Yours, Mine, or Ours?
by Cody Franklin

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Above all, the argument this paper seeks to make is that we do not actually own ourselves, that the “freedom” we hold so dear in Western culture has mutated from autonomy and individual sovereignty into the “right” to conform to social norms and regulations, and that soon this right of self-ownership — the right to possess one’s body as one’s most basic property — may just disappear altogether. This argument is a transhistorical one, covering ground from the Lockean concept of self-ownership to the modern “freedom to conform” to a future in which the individual body may be trampled, dissected, and exploited for the benefit of the many. Though some will undoubtedly argue that the greater good sometimes necessitates sacrifice on the part of individuals, a society that grants itself the power to dispose of my body for whatever reason — be it regulatory impulse or humanitarian imperative — is not a society in which I care to live. In fact, the reason we ought to be surprised by — and suspicious of — this change is that, though gradual subjugation of the individual is usually justified by appeals to the common good, the actual social effects of redefining self-ownership are anything but good.

John Locke paved the way for our traditional concept of self-ownership, writing in his Second Treatise on Civil Government that “every man has a property in his own person: this no body has a right to except himself” (Sec. 27). It is this notion of self-as-property which helped to curb the power of sovereigns who would wantonly exercise “disciplinary power” — a term coined by Michel Foucault referring to power exercised over individual physical bodies (241-242) — over their subjects. However, a new type of power, developing in contemporary culture, has both challenged and changed the way in which the body is viewed. This power, according to Foucault, is regulatory. Where discipline seeks to dominate and arrange individual bodies, regulation seeks to exercise power over populations to force conformity and uniformity (242). To borrow directly from Foucault, the difference is between “the power to make die or let live”, which is disci-
pline, and “the power to make live and let die”, which is regulation (241).

The manifestation of this new kind of power is directly linked to the rise of the social principle that the interests of the many necessarily outweigh the interests of the one. The transition was already apparent twenty years ago in the case Moore v. Regents of the University of California. John Moore was diagnosed with hairy cell leukemia and was placed under the care of Dr. David Golde, a physician at UCLA. Over seven years, Dr. Golde drew a number of blood and tissue samples and even extracted Moore’s spleen in a medical procedure (Moore Brief, para. 1-3). What Golde failed to mention was that he not only kept the spleen for medical research but also used it to develop and patent a cell line for which he gained approximately $3.5 million in funding and stock options from a biotech company (Skloot 199-200). The consent form that Moore signed stated that he had discarded his bodily materials, but only under the condition that they be cremated. A separate form, given to Moore later and amounting to a total waiver of Moore’s rights to his spleen, blood, and tissue, received no signature and was later given to his attorney (200). When Moore took Golde and the Regents of the University of California to court, he brought up thirteen charges which were all subsumed under a claim of conversion—a legal term denoting an action on the part of one person inconsistent with another’s right of ownership. Based on the demurrer—a pleading which objects to a pleading filed prior by the opposing litigant—of Golde et al, the trial court dismissed the case. After a series of appeals by both parties, the struggle arrived at the California Supreme Court, which ruled that, though Moore could sue for injuries incurred as a result of Golde’s deception, he had no right either to the profits made from the commercialization of his body parts or to the body parts themselves (Brief, para. 3).

The Moore case is a strong indicator of a social and legal trend to slowly step away from Lockean ideas of self-ownership toward a “public interest” agenda—an agenda whose purported goal is “the good of all”, no matter the costs. What’s fascinating about this case in particular is the lack of a legal precedent upon which the court could base their decision. In cases where no written legal criteria exists, a court becomes a kind of autonomous, de facto legislator, using whatever principle or theory it sees fit to settle the case. In Bodies of Law, Alan Hyde explains how the California Supreme Court made its decision in Moore:

The Court decided that Moore’s spleen was not his property by evaluating the competing needs of patients and medical researchers... [according to the court,] Moore’s argument would “impose a tort duty on scientists to investigate the consensual pedigree of each human cell sample used in research... [which] implicates policy concerns far removed from the tradition, two-party ownership disputes in which the law of conversion arose.” The court, then, has a theory of property, despite its absence of theoretical citation: property is that which is defined by a court as property, doing so in order to promote some sort of utilitarian greatest good for the greatest number, under which John Moore may appropriately be asked to sacrifice if society is thereby improved. (69-70)

By this logic, we see that modern self-ownership theory is already a mere shadow of what it used to be. Though Moore’s consent was clearly obtained in an illicit manner, the court could not bring itself to transcend the regulatory “public good” framework by prioritizing Moore’s body rights over the scientific advances made by Dr. Golde as a result of violating those rights.

Had Moore been deprived of some external material possession, he would undoubtedly have had a strong case against Golde; however, because the subject of the case was his own body, the legal certainty that the two parties could conceivably have had walking into the courtroom was, in reality, rather low. This is true not only because of the lack of a precedent, but also because there wasn’t
any law applicable. Hyde explains this phenomenon:

This is a question left open by the American statutes on organ sales, since they are narrowly drawn and do not state whether body parts are property in a more general way. In fact, neither the prohibition of sales in the National Organ Transplant Act nor that of the Uniform Anatomical Gift Act applied to Moore’s case, the former because Moore’s spleen was not sought “for transplantation”, and the latter because the spleen was removed while Moore was still living. (68-69)

Still, the legal problem is not the most frightening. The real worry here is twofold: first, the court’s decision acts as a sort of progenitor for a new kind of control – bodily regulation – whose borders are hazy and whose exercise is entrusted solely to unilateral state power. Second, governmental advocacy of the body as part of a “global mass”, to again borrow from Foucault (242), has caused this image to trickle down and take root in America’s cultural norms. What we are therefore faced with is a developing social attitude that our bodies are no longer only ours – that, in fact, one’s body is public property and belongs to anyone who cares to claim it in the name of the public good.

As far as the evolution of modern self-ownership theory is concerned, the most famous (or infamous) case of bodily intrusion today is no doubt the security methods practiced in airports by the Transportation Security Administration (TSA). The media has been bombarded, and has bombarded the public in turn, with reports of revealing scans, invasive pat-downs, and awkward, humiliating experiences in front of fellow passengers (Felde para. 9). While the TSA’s extensive screening processes have drawn negative attention and calls for boycotts, the TSA maintains, true to the regulatory paradigm, that such measures are necessary for the safety of all passengers. An oft-cited example is the attempt by a man on Christmas Day in 2009 to board a plane while hiding an explosive device in his under-wear (Felde para. 1, 5). It is arguments like this which made decisions like Moore possible, and they are now being invoked to justify further expansion of state power. Let us consider the best of these arguments.

The most compelling claim is that there ought to be restrictions on the individual in cases where the public interest is advanced. Given that we are perfectly accepting of prohibitions against murder, theft, and even harmful speech (e.g. shouting “Fire!” in a crowded theater), this principle appears to be reasonable; however, there are a few problems with this argument. First, in the case of TSA screenings, we are not actually dealing with this principle. This principle places negative restrictions on individuals: do not murder; do not steal; do not incite panic or violence. These negative obligations acknowledge every person’s right of self-ownership by forbidding any individual to commit an act of aggression against another. The principle with which we are currently dealing, however, places positive power in the hands of different agents: do take the spleen; do invasively search people and their belongings. This positive power does not prevent aggression: it delegates to each individual the ability to aggress against his neighbors by laying claim on their bodies for his own ends. Golde and his scientists may claim Moore’s spleen to retain the medical benefits, and the many may demand a humiliating search of the one so that they can feel safe. In other words, they acknowledge the power of all to claim ownership of all, rather than the right of each to own himself.

Second, taking this new principle to its logical conclusion has effects which are altogether contrary to the common good. If the state granted invasive access to the body in every case where a collective benefit was promised, we would likely see unwanted intervention in many other areas of life: bans on certain types of food and drink to reduce obesity and disease rates, strict surveillance programs designed to reduce crime, and perhaps even coercive control of the birth rate to curb population growth. Though such invasions
of the individual are regarded as mere dystopian fantasies, China’s one-child policy and Great Britain’s use of CCTV surveillance seem to suggest that the threat of their manifestation in American culture is quite real. Still, it has not yet been demonstrated that such programs would actually be problematic for the public interest. If we are to treat the argument fairly, the mere fact of the principle’s logical conclusion is insufficient to dismiss the principle itself.

The argument’s failing becomes apparent when we attempt to actually define the common good. Generally, it is an umbrous abstraction taken to mean “that which benefits everyone”; however, in the context of regulation, its practical meaning is quite different. The aim of regulation is to exercise control over a population—in essence, to treat society as a kind of scientific system whose homeostasis must be perpetually maintained. A regulatory regime is concerned with statistics and aggregates rather than direct control of individuals. This perspective has often been used to justify oppression, since what matters most is numerical improvement, even if individual liberties have to suffer in the process.

This poses a problem. There is a sort of intuition that statistical improvement doesn’t necessarily denote an improvement in overall quality of life. In fact, the opposite may very well be true. In pursuing social homeostasis, the actual collective (i.e. a collection of individuals labeled under an abstraction) is both neglected and harmed by deeper and deeper intrusions upon their persons. This means that, though exercises of regulatory power can produce good numbers, the effects on individuals can be egregious and immeasurable, which makes it that much more difficult to justify the trade-off. It would seem, then, that this principle of maximizing “social good” is neither particularly compelling nor inherently beneficent to the one or to the many. At best, all it achieves is well-orchestrated conformity.

In airports, for example, everybody is subjected to the same regulations and standards. Anyone who doesn’t appear to conform is immediately identified as an other—one to be checked, screened, scanned, groped, and perhaps ejected—and is treated as an immune system might treat some suspicious, alien substance. In cases like these, people are not viewed as individuals, or rights-holders, or as sovereign bodies, but as entities which may perhaps be in possession of some dangerous substance or object—as potential dangers. As such, the freedom that we have is not to make autonomous, informed decisions, but actually the freedom to conform to regulatory rules. We have the freedom to step out of line—to raise our hands and spread our legs in the backscatter machine—to hold perfectly still while a TSA agent feels up every body part, looking for an excuse to expel a foreign entity which does not belong. If we do not exercise this freedom, however—if we do not step out, spread out, and stay still—it is only a matter of moments before we are again recognized as self-owning beings, at which point those in power are more than happy to exercise the power of discipline over us in whatever legally prescribed manner they choose. It is bitterly ironic that, while our body is normally owned and regulated by the “public”, which is responsible for ensuring that individual biological entities meet all the right social standards, the right of self-ownership that is given back to us when we are labeled as threats so that the public can hold us individually responsible for our nonconformity by punishing us. Simply put, the body belongs to the public until we must be disciplined, at which point we are mysteriously recognized as autonomous, sovereign body-owners once again.

Based on the current state of affairs and the disparity that already exists between past and present respect for self-ownership, we may rightly predict—and perhaps fear—what the future holds for this intimate right. First and foremost, this right runs the risk of being altogether eliminated. To illustrate this point, consider the evolution of the protective boundaries one possesses where his body is concerned. In the days where Lockean self-ownership was respected, one could only be
justifiably violated in cases where the use of his body caused some direct harm to another person who is attempting to exercise his own freedom—in other words, when the existence of two or more conscious entities came into conflict. Today, one may be justifiably violated by virtue of the potential threat that he poses to other people—in other words, a person gives up his right to self-ownership simply by choosing to exist in a public place. In the future, we might speculate that one may be justifiably violated merely because he exists. Without feeding on the dystopian paranoia of works like Nineteen Eighty-Four, Animal Farm, or A Clockwork Orange, we could easily say that protections which currently exist—say, laws banning unreasonable search and seizure—may be done away with completely in the interest of national security in much the same way as protection of anatomical integrity in airports already has been.

Even now, the restrictions on search warrants are becoming more and more liberal. Alan Hyde invokes the case of Shirley Rodriques, a Massachusetts woman against whom the police obtained a search warrant authorizing not only a physical search of her apartment, but also a "medical search" of her vagina (165). Claiming that the medical search violated her civil rights and that she had been forcibly pinned to an operating table while a doctor visually and manually searched her vagina, "Shirley Rodriques sued the officer, physician, town, and hospital for damages under the Civil Rights Act of 1871 but lost when summary judgment was granted to all defendants" (166). A summary judgment is an instance where a court comes to a decision without going through a full trial. Hyde comments on this judgment: "But since the case ends without any trial, but with summary judgment for the defendants, the court must be holding that Shirley Rodriques's civil rights were not violated even if her narrative of the search is correct" (167). This judgment, both baffling and counterintuitive, deserves and requires an explanation.

According to Hyde, the court made clear that cavity searches without probable cause were, among a who’s who of negative terms, “dehumanizing”, “humiliating”, and “terrifying” (167); however, they had a different opinion of searches backed by warrants. While the court noted that the bodily intrusion in these searches is extremely intrusive, detrimental to personal privacy, and a threat to “the highest degree of dignity” (167), it stated that “the need for the search was also great. Society’s interest in the prevention and punishment of drug trafficking weighs in favor of intrusive searches in certain instances” (167). This is undoubtedly the crux of the problem of self-ownership. The court, rather than favoring Shirley’s dignity and privacy, chose to side with the interests of the many—in this case, the alleged interest in catching and punishing drug traffickers, a group designated as a “them” which does not fit in. We can clearly see what the consequences of nonconformity are, then. Even the mere possibility of being an undesirable resulted in Shirley’s intimate areas being exposed and presented for investigation. The heartbreaking truth about the case, though—past the vaginal warrant, past the court’s defense of invasive searches, and past Rodriques’s allegations of physical coercion—is that, according factual background of the case, “The search revealed an absence of foreign bodies in [Rodriques’s] vaginal cavity” (Rodriques v. Furtado). In other words, Shirley Rodriques was violated for nothing.

Interestingly, disciplinary force was only employed at the point that Shirley refused to exercise her freedom to conform. Hyde quotes the case directly: “Appellant was informed of the warrant to search her vaginal cavity, informed that the warrant directed that the search be conducted by a physician at the Morton Hospital, and was offered the opportunity to remove whatever might be hidden in her vagina voluntarily, thus alleviating the necessity of the search” (166). This is precisely how subjugation works: we are given the "choice" to go along with the established regulatory paradigm, but are coerced into conformity in
the event that we choose not to acquiesce. As long as there is some dark, brooding, nebulous threat lurking just over the horizon, however, the state can continue to point to some urgent necessity—from national security to medical emergency—which requires further sacrifice of self-ownership. Unfortunately, if this sense of threatened-ness remains pertinent, this state of emergency—in which our life is claimed to be in some special danger combatable only by state power—will become the rule, rather than the exception, as Giorgio Agamben has argued in *Homo Sacer* (6).

What is certain—behind the confusion and convolution—is that, though we possess our bodies, we no longer own them. The liberty we may currently take in exercising power over our bodies is limited to the freedom to act responsibly and safely in the eyes, if not of the state, then of the many—of “society”. Pathetically, one of the last strongholds of self-ownership is the lingual tradition of referring to a body with possessives like “our”. Physically, this right is all but gone. Every attack, every outbreak, and every breach of security is the genesis of a new regulatory chain sent to bind us; we are violently shackled by the chains we refuse to wear. Where we were once fairly free to live for our own sake, now we are chained so that, paradoxically, “everyone” may be free. Soon, however, we may find these chains ready to strangle us to temporarily quell society’s perpetual fear of death.

**Works Cited**


