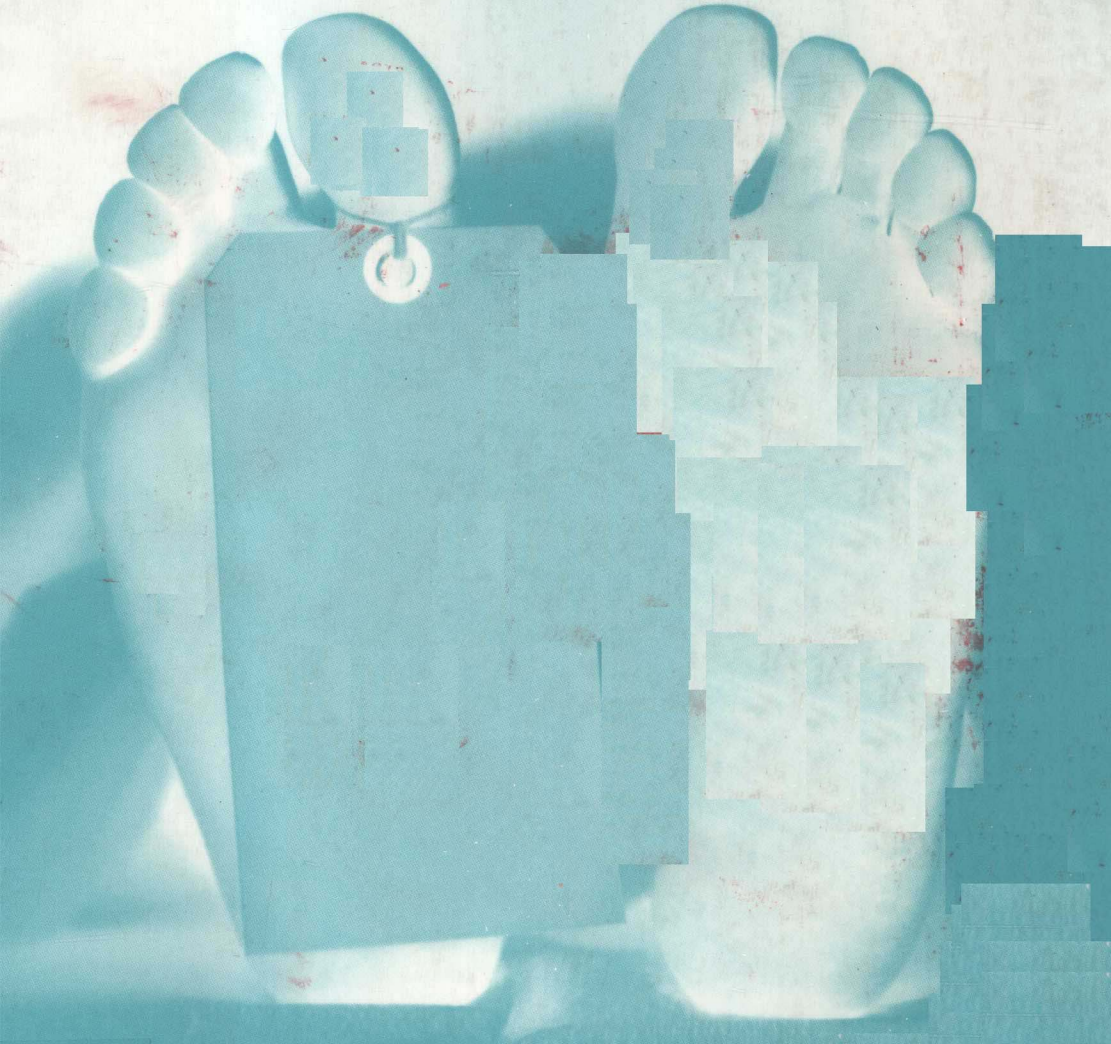
Body Lore and Laws



Edited by
Andrew Bainham, Shelley Day Sclater, Martin Richards
for the Cambridge Socio-Legal Group

Body Lore and Laws

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ANDREW BAINHAM
SHELLEY DAY SCLATER
and
MARTIN RICHARDS

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Preface

This collection of essays is the product of a series of seminars held by the Cambridge Socio-Legal Group in 2000. As with our first book (*What is a Parent? A Socio-Legal Analysis* (1999)), each chapter was originally presented as a paper for discussion by the Group before it was edited for the book.

Once again the Editors owe their thanks to Jill Brown, Secretary of the Centre for Family Research, for the role she has played in helping in the organisation of the seminars and in the process of preparing the papers for publication. Julie Jessop has played an indispensable role as a copy editor for the book and Sally Roberts has contributed her technical skills. We are very grateful to these three who made the editorial role manageable.

ANDREW BAINHAM
SHELLEY DAY SCLATER
MARTIN RICHARDS
June 2001

Notes on Contributors

Andrew Bainham is a Fellow of Christ's College, Cambridge and University Lecturer in Law. He has been Editor of the *International Survey of Family Law* (published by Jordans on behalf of the International Society of Family Law) since 1994. He is author of a leading text on children and the law, *Children: The Modern Law* (2nd edn., Jordans, 1998).

Caroline Bridge is a senior lecturer in law at the School of Law, University of Manchester. She is Editor of the *Family Law Reports*, Editor of "Case Comments" for *Family Law*, a member of the research team evaluating Information Meetings under the Family Law Act 1996 for the Lord Chancellor's Department and the author of many articles on family and child law and medical issues concerning children.

Anne Bottomley is a member of the faculty of Kent Law School, University of Kent at Canterbury. She is a founder member of the editorial board of the journal *Feminist Legal Studies* and series co-editor (with Sally Sheldon, University of Keele) of the *Feminist Perspectives on Law* series published by Cavendish. She has published widely in the area of feminist scholarship on law and legal theory.

Belinda Brooks-Gordon is a Lecturer in Forensic Psychology at the University of Leicester where she runs an MSc in applied psychology for practitioners engaged in the assessment and treatment of sex offenders. She completed a PhD at the Institute of Criminology and Churchill College, University of Cambridge under the supervision of Loraine Gelsthorpe. Belinda's research interests encompass the demographics, criminal careers and the subjective accounts and experiences of men who kerb crawl and/or commit street sexual offences.

Elizabeth Chapman is a Research Associate at the Centre for Family Research, University of Cambridge. She is currently a Wellcome Trust Fellow in Biomedical Ethics examining the implications for education and genetic counselling of different ways of conceptualising the body in genetic conditions. Her most recent publication is "Conceptualisation of the Body for People Living with HIV: Issues of Touch and Contamination", in (2000) 20 *Sociology of Health and Illness.*

Richard Collier is Professor of Law and Social Theory at the University of Newcastle Upon Tyne. He has published extensively in the area of law and gender, and is the author of *Masculinity, Law and the Family* (1995) and *Masculinities, Crime and Criminology* (1998). He is presently working on the project "Male Lawyers and Work-Life Balance", funded by the British Academy, and completing a book on heterosexuality, law and family. Richard Collier is a co-editor of *Social and Legal Studies: An International Journal.*

Rachel Cook is a Senior Lecturer in Health Psychology and Field Leader in Psychology at Anglia Polytechnic University, Cambridge. She is a psychologist with research interests in infertility and its consequences. She is currently working on collaborative projects on surrogacy and children conceived by donor insemination.

Shelley Day Sclater is a Reader in Psychosocial Studies at the University of East London and Co-Director of the Centre for Narrative Research. Formerly a lawyer, she has published widely in the field of socio-legal studies. She is currently researching contact disputes in family law, co-editing a book on surrogacy (with Rachel Cook), and writing about subjectivity.

Loraine Gelsthorpe is a Fellow of Pembroke College, University Senior Lecturer in Criminology and Director of the PhD Programme, Institute of Criminology, University of Cambridge. Her particular research interests revolve around discretion and discrimination in the conception and delivery of criminal justice, youth justice issues, and community penalties. Current research includes the criminalisation and detention of asylum seekers, and social exclusion, crime and justice. Her published work includes numerous articles and essays on youth justice, and community penalty issues, *Sexism and the Female Offender* (Gower, 1989), *Feminist Perspectives in Criminology*, co-edited with Allison Morris (Open University Press, 1990) and *Community Penalties: Change and Challenges* (edited with Anthony Bottoms and Sue Rex, Willan, 2001).

Jonathan Herring is a Fellow of Exeter College and University Lecturer in Law at Oxford. He is the author of *Family Law* (Pearson, 2001) and co-author with M. Cremona of *Criminal Law* (2nd edn., Macmillan, 1998). He is also an advisory editor for the *Family Court Reports*.

Julie Jessop has recently completed a PhD at the Centre for Family Research, University of Cambridge researching into parenthood and new partners. She has previously worked on an ESRC funded project on the psychology of divorce and a Joseph Rowntree project on children's definitions of family.

Martin Johnson is Professor of Reproductive Sciences and Fellow of Christ's College at the University of Cambridge. He was a member of the HFEA for six years until 1999, has written over 220 papers on reproduction, bio-ethics and medical education, and is co-author of *Essential Reproduction* (5th edn., Blackwell Science), the major teaching text on Mammalian Reproductive Biology.

Felicity Kaganas is a senior lecturer in law at Brunel University and a co-director of the Centre for the Study of Law, the Child and the Family there. Her writing has focused on feminist issues and on child and family law. She has published both in England and in South Africa, where she was previously a lecturer at the University of Witwatersrand. Her publications include *Family Law, Gender and the State* (with Alison Diduck, Hart, 1999) and "Contact, Conflict and Risk" in Day Sclater and Piper (eds.), *Undercurrents of Divorce* (Ashgate, 1999).

John Keown is Senior Lecturer in the Law and Ethics of Medicine, Faculty of Law, University of Cambridge. He has written widely in his field and his publications include *Abortion, Doctors and the Law* (Cambridge University Press, 1988) and *Euthanasia Examined* (Cambridge University Press, 1995). His next book, *Legalising Voluntary Euthanasia: Evaluating the Case for Reform* will also be published by Cambridge University Press.

Mavis Maclean is Director of the Oxford Centre for Family Law and Policy, a new research group which brings together scholars from family law and social policy. Recent publications include *Family Lawyers* with John Eekelaar, an empirical study of the work of family solicitors and *Making Law for Families*, an edited volume on the legislative process arising from a conference held in Onati (both Oxford, Hart, 2000). She is a member of the Oxford Law Faculty, and Academic Adviser to the Lord Chancellor's Department. She also co-edited *Cross Currents* for Oxford University Press with Sanford Katz and John Eekelaar, an account of family law in the United Kingdom and the USA over the last 50 years.

Derek Morgan is Professor of Health Care Law, Jurisprudence and Bioethics at Cardiff Law School. He is a member of the British Medical Association's Medical Ethics Committee (1995–), was a member of the Chief Medical Officer's Expert Advisory Group on Stem Cell Research (1999–2000) and is co-editor of *Legal Studies*; the Journal of the Society of Public Teachers of Law. The author and editor of numerous essays, articles and books on health and medical law, his most recent book is *Human Fertilisation & Embryology: Regulating the Reproductive Revolution* (Blackstone Press, 2001).

Gregory Radick is a Lecturer in History and Philosophy of Sciences, Leeds University. Publications include J. Hodge and G. Radick (eds.) *The Cambridge Companion to Darwin* (Cambridge University Press, forthcoming)

Martin Richards is Director of the Centre for Family Research and Professor of Family Research at the University of Cambridge. His research interests include marriage, divorce and family life and psychosocial aspects of new genetic technologies. Books include *Sexual Arrangements: Marriage and Affairs* (with Janet Reibstein, Heinemann/Charles Scribners Sons, 1963); *The Troubled Helix: Social and Psychological Implications of the New Human Genetics* (editor with Theresa Marteau, Cambridge University Press, 1996) and *What is a Parent? A Socio-Legal Analysis* (edited with Andrew Bainham and Shelley Day Sclater, Hart, 2000). He is a member of the Human Genetics Commission.

Eileen Richardson is Executive Director of the Centre for Women Leaders and a Fellow of Lucy Cavendish College, University of Cambridge. Her research interests focus on the regulation of new reproductive technologies.

Bryan Turner is Professor of Sociology at the University of Cambridge. He published *The Body and Society* in 1984 and *Regulating Bodies* in 1992. With Mike Featherstone, he is the founding co-editor of *Body and Society*. His current

research with Steven Wainwright (University of London) is on injury, the body and retirement among professional ballet dancers.

Jane Weaver is a Research Associate at the Centre for Family Research, University of Cambridge. She is currently working on a three-year project exploring choice and decision making in caesarean section funded by the Nuffield Foundation. Jane trained as a midwife at West Cumberland Hospital in the 1970s and thereafter practised in a variety of hospital and community settings. In 1991 she took a degree in psychology followed by a PhD on control issues in childbirth, both at University College London. Jane's research interests include psychological issues relating to childbirth, women's health and feminist issues in general.

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1

Introduction

SHELLEY DAY SCLATER*

"Rationalist legal theory underplays the mundane fact that in order for the law to function at all it must first and foremost have a hold over bodies".[1]

"Once the Cartesian conception of humans as subjective immaterial souls inhabiting, but essentially independent of, physical bodies is rejected, the question of defining the characteristics of bodies becomes inseparable from that of defining persons. So, too, is the *power* to define bodies the *power* to determine persons".[2]

"And 'the body' is never above—or below—history".[3]

THIS BOOK IS about the relationship between law and the human body.[4] As its title suggests, "law" is not seen unambiguously, in isolation, but in its relationships to the diverse range of social discourses that make up "body lore" and which also structure the narratives that rhetorically create law as a body of rational principles and practices. These essays tell tales of inevitable ambiguities—the body is in law, but law is also in the body—and both body and law are necessarily mixed up with our shifting cultural lore. This matrix of relationships points to the mutually constitutive nature of both "body" and "law"; they depend upon each other and there can be no final separation between them. But this is not a marriage made in heaven; on the contrary, body/law intimacies may signify mutual dependencies, but they also signify multiplicities, even antagonisms. Body and law relate to each other in multifarious, sometimes antagonistic, ways; there is no one body of law, but a multiplicity of contingent and provisional bodies, lore and laws.

The purpose of this book is to explore the multiple manifestations of the body in law. This is an enterprise that takes on a new and elevated significance as we stand poised at the beginning of what has been called the "biotech century". Biotechnologies have proliferated apace, and it is now a commonplace that law has

* I would like to express grateful thanks to my co-editors for their helpful readings of an earlier version of this chapter, and to Jill Brown and Julie Jessop for editorial support.

[1] Cheah et al. (1996) p. xv.

[2] Fineman and Thomasden (1991) p. 59.

[3] Riley (1988) p. 104.

[4] Of course, as Rose and Valverde (1998) point out, there is no such thing as *the* law; law as a unified phenomenon governed by certain general principles is a fiction that law itself creates.

failed to keep up.[5] The Human Genome Project—what Glasner and Rothman (1998) refer to as the "holy grail of genetics"—has brought into public visibility a whole range of social, legal and ethical issues that remain unresolved, matters for ongoing debate.[6] For example, the legal position concerning property rights[7] in the body, and in body parts, organs, products and fluids, is complex[8] and depends, not on any comprehensive formal legal regulation, but instead on piecemeal contributions from the law of tort, property law, criminal law, family law, commercial law and equity.[9] There are no definitive answers to the fundamental question of who owns DNA[10] or the related issue of whether DNA can be the subject of copyright; the patenting of genes continues to generate controversy and litigation.[11] The extent to which health (including genetic) information may be used, by whom and in what circumstances remains an open question; and where genetic information is to be stored on databases, although the Data Protection Act 1998 offers some protection, there will be concerns about confidentiality and control over disclosure.[12]

Insurance companies and employers clearly have interests in the results of genetic tests (see, for example, Cook (1999)), and these are issues with which the Human Genetics Commission has been concerned.[13] "Genetic privacy" cannot currently be assured in England and Wales, though the coming into force of the Human Rights Act 1998, under which English courts can enforce individual rights

[5] See, for example, Brownsword et al. (1998); Fox and McHale (2000). Beck's point that the debate about the course of genetic technology is now occurring as an "obituary" for activities begun long ago, is widely quoted. See Beck (1992) p. 203. See also Morgan and Nielsen (1992).

[6] See, for example, Marteau and Richards (1996); Kevles and Hood (1992); Sloan (2000). The Human Genome Diversity Project similarly raises a number of unresolved ethical issues; see, for example, Dodson and Williamson (1999).

[7] There has been extensive commentary on whether or not bodies and body parts constitute "property", and the related issue of "commodification". For background discussion, see, for example, Scott (1981); Toombs (1999); Smith Jr (1999). Gold (1996) argues that property discourse is not an appropriate framework in which to talk about bodies, body parts and products as it encourages us to make important decisions about the body based on the norms of commercial markets. Beyleveld and Brownsword (2000) would disagree. Hyde (1997) p. 95 considers that the biggest weakness of the "body-as-property" discourse is the risk of making it the property of someone other than the person inside it, as happened in slavery. See also Wilkinson (2000). Discussion of these issues is found in Eileen Richardson and Bryan Turner (ch. 2) and Jonathan Herring (ch. 3).

[8] See, for example, Farsides (1992); Andrews (1986); Campbell (1992); Harris (1996); Bristol Inquiry Interim Report (2000); McHale (2000).

[9] Some specific statutory regulation also exists limiting, for example, commercial dealing in organs; see Human Organ Transplants Act 1989, though the question of commercial benefit from body products is a different matter. See also Human Tissue Act 1961.

[10] It should not be surprising that there is no definitive legal position on the ownership of DNA, since there is also no definitive legal position on the ownership of the body. DNA is therefore not alone in having an anomalous legal status.

[11] Gregory Radick (ch. 4) discusses the complex issues involved in gene patenting.

[12] See Murray (1997) for further discussion of confidentiality issues.

[13] See Human Genetics Commission (HGC) *The Use of Genetic Information in Insurance: Interim Recommendations of the Human Genetics Commission* (2001), and HGC *Whose Hands on Your Genes? A Consultation Document* (2000), both available on www.hgc.gov.uk.

to respect for private life and family life under Article 8 of the European Convention on Human Rights, may make a difference.[14]

Developments in reproductive technologies have renewed debates about the moral and legal status of the embryo[15] and foetus, and the tensions between different areas of law on issues concerning sanctity of life versus quality of life remain unresolved.[16] These are only a few of the most obvious examples of the uncertainties of law regarding some of the fundamental concepts in the wake of biotechnological advance. As Byk (1999) p. 265 reminds us, "today, as elements of the human body, including blood, gametes, and organs, are now distributed outside of the body for transformation or transplantation, we may be in danger of losing many of our legal certainties regarding the human body". It can be seen that these uncertainties are not unique to the issues raised by biomedical advances, but in many ways are uncertainties that bedevil medical law and ethics more generally.[17] It is widely believed that there is a need for comprehensive legal regulation to safeguard the interests of citizens, clinicians and researchers; Gevers (1995) p. 205, for example, has called for "the development of an international set of principles". McGleenan (1999) also expresses concern that the European response appears to be based on pragmatism rather than principle.[18] The coming into force of the Human Rights Act 1998 may provide an impetus for a wider airing of some of these issues in public, and their consideration by the higher courts, though it would seem less than ideal to have a regulatory system based on such ad hoc decision-making, in the absence of a clear legal and ethical framework. The contributors to this volume therefore echo the recent call by Fox and McHale (2000) for an overarching review of the complex issues of ethics, law and policy currently being raised by scientific and technological advances.

At an international level, there have been some attempts to place genetic technologies within frameworks of human rights.[19] At a national level, there are no less than nineteen bodies involved with the regulation of genetic technologies. The

[14] See Sommerville and English (1999). For a discussion of the legal and public policy issues in DNA forensics, see Reilly (2001). See also Nelkin and Andrews (1999) who discuss what they call "surveillance creep" as growing numbers of people have their DNA on file. See also HGC press release *Human Genetics Commission discusses concerns over police forensic DNA database proposals* (2000), available on www.hgc.gov.uk.

[15] See Fox (2000). Derek Morgan (ch. 18) discusses the complexities of defining an "embryo" under the Human Fertilisation and Embryology Act 1990 for the purposes of regulating "cloning".

[16] See Wheale (2000). These issues feature prominently in the euthanasia debate discussed by John Keown (ch. 14).

[17] See, for example, Mason and McCall Smith (1999). For more detailed discussion of the issues raised by the new human genetics see the essays in Brownsword et al. (1998).

[18] McGleenan (1999) p. 18 concludes that: "The procedural model of regulation too readily sacrifices a principled approach in favour of pragmatism while genetic privacy laws may well foster a culture of secrecy and mistrust about genetics which could undermine many of the possible benefits of screening and testing techniques".

[19] See Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, Oviedo, 4.IV.1997. The United Kingdom has not yet signed up to this Convention. See also UNESCO Universal Declaration on the Human Genome and Human Rights, 1997.

Human Genetics Commission (HGC)[20] was established to analyse current and future developments in human genetics and to advise the Government on the ways in which these developments are likely to impact on people and healthcare, and their social, ethical, legal and economic implications. The HGC is an "umbrella" that replaces several other regulatory bodies and is committed to public consultation. It was established following the Government's review of the Advisory and Regulatory Framework for Biotechnology in May 1999. Three main concerns emerged from the review, namely: current regulatory arrangements are complex and difficult for the public to understand; they do not properly reflect the broader ethical questions and views of potential stakeholders; they are not sufficiently forward-looking for so rapidly developing a technology. The review envisaged that the establishment of the HGC would make a fundamental contribution to a "system for regulating biotechnology which is rigorous, open and which will effectively safeguard the public interest". The question of how the HGC will function, and the extent to which its mission will be accomplished, remains an open one. In addition to official bodies involved in regulating and advising, there are a number of non-governmental organisations such as the Nuffield Council on Bioethics whose work is concerned with the impact of technological developments.

There is certainly a pressing need to clarify the boundaries of law in relation to the new bodies that are currently being constructed in discourses of biotechnologies. But the discourse of the gene is a very powerful one. As Nelkin and Lindee (1995) point out, the gene has become something of an icon in the developed world, as scientists and non-scientists alike have talked up its power. Such fantasies about the unique potency of DNA bear more relation to the metaphors that have been used to describe it than they do to its biological properties, as Richards (2001) reminds us. The task of clarifying the boundaries of law in relation to the proliferation of these new bodies is by no means an easy one, for the human body has always been a problem for law. The advent of biotechnologies has merely brought to the fore again a whole range of old, yet unresolved, questions about the meanings of life, death and what it is to be human; they force us to confront anew these old questions of embodiment[21] in new contexts. It is undoubtedly significant that, as McKenny (1999) p. 354 reminds us, the dominant forms of bioethics have had little to say about the body, their lexicon instead being populated with terms referring to the obligations and duties of disembodied "persons": "standard forms of bioethics have failed to address many of the most important issues raised by the conquest of the body by medicine".

Williamson (1999a) asks a pertinent question that forces us to stop and re-examine the assumptions that underlie much of the moral indignation with which these developments are often debated: whether there is anything new in the "new genetics" from the point of view of ethics and public policy.[22] He suggests three reasons why

[20] See http://www.hgc.gov.uk.

[21] See Bynum (1995).

[22] See also Murray (1997); Richards (2001). Elizabeth Chapman (chap. 17) considers this question in the context of genetic testing.

genetic knowledge has proved to be so controversial. First, it is knowledge that applies not just to an individual but also to whole families or groups of people. Secondly, the history of atrocities committed in the name of eugenics suggests that genetic knowledge could, in future, be "misused". Thirdly, and most importantly, genetics has been (rightly or wrongly) endowed with a cultural potency that calls forth a deep emotional response;[23] the genetic code has been equated with embodying identity and the very essence of humanity—it appears in the popular mind as a fundamental truth that should not be tampered with. Of course this image of the gene as embodying some fundamental truth about humanity misrepresents what many biologists and geneticists would claim,[24] but such images seem to have taken hold on the popular imagination nevertheless.[25] It is the emotion provoked by these images, and by myths of science as the domain of unlimited possibilities, that have given old questions about the body, about rights and responsibilities, the limits of life and death, and the nature of personhood a new lease of life in the "biotech" century.

Bodies have a material, substantial reality—our flesh, bones and blood, our DNA, are biological facts. But the meanings of the body are facts of culture—partaking of cultural lore—meanings that are provisional, multiple, ambiguous, shifting from context to context. As Eisenstein (1988) has pointed out, the scientific method, with its standpoint of objectivity, has established biology as *the* science of *the* body; the body thus appears as a "natural" entity that seems to stand outside of history, society and culture.[26] What we see reflected, however, in discourses of nature, are cultural concerns embedded in the language of science; science working to negotiate the boundaries of culture. The significances of culture are frequently debated on such scientific terrain. In this context, the body emerges as a contested site: is it nature, or is it culture? Both? Neither?

Law reinforces constructions of "natural" bodies, but it also undermines its own project by its own location in culture, and by its reification of the body as a thing to be regulated in human society. For, primarily, the body appears in culture as a moral entity—it has long been integral to discourses of morality. "It is", argue Friedman and Squire (1998) p. 133, "the apotheosis of immorality, the place where Western culture seeks and finds unnaturalness, depravity and chaos". Thus, discourses and practices designed to civilise, regulate and manage the unruly, unpredictable body proliferate (Foucault (1977)), turning the body into a contested moral terrain. Foucault's disciplined and docile body may be secular and scientific, but what science "knows" about the body is apt to change,[27] and its "truth" can, at

[23] Psychoanalyst Christina Wieland (1996) p. 300 states: "Technological culture bears all the marks of a masculine omnipotent creation that includes the substitution of baby, created by the parental couple, by manufactured reality and entails all the destructiveness of an attack on mother and on life".

[24] See, for example, Rose and Rose (2000).

[25] Williamson (1999b) p. 96, for example, argues against cloning and states that "I believe that there is a personal right, ethically based, to individuality, autonomy and identity . . . Reproductive cloning crosses a significant boundary in removing the single most important feature of autonomy: the fact that each of us is genetically unique and individual. Our genetic identity is an essential part of this individuality".

[26] See also Soper (1995) for a detailed discussion of "nature".

[27] This point was amply illustrated at the exhibition "Spectacular Bodies: The Art and Science of the Human Body from Leonardo to now", Hayward Gallery, October 2000–January 2001.

best, be only provisional. In a post-modern world, it is no longer possible unproblematically to appeal to science's truth as the ultimate moral arbiter; rather science itself must struggle to maintain its place among other rhetorical discourses that provide moral frames of reference for different groups (see Friedman and Squire (1998)).

With the advent of new kinds of science and biotechnologies that promise to "know" (and thence, in Foucauldian terms, to discipline) bodies in significant new ways—to make, remake and shape them according to prevailing mores and styles—there is no doubt that we have landed in something of a legal and ethical quagmire. We might hope that science will be the rope to drag us out, but that seems unlikely, as science is increasingly seen as part of the problem—the reason we are in this muddle in the first place. And law, it seems, is as susceptible as the rest of us to the body's moral confusion. Law has not, will not, and probably cannot impose a unifying ethical order; instead, argues McLean (1999), law has been too ready to defer to scientific and medical expertise, opting out of addressing fundamental ethical questions, disenfranchising the citizen and denying her or him moral agency, and foregoing the opportunity to place the issue of biomedical advances firmly within a human rights framework. Law, it seems, is prepared to buy into the fantasy that science has the answers.

But there is another side to law too; it does not always simply co-opt science or rely on science's own (assumed) authority. On the contrary, as King (1991, 1993) and others (e.g. Teubner (1989)) suggest, law is prone to adapt other discourses to its own ends. The powers of law remain not just unsullied but actually enhanced by law's deployment of other authoritative discourses. As Nelken (1996) argues, law deploys its own criteria of significance and creates its own truth. And as Cotterell (1998) reminds us, law's truth is not a unified, distinctive discourse but is an ongoing rhetorical achievement.

Law's "truth", then, may be no more certain than that of science;[28] it too is under siege. As Eisenstein (1988) points out, law establishes regulations and institutes expectations about what is legitimate, acceptable, rational, natural and normal; laws operate as symbols for what is honourable and desirable. The "rule of law" depends upon dominant discourses of law constructing law's processes and truths as fair, neutral, rational and objective. It is this narrative, argues Eisenstein, that that gives law its authority. On this story, law (like science) is a neutral, objective arbiter. The power of law thus depends less on its ability to coerce and more on its ability to persuade people that the world it describes is the only available world.

Law's truth about the human body is no exception. According to Hyde (1997), in law "body" means an inconsistent and incoherent assortment of representations. The law currently constructs a range of different bodies—as property, as machine, as the commodified body of consumer culture, as the bearer of privacy rights, and as the bearer of narratives of all of these things. Law constructs different bodies for different purposes –as inviolable, as sacred, as objects of desire, as a

[28] For detailed discussion see Patterson (1996).

threat to society. Such constructs of the body, Hyde argues, are inevitable; they are what make up the democratic citizen as we know it to be. Hyde identifies a close link between the rise of modern market democracy and the rules and practices of manners, civility and bodily control that separate the modern world from the medieval one. Modern democratic citizens are self-controlled and imagine themselves as autonomous and self-determining: "Many of the dances law makes around the body are in the service of a larger mission, law's construction of an autonomous legal self, a self that must be both property and never-property, free and ordered, autonomous and socialised" (Hyde (1997) p. 53). Hyde concludes that law is in the business of constructing a range of multiple and competing discursive bodies; the unifying element is that law's discourse of the body reifies the body—renders it as an object, a thing—separate from the person, but as the bearer of that person as a legal subject, as a citizen in civil society.

Each body is, in a sense, an individuated entity, with distinct boundaries between it and other bodies, with an inside and an outside. The embodied citizen has free will and autonomy, it commands its body and its body obeys. The body of the citizen is private and may not be violated; it signifies the private self, and the public/private division is played out on the surface of the body. Law therefore constructs the personal integrity of the body[29] and the autonomy[30] of the embodied citizen in ways that are consistent with dominant (though unstable) cultural values. The meanings of concepts such as "bodily integrity" and "autonomy" are various and shifting, being constructed and reconstructed anew in broader social discourses as well as in legal decision-making.

The essays in this book address these vexed questions about the multiple manifestations of the human body in law. Contributors bring expertise from a wide range of backgrounds—sociology, law, reproductive medicine, criminology, psychology, philosophy and midwifery. The essays challenge the presuppositions of legal theories that the corporeal body is an object that is external to law and that comes to law already constituted. Liberal law repeats the privileging of mind over body in its portrayal of human subjects and human acts as disembodied. The essays in this book illustrate the ways in which law not only needs the body, but also constitutes the body at the same time as it renders those processes of constitution invisible by an implicit appeal to a discourse of the body as natural. These essays expose the multiple powers of law to constitute and reconstitute human bodies.

Law routinely produces its human subjects, but its task is always necessarily incomplete (if it weren't, there'd be no further need for law). For bodies are material forces as well as sites of discursive relations. If we agree with Butler (1993) that corporeality is active and performative, then it is likely to exceed any discursive representation of it that attempts to tame or contain the feared excesses of the

[29] On the "integrity of the body", see McKenny (1999) who argues that the body has been insufficiently present in bioethics.

[30] On the vexed question of autonomy and its genealogy, see Douzinas and McVeigh (1992). For these authors, "autonomy" is an ethico-legal fiction.