplant Act, 98 Stat. 2339 (1984), 2339–49; Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 498 (Cal. 1990) (Arabian, J., concurring) ("The ramifications of recognizing . . . a property interest in body tissues are not known, but are greatly feared . . . . "). But also in a figurative one. *See, e.g.*, ARK. CODE ANN. § 5-70-102-03 (2019) (example of a state law outlawing prostitution).

81. *See, e.g.*, Lough v. BNSF Ry. Co., No. 2:16-cv-00338-JCH-SMV, 2019 U.S. Dist. LEXIS 119122 at*35–36 (D.N.M. July 16, 2019) (excluding expert testimony attempting to quantify hedonic damages, where expert proposed to provide the jury with an approximation of "the median value for the value of a statistical life . . . approximately . . . $9.7 million in 2017"); Lehman v. City of Brooklyn, 29 Barb. 234, 238 (N.Y. App. Div. 1859) ("The life of this little boy, however priceless may have been its value in other aspects, had no pecuniary value which the jury could justly estimate at $1500."); *see also* MICHAEL L. BROOKSHIRE & STAN V. SMITH, ECONOMIC/HEDONIC DAMAGES: THE PRACTICE BOOK FOR PLAINTIFF AND DEFENSE ATTORNEYS (1990).

82. For instance, in torts calculations of non-economic costs (*e.g.*, pain and suffering, mental anguish of survivors, loss of consortium, punitive damages) in a wrongful death lawsuit.

83. *See, e.g.*, Myers v Schneiderman, 30 N.Y.3d 1, 29 (N.Y. 2017) (Rivera, J., concurring) ("There is no lack of nobility or true dignity in being dependent on others. The natural developments of old age . . . are dependence and waning consciousness."); WILLIAM LLOYD PROSSER, HANDBOOK OF THE LAW OF TORTS 340 (4th ed. 1941) (eggshell-skull rule in torts); Griego v. Douglas, No. CIV 17-0244 KBM/JHR, 2018 U.S. Dist. LEXIS 26933 at *2 (D.N.M. Feb. 20, 2018) (prohibiting quantification of life "milestones" in assessing damages); *but see* Curlender v. Bio-Science Lab'ys, 165 Cal. Rptr. 477, 480–81 (Cal. Ct. App. 1980) (damages for "wrongful-life").

84. *Ex parte* Watkins, 32 U.S. 568, 680 (1833).

85. Usery v. Tamiami Trail Tours, Inc., 531 F.2d 224, 238 (5th Cir. 1976) ("Priceless as is a single life in our concept of the value of human life[.]"); Towle v. The Great Eastern, 24 F. Cas. 75, 80 (S.D.N.Y. 1864) ("[T]his great ship, with her valuable cargo and priceless freight of human lives . . . ."); Todero v. Blackwell, No. 1:17-cv-01698-JPH-MJD, 2021 U.S. Dist. LEXIS 193913 at *28–29 (S.D. Ind. Oct. 7, 2021) ("Defendants argue . . . [Plaintiff] should not be allowed to argue about the priceless value of human life . . . . [but] have not cited authority drawing such a rigid distinction between the subjective value of life and the enjoyment of life, and the case law does not support one.").

having one.[86] Many of us want to keep the bodies we have. In fact, the fear of having our bodies taken from us—by force, disease, or deprivation—ostensibly lies at the center of our social compact with the state.[87]

Note that in the above truism, the value of the living body is situated in relation to *nothingness*, rather than *not-aliveness*. This is because law's paradigm of THE BODY skews deontological rather than utilitarian. A *living body's* value is ostensibly rule-based and categorically imperative; *absolute*.

However, we have noted that there exist certain exceptions where a nonliving body *does* have some value. Corpses have legal protections up to a point,[88] as do pre-embryos.[89] So for the truism to hold, the living human body must be situated in relation to a null value. We note here that, at the intellectual fringes, not all philosophers actually agree that *aliveness* always intrinsically outweighs *not-aliveness*, in a hedonic calculus.[90]

The common law—mostly—presumes that it does. However, in the next sections we continue to explore the definitional hybridity lurking in the *Pricelessness* rule, another of law's seemingly discrete properties.

V. THE BODY-PERSON NEXUS

Judges, even those of faith, generally avoid factoring in the "rewards and punishments" of the afterlife in their hedonic calculus.[91] In spite of this, or maybe because of it, the silhouette of the worldly, material body is legally, if not religiously, *sanctified*. Its secularized *pricelessness* provides both the source of its inviolability in relation *to* the state, and a potential rationale for its regulation *by* the state. It is the most

86. *See, e.g.*, PETER CANE, THE ANATOMY OF TORT LAW 67 (1997) ("Tort law recognizes that every human being has an interest in good health and in being whole in body and mind . . . it also insists that any life is better than none.").

87. Edward S. Corwin, *The Basic Doctrine of American Constitutional Law*, 12 MICH. L. REV. 247, 247 (1914) ("[T]he written constitution . . . was at first regarded as a species of social compact, entered into by sovereign individuals in a state of nature.").

88. Consider, for instance, the law's treatment of harm to a living versus a dead body. *Compare* OKLA. STAT. tit. XXI, § 1161.1(B) (2008) (penalties for desecration of a corpse) *with* OKLA. STAT. tit. XXI, § 701.9 (2017) (penalties for intentional murder).

89. Davis v. Davis, 842 S.W.2d 588, 597 (Tenn. 1992) ("[P]reembryos are not, strictly speaking, either 'persons' or 'property,' but occupy an interim category that entitles them to special respect because of their potential for human life.").

90. *See, e.g.*, DAVID BENATAR, BETTER NEVER TO HAVE BEEN: THE HARM OF COMING INTO EXISTENCE (2006).

91. *See, e.g.*, United States v. Kennedy, 26 F. Cas. 761, 761 (D. Ill. 1843) ("[W]hether the rewards and punishments are limited to this life, or the next, is not material.").

(in)valuable thing we possess. Paradoxically, we don't "own" it,[92] we can't disown it,[93] and we can't even claim that it legally *exists* separate from its relationship to the state.[94]

Jurisdiction over THE BODY is foundational to the Anglo-American common law, which—contrary to American myth—spans the regimes of kings and elected leaders; of slavery and liberty; of theocracy and democracy.[95] The peculiar status of THE BODY at common law is alleged to be a facet of modernity, where jurisdiction transferred from ordained right of king, to *body politic*: the state as *embodiment of* will of the people.[96]

This brings us back to our discussion of the relationship of THE BODY to legal PERSONHOOD, a complicated conceptual domain in its own right.[97] We have noted that, even at present, there do exist extreme conditions—namely capital punishment—wherein a person's living body experiences an ontological "falling away and crossing over"[98] into a negative realm of reduced value. That is, *dehumanization* approaching *nothingness*. Such examples appear to violate the *Pricelessness* rule.

However, we again note that legal constructions separating the *living body* from *legal personhood* are as old as the nation. Nestled most clearly in the Constitution's recognition of slavery,[99] but also in instances where a biological basis was used to break the chain of valuation linking citizenship, personhood, and bodily rights.[100] Thus, there exist certain conditions under which THE BODY and THE PERSON are legally divisible. The *Pricelessness* rule should therefore be qualified by a third truism:

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92. J.W. Harris, *Who Owns My Body*, 16 OXFORD J. LEGAL STUD. 55, 55–56 (1996).

93. Compassion in Dying v. Washington, 79 F.3d 790, 845 (9th Cir. 1995) (citing PLATO: THE COLLECTED DIALOGUES, 44–45 (Edith Hamilton & Huntington Cairns eds., 1987) [Plato's *Phaedo*] & Thomas Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 21 (1985)) ("In Plato's philosophy . . . death should not be hastened by suicide.").

94. *See, e.g.*, Monroe v. Beard, 536 F.3d 198, 203 n.4 (3d Cir. 2008) (rejecting "flesh and blood" advocates who believe "that a person has a split personality: a real person and a fictional person called the 'strawman,'" theorizing that the government "has power only over the strawman and not over the live person, who remains free.").

95. *See* MICHEL FOUCAULT, *The Body of the Condemned*, *in* DISCIPLINE AND PUNISH (1975).

96. *Id.*

97. *See Morton*, 41 S.E. at 485 ("In law, the word 'person' does not simply mean the physical body, for if it did it would apply equally to a corpse.").

98. CAMPBELL, *supra* note 7, at 44.

99. *See* U.S. CONST., art. I, § 2.

100. *See, e.g.*, United States v. Thind, 261 U.S. 204 (1923); Korematsu v. United States, 323 U.S. 214 (1944); U.S. CONST., amend. 19 (prohibiting the denial of voting rights to citizens on the basis of sex over a century after constitutional ratification).

A living human body's pricelessness is contingent on its personhood.

Let's call this the *Dehumanization* or *Body-Person* rule. In the common law, a living body is not *intrinsically* priceless but rather obtains its pricelessness through its nexus with personhood. By the common law's internal logic, the *Body-Person* nexus can be broken, either at birth or during the lifespan.

Punishment is again an instructive example.[101] Like slavery, the legal concept of *civil death* has roots dating to antiquity.[102] Although recent policy framings of harsh criminal punishment, like the death penalty, employ a sociological language of utilitarian deterrence,[103] the hybridity of that frame with "eye for an eye"[104] retribution is clear, and in fact not denied.[105]

It has thus always been possible in the common law, via the *Dehumanization* rule, for a living body to lose its pricelessness. The existence of such a possibility indicates that a *threshold* must exist within the law's deontological framework of THE BODY's pricelessness,[106] a point at which rule-based thinking gives way to consequentialism. Next, we discuss the lower and upper limits of that threshold.

VI. DEONTOLOGICAL THRESHOLDS

At the lower-end of law's deontological threshold of bodily *pricelessness*, the *Body-Person* nexus can be broken where the mind

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101. *See* FOUCAULT, *supra* note 95, at 9 (arguing that punishment has become not more humane but more hidden); *In re* Kemmler, 136 U.S. 436, 446 (1890) ("[I]f the punishment . . . were manifestly cruel . . . as burning at the stake, crucifixion, [or] breaking on the wheel . . . it would be the duty of the courts to adjudge [them] . . . within the constitutional prohibition.").

102. Austin, 21 Cal. App. 5th at 592 (citing Alec Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States*, 2002 WIS. L. REV. 1045, 1059–61 (2002)). ("Civil death is a legal status with roots in ancient Greece and English common law . . . 'which put an end to the person by destroying the basis of legal capacity, as did natural death by destroying physical existence.'").

103. The actual link between harsh criminal penalties and deterrence is attenuated at best. *See, e.g.*, TODD R. CLEAR & NATASHA A. FROST, THE PUNISHMENT IMPERATIVE: THE RISE AND FAILURE OF MASS INCARCERATION (2015) (noting empirical evidence of the dearth of evidence of the actual deterrent effect of American tough-on-crime policies).

104. *See generally* MITCHELL P. ROTH, AN EYE FOR AN EYE: A GLOBAL HISTORY OF CRIME AND PUNISHMENT (2014).

105. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 571 (2004) (*quoting Gregg*, 428 U.S. at 183). ("We have held there are two distinct social purposes served by the death penalty: 'retribution and deterrence of capital crimes by prospective offenders.'").

106. One could argue that this is a rule utilitarianism, but we will describe that the actual lives saved in these examples is usually profoundly unknowable. *See* Larry Alexander, *Deontology at the Threshold*, 37 SAN DIEGO L. REV. 893 (2000).

within a living body no longer demonstrably exists in a biomedical-legal sense. As the individual on death row is dehumanized through a perceived loss of *conscience*, in this example the dehumanization centers on a persistent loss of *consciousness*.

We call this the *Lower Threshold* because it applies consequentialist rhetoric to a single human being, characterized as being *trapped* in a useless[107] or "vegetative"[108] body that has, usually metaphorically, experienced "brain death."[109] In these cases, the consciousness of the *person* is physicalized as the *function of the brain*—THE BODY'S "central command unit."[110] The living, material body becomes inseparable from its *turned-off* mind (read: consciousness).[111] Mind-consciousness is therefore antecedent to aliveness and personhood. A fourth truism is thus:

The existence of mind is prerequisite to aliveness and personhood.

Let's call this the *Lower Threshold* or *Mind-Body* rule.[112] We might have replaced *mind* with *consciousness*, *soul*, *spirit*, or the like—into present day, these terminologies are often used interchangeably in

107. *Cruzan*, 497 U.S. at 292 (Scalia, J., concurring) ("[A]gonizing . . . questions . . . are presented by the constantly increasing power of science to keep the human body alive for longer than any reasonable person would want to inhabit it.").

108. *Schindler*, 780 So.2d at 180 ("[A]fter ten years in a persistent vegetative state that has robbed her of most of her cerebrum and all but the most instinctive of neurological functions, with no hope of a medical cure but with sufficient money and strength of body to live indefinitely . . . ."); *see also* TERRI SCHIAVO: THE CASE'S ENDURING LEGACY (New York Times, 2014) (discussing modern developments in brain scan technology that might undermine the medical determinations of brain death in the Terri Schiavo case).

109. *See* Melissa Moschella, *Deconstructing the Brain Disconnection-Brain Death Analogy and Clarifying the Rationale for the Neurological Criterion of Death*, 41 J. MED. PHILOS. 279 (2016).

110. Ingunn Moser, *Against Normalisation: Subverting Norms of Ability and Disability*, 9 SCI. AS CULTURE 201, 205 (2000).

111. *See Cruzan*, 497 U.S. at 343 (Stevens, J., dissenting) ("[T]he constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell therein."); *see also* Mark Johnson, *The Meaning of the Body*, *in* WILLIS OVERTON, ULRICH MUELLER, & JUDITH NEWMAN, DEVELOPMENTAL PERSPECTIVES ON EMBODIMENT AND CONSCIOUSNESS 19 (2008) ("[Human] embodiment shapes both what and how we experience, think, mean, imagine, reason, and communicate. This claim . . . flies in the face of our received wisdom that what we call 'mind' and 'body' are not one and the same but rather are somehow fundamentally different in kind.").

112. *See generally* Torkild Thanem, *The Body: Philosophical Paradigms and Organizational Contributions*, *in* THE ROUTLEDGE COMPANION TO PHILOSOPHY IN ORGANIZATION STUDIES 276–77 (R. Mir, H. Willmott & M. Greenwood, eds., 2015) ("[Dualism] deems the human mind rational and capable of managing the allegedly passive and irrational body . . . . ").

jurisprudence.[113] This truism of course invokes the Mind-Body problem of Western philosophy, which is often invoked in efforts to explain *why* THE BODY is "more than a physical conglomeration of tissue and bones;"[114] how it can be simultaneously alive and not (similar in this way, to the *Dehumanization* rule).

However, we also live in an era of *eliminative materialism*.[115] This is why we prefer the *Lower Threshold* terminology. Somewhat surprisingly, Mind-Body dualism is no longer the *de facto* ontological framework of law. Brain mapping and developing neurosciences of the biological function of the brain have changed the cultural context wherein Mind-Body problems are legally debated.[116] Thus, it is only in relatively targeted contexts that judges now apply the *Mind-Body* rule: often exclusively in the realm of severe cognitive disability,[117] and there are other contexts where they explicitly reject dualism.[118] This leads us to our discussion of the upper threshold.

At the upper-end of law's deontological threshold of bodily *pricelessness*, there are examples where a living body's valuation is modified via consequentialist logic that is not *dehumanizing* but *deindividualizing*. THE BODY'S valuation is pitted against the broader valuation of *other*—real or hypothetical—bodies and persons and

113. *See, e.g.*, *Cruzan*, 497 U.S. at 343 (Stevens, J. dissenting).

114. *See, e.g.*, Gressman v. State, 323 P.3d 998, 1008 n.8 (Utah 2013) ("*Ego cogito, ergo sum*" [I think, therefore I am]); *Lawson*, 69 Cal. App. 4th at 662 ("The question of emotional distress damages implicates nothing less than the mind-body problem in philosophy.").

115. *See Eliminative Materialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Mar. 11, 2019), bit.ly/3EI3HE3; *see also* Schultz v. Medina Valley Ind. Sch. Dist., Civil Action No. SA-11-CA-422-FB, 2012 U.S. Dist. LEXIS 19397 at *41 n.10 (W.D. Tex. Feb. 9, 2012) (quoting Stephen Hawking) ("I regard the brain as a computer which will stop working when its components fail. There is no heaven or afterlife for broken down computers; that is a fairy story for people afraid of the dark.") (citations omitted).

116. *See, e.g.*, Mut. Life Ins. Co. v. Terry, 82 U.S. 580, 589 (1873) ("The intellect and intelligence of man are manifested through the organs of the brain, and from these, consciousness, will, memory, judgment, thought, volition, and passion, the functions of the mind, do proceed. Without the brain these cannot exist.").

117. For instance, in the Anglo-American common law's use of mind-body dualism in criminal insanity and competency considerations. A complex history exists of equivocating the moral status of those with cognitive disabilities to non-human life forms, within a framework of Cartesian dualism. *See* 4 WILLIAM BLACKSTONE COMMENTARIES 232 ("[M]adness alone punishes a madman."); Rex v. Arnold, 16 How. St. Tr. 695, 765 (1724) (accused's responsibility depends on whether they were totally deprived of understanding and memory such that they were "no more than an infant, than a brute or a wild beast").

118. *See Ware*, 180 P.3d at 622 (quoting Daniel W. Shuman, *How We Should Address Mental and Emotional Harm*, 90 JUDICATURE 248, 248–49 (2007) ("Our current understanding rejects . . . Cartesian dualism . . . [in favor] of an integrated model for understanding harm.").

subordinated to the interests of the *group*. In such instances, it can no longer be said that THE BODY is priceless.

For example, during war or national emergency, THE BODY of an individual may be subordinated to the hypothetical loss of greater aggregate life,[119] and the taxonomically superior "emergency powers" of the state.[120] Another example can be found in abortion debates, where there exists a point at which "the female body . . . [is] subordinated to [its] biological destiny."[121] This brings us to a fifth-and-final, summative truism:

A living body's value may be subordinated to the interests of the group.

Let's call this the *Deindividuation* rule.[122] As noted above, capital punishment occupies an odd—but telling—middle ground between the *Dehumanization* and *Deindividuation* rules, because of its hypothesized deterrent effect, which invokes a "group" threshold in reference to saving unknown future lives. Ultimately, the sociopolitical BODY in law is paramount.

VII. CONCLUSION

This leads us back to where we started: to the *socially invested* body of law. Much of Western thought and empiricism has centered on prioritizing the social body to the biological one, and law is no different.[123] Some argue that the material body is *socially invested* at birth or even before.[124] It may be the *social* existence of THE BODY that creates a

119. *See, e.g.*, Gillette v. United States, 401 U.S. 437 (1971); Hanna v. Sec'y of the Army, 513 F.3d 4, 6 (1st Cir. 2008) (interpreting 32 C.F.R. § 75.5 (2019)).

120. *See, e.g.*, U.S. CONST., art. II, § 2; 50 U.S.C. §§ 1601–51; *See generally,* JEAN BETHKE ELSHTAIN, JUST WAR THEORY (1992).

121. Karpin, *supra* note 57, at 326.

122. *See* MARY DOUGLAS, NATURAL SYMBOLS: EXPLORATIONS OF COSMOLOGY (1970) (discussing cultural symbolism, and tension, of "group" human social relations—allegiance to a social whole—and "grid" social relations—the rule-based, formal matrices governing relations between specific *individuals*).

123. *See* THANEM, *supra* note 112, at 276–77 (noting that Émile Durkheim, in seeking to establish the social sciences, lauded Descartes' rationalism and "effectively accept[ing] the Cartesian denigration of the body . . . . Emphasizing the need to focus on the *sui generis* of the social, [insisting] on an epistemic division of labour, where the social sciences should focus on objects of knowledge unique to the social world of humans and avoid phenomena associated with the natural world."); *see also* ÉMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD (1895).

124. *See* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY (Robert Hurley, trans., 1980); Judith Butler, *Performativity's Social Magic*, *in* SCHATZKI & NATTER, *supra* note 27, at 29 (1996) (examining the performative construction of selves through a critique that warns

genuine extent to which a human body obtains new meaning in different legal contexts, and if THE BODY is not the "the unchanging anchor of identity,"[125] then maybe instead it is the "anchor of the social order."[126]

We may therefore view the proliferation of sundry legal constructions of THE BODY either as an authentic representation of the *social nature of existence*, or alternately as evidence of law's detached "classification mania."[127] THE BODY is perpetually the subject of cultural *simulation* in ways old and new, in video games, magazines, billboards, and on social media.[128] It is possible that we cannot separate those simulations from our own construction of our bodily selves.[129] Law, too, simulates THE BODY, with untold implications.

against theorizing this bodily construction with such dualities as subjective versus objective).

125. GARLAND-THOMSON, *supra* note 13, at 20.

126. SCHATZKI & NATTER, *supra* note 27, at 21.

127. Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1062 (2002).

128. *See, e.g.*, Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 818 (2011) (Alito, J., concurring) ("In some of these [video] games, the violence is astounding . . . . Victims are dismembered, decapitated, disemboweled, . . . chopped into little pieces . . . . Blood gushes, splatters, and pools.").

129. *See* JEAN BAUDRILLARD, SIMULACRA & SIMULATION (Sheila Faria Glaser, trans., 1994).