

Articles

On Commodification and Self-Ownership

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ABSTRACT

This Article explores the ongoing jurisprudential dispute over whether commodification of the human body, including gendered commodification as produced by biotechnology, conflicts with a desirable exercise of self-ownership rights. Contrary to the prevailing view, it argues that the commodification of the human body caused by biotechnology, including reproductive technologies, does not necessarily undermine the discourse of emancipatory Lockean self-ownership, or feminist and critical revisions of the Lockean paradigm. Commodification of the body by biotechnology, precisely because this technology is universal and indiscriminate, may extend self-ownership to subjugated groups historically denied it. The commodification so feared in emerging biotechnology finds precedent in earlier anti-slavery and emancipatory conceptions of self-ownership, thus undermining many of the central objections to commodification. The Article concludes that there is a real peril that market forces and discrimination may nonetheless disproportionately impact members of subjugated groups and jeopardize the benefits of this newly robust self-ownership.

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*Who is so fond of this body that he would drag it about with him through all eternity if he could get on without it.*¹

*Undergirding our selfhood and our rights is our creatureliness—that is, our mortal bodies.*²

INTRODUCTION

It makes sense that the law should protect the safety, security, and integrity of our bodies. At once mysterious and mundane, our bodies are home in a very basic sense to our personhood and subjectivity, however understood.³ Law employs the vocabulary of personhood and subjectivity, along with the secondary vocabulary of privacy, autonomy, inviolability, and self-ownership;⁴ both vocabularies reflect and construct different conceptions of the body, depending upon the political and social (gender, racial) context of a dispute.⁵ Science and technology diminish the body's mystery, employing a discourse of instrumentality and utility to which, from a practical standpoint, it is often difficult to object. And yet there is something disturbing in this emerging consequentialist strand in discourse about the body. Non-economic values are unlikely to enjoy prominence or protection in the law's haste to take the body to market. Two hundred years of legal chattel slavery in the Americas makes plain the potential for collision of the market with human freedom, centered precisely on the human body—yet, of course, the discourse of self-ownership was central and instrumental in liberal abolitionist discourse.⁶ This Article asserts that

1. Immanuel Kant, *quoted in* Leone Macdonald, *Passio Perpetuate*, in *INCORPORATIONS* 604 (Jonathan Crary & Sanford Kwinter eds., 1992), *as cited in* Roxanne Mykitiuk, *Fragmenting the Body*, 2 *AUSTL. FEMINIST L.J.* 63, 64 (1994).

2. PEREZ ZAGORIN, *A HISTORY OF POLITICAL THOUGHT IN THE ENGLISH REVOLUTION* 19 (1954), *cited in* ROSALIND PETCHESKY, *The Body as Property: A Feminist Re-vision*, in *CONCEIVING THE NEW WORLD ORDER: THE GLOBAL POLITICS OF REPRODUCTION* 387, 392 (F.D. Ginsburg & R. Rapp eds., 1995).

3. Indeed, even our disgust at our own and others' bodies drives the law in subtle ways. See MARTHA NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 71-171 (2004).

4. See Peter Vallentyne, *Self-Ownership*, in *ENCYCLOPEDIA OF ETHICS* 1561 (Lawrence C. Becker & Charlotte B. Becker eds., 2d ed. 2001) ("John Locke, libertarians, and others have held that agents are self-owners in the sense that they have private property rights over themselves in the same way that people can have private property rights over inanimate objects. . . . The property rights in question are moral rights and need not be legally recognized. Thus, a country that allows slavery fails to recognize the (moral) right to self-ownership.").

5. *ETHICS OF THE BODY* (Margit Shildrick & Roxanne Mykitiuk eds., 2005); ALAN HYDE, *BODIES OF LAW* (1997); *THINKING THROUGH THE BODY OF THE LAW* (Pheng Cheah et al. eds., 1996); PATRICIA WILLIAMS, *THE ROOSTER'S EGG* (1995); Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 *IOWA L. REV.* 1331 (1996); William MacNeil, *Law's Corpus Delicti: The Fantasmatic Body of Rights Discourse*, 9 *L. & CRITIQUE* 37 (1998); Therese Murphy, *Feminism on Flesh*, 8 *L. & CRITIQUE* 37 (1997); PETCHESKY, *supra* note 2; Radhika Rao, *Genes and Spleens: Property, Contract or Privacy Rights in the Human Body?*, 35 *J.L. MED. & ETHICS* 371 (2007); Radhika Rao, *Property, Privacy, and the Human Body*, 80 *B.U. L. REV.* 359 (2000).

6. "Like the free laborer, therefore, the slave remained essentially self-owning—in Thornwell's

the relationship between human commodification and self-ownership has been misinterpreted in the recent burst of interdisciplinary scholarship on law and the body. With some caveats about possible exploitation, I propose an inversion of the standard commodification thesis: I posit that the universal commodification of the person produced by biotechnology can actually democratize and broaden the applicability of rights of self-ownership.

The term commodification, in this context, refers to the extent to which our bodies, our selves and our labor become commodities with a market exchange value, either literally, or rhetorically in the sense that we conceive of human bodies and capacities as amenable to market value and reducible to a matter of satisfying economic preferences.⁷ The commodification literature addresses the concern that we may (or may *again*, I should say, since commodification was brutally manifest in chattel slavery) come to own property interests in ourselves or other people and that those interests become commodities subject to market

words, the slave's body was 'not mine, but his.'" Arguments such as Thornwell's cut to the heart of the abolitionist faith. In the eyes of virtually all antislavery advocates, self-ownership constituted the taproot of freedom. For them, the defining sin of slavery was its denial of property in the self. As Theodore Dwight Weld proclaimed in 1838, "SELF-RIGHT is the foundation right—the post in the middle—to which all other rights are fastened." In 1838, the Second National Anti-Slavery Convention of American Women declared that women had the authority to assert the core right of self-ownership on the slave's behalf, to ask whether a man's "bones and sinew shall be his own or another's." AMY DRU STANLEY, *Possessive Individualism, Slave Women, and Abolitionist Thought*, in *MORAL PROBLEMS IN AMERICAN LIFE: PERSPECTIVES IN CULTURAL HISTORY* 125 (Karen Halttunen & Lewis Perry eds., 1998).

"The idea that liberty entailed self-ownership and the right to sell one's own labor was not, of course, an innovation of the abolitionists and their day. . . . The abolitionist's ideological innovation was, thus, one of emphasis and implication. . . . 'Labour, like every other commodity, will seek its own level and true value, in an openly positive view of self-ownership per se as the touchstone of liberty in American society.'" William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Guilded Age*, 1985 WIS. L. REV. 767, n.41 (1985) (citing *Commonwealth v. Pullis Philadelphia Mayor's Court* (1806) 3 DOC. HIST. OF AM. IND. SOC. 59, 71, 111 (J.R. Commons & E. Gilmore eds., 2d ed. 1910); See e.g., THE PROBLEM OF EVIL: SLAVERY, FREEDOM, AND THE AMBIGUITIES OF AMERICAN REFORM (Mintz & Stauffer eds., 2007); *Self-Purchase*, in THE OXFORD ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY 793 (2001); See generally MICHELLE GOODWIN, BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS (2006) (discussing self-ownership in the contemporary context). FREDERICK DOUGLASS, LIFE AND TIMES OF FREDERICK DOUGLASS 163 (1962) (discussing abolition and liberty, stating that "[l]ife is not lightly regarded by men of sane minds. It is precious to both the pauper and to the prince, to the slave and to his master, and yet I believe that there was not one among us who would not rather have been shot down than pass away life in hopeless bondage").

7. See, e.g., RETHINKING COMMODIFICATION (Ertman & Williams eds., 2005). The central work here is still Margaret Jane Radin, *Contested Commodities* (1996); also her article *Market-Inalienability*, 100 Harv. L. Rev. (1987). Radin describes degrees of commodification from *universal* commodification (where every aspect of personhood is market-exchangeable) through *partial* or *incomplete* commodification (where only some aspects of personhood are market-exchangeable, or where some aspects of exchange are limited or forbidden) to *universal non-commodification* (where no aspect of personhood is subject to market exchange). See generally, Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81 (1997); Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331 (1996). Richard Titmuss's classic work, *The Gift Relationship: From Human Blood to Social Policy* (1971) offers the essential anti-commodification thesis that body products ought to be allocated by gift or donation only, not through sale, because market exchanges of these products would commodify human beings in ways incompatible with human dignity.

exchange in a manner which degrades or debases personhood.⁸ Indeed the property most constitutive of personhood⁹, if it is property, is the raw material of human bodies: tissue and genetic information. Harnessing the commodifying tendencies of biotechnology, I argue that the notion of property as constitutive of personhood can be enlisted in the project of buttressing and reinvigorating self-ownership.

As against commodification, self-ownership posits that one has a self-proprietary right to prevent anyone, including the state, from acquiring market interests in persons that would interfere with liberty and autonomy.¹⁰ Indeed, self-ownership might be described as a right to autonomy or self-government, which is why commodification is said by some to be dangerous or wrong: because it interferes with the liberal ideal of the autonomous, self-governing subject. Law and economics analyses share with liberal arguments at least this feature: the supposition of atomistic, rational actors whose rational choices out not be limited by the external constraints imposed by undesirable forms of commodification.

One might just accept, then, that self-ownership and commodification are obviously related but opposing categories and leave it at that. But in fact, commodification of the body or person (whether resisted or endorsed, and it has been both) has been described—whether as an erosion of liberal commitments to individual personhood and uniqueness or as a recognition of the economic value or deservingness of particular economic actors—for the most part without explicit reference to a theory of self-ownership. For its part, self-ownership seems to have acquired a curious duality of meaning which has made its relationship to commodification unclear. It seems to describe not only autonomy or a right to maintain the sacred wholeness of one's person or body, but also the opposite of this, that is, the capacity of a person as transactor to deal in his own body or person as commodity.¹¹

8. Commodification is both real and rhetorical: Margaret Radin, for example, distinguishes between the concerns that accompany real commodification (i.e., actual sales of actual body parts, commercial surrogacy, prostitution, etc.) from those that accompany rhetorical or discursive commodification (i.e., our tendency to speak of previously non-market objects in market terms). MARGARET RADIN, *CONTESTED COMMODITIES* 6-8 (1996). An example giving rise to the commodification-dread that occupies much of the literature can be found in (surprise) a law and economics example: that of creating a market in babies. "Were baby prices quoted as prices of soybean futures are quoted, a racial ranking of these prices would be evident, with white baby prices higher than nonwhite baby prices." Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 344 (1978). The authors distinguish between market recognitions of "first quality" and "second quality" children. See also, Robert Pritchard, *A Market For Babies?*, 34 U. TORONTO L.J. 341 (1984).

9. Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982)

10. See, e.g., G.A. Cohen, *SELF-OWNERSHIP, FREEDOM, AND EQUALITY* (1995); Robert Nozick, *ANARCHY, STATE, AND UTOPIA* (1970).

11. For example, "If my body is property, then my alienation of it to others is just a contract." ALAN HYDE, *BODIES OF LAW* 56 (1997). Patricia Williams nicely describes this duality of self-ownership:

Ownership of the self still vacillates for its reference between a Lockean paradigm of radical

The absence of an explicit linkage of or clear theoretical distinction between commodification and self-ownership may be in part a function of definition: self-ownership has come to represent, in political theory, libertarian commitments of a particular, conservative, Robert Nozick variety—i.e., personal liberty rights to be free from (primarily) governmental interference, including rights against coerced redistribution of property, rather than property rights which primarily protect a right to be free from interference from other private actors, competitors, and the like. Thus defined, liberty interests and liberty problems do not match up very closely with property interests and property problems, such as commodification, whether it is harmful or desirable, in what contexts, etc.— and consequently do not suggest an obvious conceptual pairing of self-ownership with commodification. Another possible reason for the absence of linkage is the currency of the following persuasive proposition: that self-ownership, rather than protecting liberty and autonomy, actually undermines it: i.e., that ownership of one's self leads inexorably to commodification by reducing the self to something that can be owned (it may be owned first by oneself, to be sure, but then why not later by someone else?). In other words, self-ownership (i.e., “good” commodification, perhaps accompanied by market recognition of one's value or desert, by means of high salary, etc.) begins a slippery slope to ownership by others (i.e., “bad” commodification, slavery or other subjugation).¹² As a consequence, there has evolved an assumed opposition, perhaps not fully articulated, between self-ownership and commodification: if self-ownership is liberty and if commodification (i.e., being subject to the ownership or control of another) is not-liberty, then the two must be at odds.

Neither of these accounts of the relation between the notions of self-ownership and commodification is straightforward, and neither account is clearly descriptively correct in characterizing existing legal or market treatment of embodied personhood. Nor does either offer a persuasive normative account of the optimal relation of markets to our bodies, and of our (legal) experience of embodiment. Such a normative account is clearly desirable in order to make sense of emerging biotechnological-legal relations. This is particularly important because biotechnology

individualism assuming a dualism between the body as commodity and the person as transactor, and an older paradigm in which ownership of the self is understood in terms of the ability to defend one's inalienable corporeal integrity against oppression and abuse.

PATRICIA WILLIAMS, *THE ROOSTER'S EGG* 230 (1995). She offers the conundrum of “the slave who doesn't own her body, but at the same time owns nothing but her body.” *Id.* at 231. Ironically, as Williams points out, new biotechnologies make us more rather than less identified with and centered on our bodies, which these technologies increasingly make potential sources of raw materials and of profits. *Id.* at 232.

12. “If my body is property, it may naturalize others' domination of it . . .” HYDE, *supra* note 5, at 56. Patricia Williams summarizes some of the concerns about the “emerging eugenic marketplace” in “Brains in a Bottle,” *THE NATION*, Apr. 10, 2000 at 9.

ushers in the specter of the dreaded “universal” or “total” commodification and complete market alienability, where property rights in bodies fully enter the market. With the goal of a better normative account of these problems, I propose an inversion of the standard commodification thesis: I posit that the universal commodification of the person produced by biotechnology can actually democratize and broaden the applicability of rights of self-ownership, and try to demonstrate how this could develop in property law. I argue that this is important terrain because of the centrality of our bodies to our conception of legal personhood, and because forcing recognition of self-ownership is an essential aspect of jurisprudentially elevating and integrating human embodiment into the upper echelon of the law’s concerns.

Part of the problem is the dominant liberal theory of property rights. Self-ownership conceived as autonomy is paradigmatically disembodied and abstract. The liberal legal model of property rights informed by Sir William Blackstone’s “sole and despotic dominion” notion of property sets up an atomistic and non-relational understanding of self-ownership.¹³ This model underestimates the extent to which our relations with others are already commodified (e.g., labor and employment). Liberal property rights simultaneously shun and demand commodification, in the sense that my self-ownership requires your subjugation, my personhood demands your recognition of me, which in turn demands my recognition, in the peculiar reciprocity of Hegelian private right. While this transactional dimension of liberal self-ownership exists, it does so more in the spirit of negative, despotic dominion than of fragmented subjects actualizing themselves positively through relationships with others. We need to re-define self-ownership to be less about absolute dominion and more embodied and relational: to reconstruct self-ownership as a “duty of self-cultivation, to do with our aptitudes and characters what is pleasing to others.”¹⁴

This Article analyzes some of the important technological innovations which bear upon the human body and which pose problems for theories of self-ownership. I argue that the commodification of the human body inextricably linked to new biotechnologies does not necessarily undermine the discourse of Lockean self-ownership,¹⁵ or feminist and critical

13. Blackstone wrote, “there is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic dominion which one man claims and exercises over the external view of the world, in total exclusion of the right of any individual in the universe.” 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 393 (J. B. Lippincott & Co. 1882) (1765).

14. G.A. COHEN, SELF-OWNERSHIP, FREEDOM, & EQUALITY (1995).

15. “[E]very man has a property in his own person; this nobody has a right to but himself. The labour of his body and the work of his hands we may say are properly his.” JOHN LOCKE, THE SECOND TREATISE ON GOVERNMENT 17 (Thomas P. Peardon ed., The Bobbs-Merrill Co. 1952) (1690).

rehabilitations of that Lockean paradigm.¹⁶ Indeed, my argument is that commodification of the body by biotechnology, precisely because this technology is indiscriminate, paradoxically extends self-ownership, democratizing it to groups historically excluded from Lockean self-ownership. Building upon this theoretical foundation, I analyze the law/body problem so posed and conclude that the commodification so feared in emerging biotechnology finds resonances with earlier anti-slavery and emancipatory conceptions of self-ownership, undermining many of the standard objections to commodification. Of course, one cannot naively assume that the forces of market and discrimination will not make the burden of commodification fall disproportionately on subordinate groups; the dangers of commodification have been amply demonstrated¹⁷, and we must set limits on commodification to prevent it from resulting in new forms of oppression. Partial market-inalienability of human genetic material and tissue might assuage these concerns to some degree; self-ownership need not mean that the self as property, in all its forms, is necessarily alienable.

Part I of the Article examines the plasticity and disaggregation that characterize property rights on a postmodern interpretation and which destabilize settled liberal legal notions of the relationship between the body and human dignity. Analysis of scholarly claims that self-ownership is threatened by commodification demonstrates that these claims are overstated. Part II explores the assertion that the law of property does both real and rhetorical violence to the legal subject and the human body and demonstrates that these effects are confined to the context of biotechnology. Part III examines the tensions posed by commodification and property rights in the human body in the context of the California Supreme Court's decision in *Moore v. Regents of the University of California*, 793 P.2d 479 (Cal. 1990), *cert denied*, 111 S. Ct. 1388 (1991). Part IV links genetic and reproductive technologies to the commodification debates in ways not previously identified and demonstrates that existing responses to commodification in this context are inadequate. The Article concludes by asserting, with some cautions about disproportionate impact, that biotechnology promotes a unique form of commodification that can strengthen rather than undermine self-ownership, and calls upon scholars to therefore reconsider the dominant objections to commodification.

16. See DONNA J. HARAWAY, *SIMIANS, CYBORGS, AND WOMEN*, 146 (1991) (discussing the focus of feminist discussion of self ownership as revolving around topics such as abortion and self-determination).

17. See, e.g., Margaret Radin's work on commodification and gender, in *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

I. POSTMODERN PROPERTY AND THE LEGAL BODY

What is a body, as a matter of law?¹⁸ What bodies matter in law? Does law fail to protect against particularly racialized or gendered harms? Where is the body? Is it marginal or central in relation to the juridical subject? Is it integral to or severable from the legal person? Upon what body is bioscience premised? Is bioscience aimed at the body, the person, the soul, society? Michel Foucault documented a transition from the public spectacle of torture of the body in the classical ages, when the body represented not only an individual person but society itself, to modernity's private discipline in prisons and rehabilitation. History reflects very different notions of the body. What body is reflected in contemporary law? Just as there is no apparent consistency in the range of explanations of modern torture of bodies¹⁹—from the economic, i.e. exploitation facilitated and enforced by torture, to the ideological, i.e. Taliban punishments, Abu Ghraib, Guantanamo Bay—there appears no consistency in constructions of the body in other areas of law.

The bioscientific conversion of the body into information reflects a pattern of what has become known as postmodernity.²⁰ Jean Baudrillard, for example, writes of the “hyperreality” of the postmodern. This means, he says, that we only acknowledge the real in its image—reality, as the hyperreal, is “always already reproduced.”²¹ The process of conversion of the body, the human organism, into genetic information is just such a reproduction of reality as hyperreality. This means that the body need no longer exist only as corporeality, but also as the “mirroring” body,²² quite literally “a body of information.” This represents a further stage in the “de-physicalization” of property that began with Hohfeld's seminal recognition of property as a “bundle of rights”²³ defining relationships

18. A rich literature exists on this question, as my footnotes throughout indicate. See generally HYDE, *supra* note 5.

19. See, e.g., DARIUS REJALI, TORTURE AND DEMOCRACY (2007); DARIUS REJALI, TORTURE AND MODERNITY (1994); TORTURE (Sanford Levinson ed., 2004); THE TORTURE DEBATE IN AMERICA (Karen Greenberg ed., 2006).

20. See, e.g., HELEN STACY, POSTMODERNISM AND LAW: JURISPRUDENCE IN A FRAGMENTING WORLD (2001). See HARAWAY, *supra* note 16, at 211 (discussing the post-modern legal body as having “destabilized the symbolic privilege of the hierarchical, localized, organic body” of the early twentieth century). Compare the post-modern idea of the self with that of the early twentieth century, modern, impression of the self. Walter Benjamin's essay, *The Work of Art in the Age of Mechanical Reproduction* (1936), discusses how progressive forms of art have formed the modern idea of a cohesive separate self. Observation of the self progressively in paint, photography, and film has created an increasing association, or identification, of self with the subject of the art. For instance, one identifies with a person depicted in film rather than on canvas. This leads to alienating the self via entertainment, rather than simply observing art.

21. JEAN BAUDRILLARD, SELECTED WRITINGS 145-46 (Mark Poster ed., 1988).

22. THE BODY: SOCIAL PROCESS AND CULTURAL THEORY 65-66 (Mike Featherstone et al. eds., 1991).

23. See Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). For an argument that this disaggregation of property and ownership rights has diminished the relevance of property overall, see THOMAS GREY, THE

between persons with respect to objects,²⁴ which replaced Blackstone's understanding of property as objects themselves.²⁵ The body, newly recast as genetic "information," represents property de-physicalized twice over: with intellectual property in bodies we have not only a bundle of rights to things, but also rights to information about things, or rights to things as information. What is happening to the body here reflects a larger transformation of the economy from one of production to one of information; our post-industrial society is moving from manufacture to information processing.²⁶ The patenting of genes and body tissues is thus some of the clearest evidence of the postmodern rewriting (and re-righting) of the body.

There is a shift in conventional notions of legal subjectivity which results, particularly around the issue of self-ownership,²⁷ from these emerging biomedical technologies, from commodification of the human body, and from the haste of intellectual property law to protect them under the guise of authorship.²⁸ Genetic science which makes human traits predictable, controllable, or alterable; cloning and trans-species gene

DISINTEGRATION OF PROPERTY IN PROPERTY: NOMOS XXII (J. Roland Pennock & John W. Chapman eds., 1980).

24. Alan Hyde and James Boyle characterize this as a "vulgar" understanding of Hohfeld. HYDE, *supra* note 5; James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1459 (1992).

25. Brendan Edgeworth, *Post-Property?: A Postmodern Conception of Private Property*, 11 U. NEW S. WALES L.J. 87, 97 (1988) ("Property is that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe"). On Hohfeld's distinction between rights *in rem* and rights *in personam*, and the de-physicalization of property that is implied for Hohfeld, see Jeanne Lorraine Schroeder, *Virgin Territory: Margaret Radin's Imagery of Personal Property as the Inviolable Feminine Body*, 79 MINN. L. REV. 55, 69-71 (1994), and J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711, 724-31 (1996). Penner here, and in his book, *THE IDEA OF PROPERTY IN LAW* (1997) tries to reestablish the place of 'the thing' in property theory, contra the Hohfeldian 'bundle of rights' orthodoxy.

26. RETHINKING COMMERCIALIZATION (Martha Ertman & Joan Williams eds., 2005); Edgeworth, *supra* note 25, at 98-99.

27. See generally J.W. Harris, *Are Persons Property?* 17 INT'L. J.L. POL'Y & FAM. 244 (2003) (book review); Michael Otsuka, *Self-Ownership and Equality: A Lockean Reconciliation*, PHIL. & PUB. AFF. 65 (1998); PETCHESKY, *supra* note 2; Rao, *Genes and Spleens: Property, Contract or Privacy Rights in the Human Body?*, *supra* note 5; Alan Ryan, *Self-Ownership, Autonomy, and Property Rights*, in PROPERTY RIGHTS 241 (Ellen Frankel Paul et al. eds., 1994); Peter Vallentyne, *Natural Rights and Two Conceptions of Promising*, 81 CHI.-KENT L. REV. 9 (2006); Peter Vallentyne, *Self-Ownership*, in ENCYCLOPEDIA OF ETHICS (Becker and Becker eds., 2nd ed. 2001); Jeremy Waldron, *Self-Ownership*, in THE RIGHT TO PRIVATE PROPERTY 177 (1988); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003); G.A. COHEN, SELF-OWNERSHIP, FREEDOM, AND EQUALITY (1995); RICHARD EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 54-59 (1995); LOCKE, *supra* note 15; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA (1974); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991); WILLIAMS, THE ROOSTER'S EGG, *supra*, note 5.

28. See JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY (1996); Keith Aoki, *(Intellectual) Property and Sovereignty: Notes Toward a Cultural Geography of Authorship*, 48 STAN. L. REV. 1293 (1996). For discussion of Lockean theory as applied to intellectual property, see Wendy J. Gordon, *A Property Right in Self-Expression: Equality and Individualism in the Natural Law of Intellectual Property*, 102 YALE L.J. 1533 (1993).

splicing; DNA mapping and sequencing and possible patenting of the human genome; the production and marketing of biomedical products from human cells — such developments fundamentally challenge the ways in which liberal legalism has defined rights, responsibility, and legal or juridical personality in relation to the human body.²⁹ “Genetic essentialism”³⁰ and the “geneticization of identity”³¹ threaten settled notions about the importance of social context, socialization, freedom and responsibility in assessing individual conduct under law.

The conversion of the body into patentable information and the speed with which that information is processed and transferred effect a postmodern, technological transformation of the human body that undermines the stability of conventional, liberal legalist assumptions about rights and persons, and about self-ownership and the autonomy it is said to protect.³² Paul Rabinow, for example, claims that the body is so fragmented by technology,³³ so analyzed into a “discrete, exploitable reservoir of molecular and biochemical products,” that really no conception of the person as a whole remains beneath. Strangely, this *disaggregation*³⁴ of the body by technology is facilitated by the legal

29. For example, the advent and patenting of transgenic species (e.g., the Harvard oncomouse) raises the spectre of transgenic slavery (see Boyle, *supra*, note 28, at 153). Patents in humans are widely thought to be forbidden by the 13th Amendment. On transgenic species, see generally Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425 (1992). The United States Patent and Trademark Office (“PTO”) recently refused to patent a human-chimpanzee chimeric species. The applicant, Stewart Newman, had no intention of using the technology; he applied hoping that the PTO, and possibly the courts, would be forced to rule on the legality of patenting human genes. Andrea J. Kamage & Julie A. Heider, *The Debate Over Beings with Mixed Genetic Components Rages On*, THE NATIONAL LAW JOURNAL, June 13, 2005, at S1. For accounts critical of the social implications of modern genetics, see generally ANDREW KIMBRELL, THE HUMAN BODY SHOP: THE ENGINEERING AND MARKETING OF HUMAN LIFE (1993); RUTH HUBBARD & ELIJAH WALD, EXPLORING THE GENE MYTH: HOW GENETIC INFORMATION IS PRODUCED AND MANIPULATED (1993).

30. Rochelle Dreyfuss & Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313, 314–15 (1992). The authors make the further interesting point that, like law and economics, which posits an “invisible hand” (the collective rationality of the individual market actors), genetics posits a genetically endowed collective behavior that “generates a customary law governing the social order at low cost. Such theories are attractive because they make external control, whether over the economy or the social order, appear counterproductive.”

31. Isabel Karpin, *Reimagining Maternal Selfhood: Transgressing Body Boundaries and the Law*, 2 AUSTRALIAN FEMINIST L.J. 36, 47 (1994). The “genetic presumption” is another term to describe this phenomenon. Lisa Ikemoto, *The Racialization of Genomic Knowledge*, 27 SETON HALL L. REV. 937, 942 (1997).

32. See, e.g., PETCHESKY, *supra* note 2, at 400 (pointing out that postmodernism is critical of self-ownership as an idea because of its general scepticism about subjectivity and the existence of an underlying self). A similar discussion appears in Michael H. Shapiro, *Fragmenting and Reassembling the World: Of Flying Squirrels, Augmented Persons, and Other Monsters*, 51 OHIO STATE L.J. 331 (1990).

33. It is of course possible that genetic engineering and other new fragmenting technologies may become integrated, accepted, or normalized in our (legal) culture, as older body technologies such as cosmetic surgery have been. Scott Altman, *(Com)modifying Experience*, 65 S. CAL. L. REV. 293, 320 (1991).

34. See, e.g., Drucilla Cornell, *Dismembered Selves and Wandering Wombs*, in LEFT LEGALISM/LEFT CRITIQUE (Wendy Brown & Janet Halley eds., 2002) at 337. In the context of modern

recognition of increasingly *aggregated* intellectual property rights, i.e., more and more control is vested in owners of intellectual property rights.³⁵ The pace at which medical and scientific technologies are impacting the body and the apparent pliability of intellectual property law, which treats these innovations no differently than it does other forms of creative endeavor, pose significant questions to which legal theory must respond.

These biotech and intellectual property innovations affect how we think of the human body and pose problems for theories of self-ownership. My intuition is that the particular commodification wrought by biotechnology need not necessarily undermine the ideal of Lockean, emancipatory self-ownership,³⁶ nor the more recent feminist and critical versions. On the contrary, because biotechnology applies universally and indiscriminately, it may open the ideal of Lockean self-ownership to groups historically denied access. And of course, this new biotech commodification problematizes self-ownership, in ways that may raise consciousness, for those socially and politically dominant bodies (i.e., straight, white, economically advantaged, able-bodied men) who have traditionally enjoyed self-ownership without experiencing the downsides of commodification—by subjecting their bodies to the same commodifying tendencies, now wrought by biotech, that others have always been exposed to.

The human body as described, defined, and regulated in law reflects the intersection of several themes—power, violence and culture—in our law, and in particular illustrates its pervasive culture of liberal cosmopolitanism.³⁷ Liberal legalism constructs and reflects a conception of the body that may or may not fit with conceptions of the body in non-legal contexts, e.g., medicine, arts and culture, sports, sexuality, politics. But law does not just announce an authoritative construction of the body; these other disciplines, discourses, social practices, history, and politics contribute. There is nonetheless a “legal body” lurking behind the law that merits examination. Examining the body as reflected in law sheds light on liberal cosmopolitan commitments in law and provides a basis for questioning its assumptions.

Liberal legalism has a complex relationship to the body and embodiment; it simultaneously emphasizes and de-emphasizes the body. On one hand, the body serves as a physical marker of the legal person.

understanding of the body as a discrete set of genetic components, “the “body” of the emergent legal person is different from that of the old legal subject precisely because it is diffracted into so many discursive existences, and because it thereby acquires a complexity which cannot be accounted for in terms of traditional configurations of body, psychology, and society.” Alan Pottage, *Unitas Personae: On Legal and Biological Self Narration*, 14 L. & LITERATURE 275, 299 (2002).

35. Aoki, *supra* note 28.

36. LOCKE, *supra* note 15, at 17 (“[E]very man has a property in his own person . . .”).

37. This section adapts with permission an abstract of a talk I gave at the 93d annual meeting of the American Society of International Law. See 93 PROC. AM. SOC. INT’L L. 352.

Thus liberal legalism protects bodily integrity and employs several metaphors to give normative bite to prohibitions of violence against bodies: the body as property, privacy, autonomy, and dignity. On the other hand, liberal rights theory, at least in its Kantian/Rawlsian mode, separates the juridical person from the body and embodiment so as to create the conditions for formal equality: the person is shorn of particular bodily characteristics in order to make persons fungible and thus equal in principle. These same contrary instincts regarding the body are exhibited by intellectual property law when it confronts the body as object.

The theoretical setting for this inquiry is the contrast of competing conceptions of the body itself: the organic or biologicistic conception (the body is what it is) and the constructivist conception (the body is biological but also discursively constructed and interpreted). The latter points out that bodies always have interpretations projected upon them by culture, just as biological sex produces gender.³⁸

Much of our law, for example Constitutional and property law, seems to assume a straightforward, linear mapping of bodies onto persons: i.e., even the critical questions posed are “whose body is protected in law?” or “why this body?”. This liberal “representational” or biologicistic model has been relatively unexamined. There is serious discussion in other disciplines about discursively constructed bodies, bodies characterized by difference rather than sameness, bodies determined by culture rather than by biology. Yet liberal legalism and property law appear to uncritically assume a biologicistic understanding of the body. For example, the universal condemnation of torture in customary international law and treaty law is evidence of the crystallization of a liberal cosmopolitan commitment to human dignity by way of the body: it supposes a fixed, biological body about which no more need be said. The body just announces itself and its connection to human dignity, intuitively, it would seem; likewise, the body announces its connection to Constitutionally protected privacy and security of the person.

It may indeed be the case that the body does so announce itself and its significance for personhood, but it is nonetheless interesting to note it and ask that law more completely theorize and make explicit the liberal linkage of bodily integrity to human dignity. Do the human body and human dignity correlate neatly or not? We should question these liberal assumptions of law and ask it to confront the existence of other bodies, un-

38. This is the classic feminist sex/gender distinction. As most feminist theorists use this terminology, “sex” refers to the anatomical and physiological distinctions between men and women; “gender,” by contrast, is used to refer to the cultural overlay on those anatomical and physiological distinctions. While it is a sex distinction that men can grow beards and women typically cannot, it is a gender distinction that women wear dresses in this society and men typically do not.

Mary Ann Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10-11 (1995).

natural, constructed, cultured, tribal, or colonized. The neat mapping of dignity onto the body as is implicit in, e.g., Anthony Appiah's defense of the core liberal value of human dignity should be explored and more rigorously justified—such linear mappings essentialize the body in ways now difficult to justify. Also, the liberal self-contradiction with respect to the body, the simultaneous embrace and denial of the body referred to above, must be confronted by legal liberalism—law cannot have it both ways and maintain internal consistency.

And it may be, of course, that legal body-discourse does not so much augment individual sovereignty or autonomy as it does augment state power. Legal discourse on the body, paradoxically, offers states a means of evading responsibility for intrusions on the body (i.e., the state can say, “we don't act on that dignified body, but on some other body”—i.e., a body that is private, not public (e.g., women's bodies); bodies that are dependent, not autonomous (e.g., the disabled or mentally ill). This augmentation of state sovereignty deflects attention from normative discourses in law other than sovereignty, such as social justice or rights to substantive equality.

II. VIOLENCE AND THE DISEMBODIED WORD³⁹

Critics of the application of existing property law regimes to human tissue argue that this law does violence to the human person, subject, and ultimately the body.⁴⁰ Others argue that property rights in the person, self-ownership or self-proprietorship, can be rehabilitated from within the male, colonial, instrumentalist, Lockean paradigm and employed to protect vulnerable human bodies and recognize their autonomous personhood.⁴¹ But apart from that debate (to which I shall return shortly), I wish here to examine the relation of law generically understood to the person, to the body. Then I shall explore whether this violence can be seen in property law's relation to the body as commodity.

Of course, both public and private law (through civil rights and tort law, for example) reflects and promotes a concern for persons' right to bodily integrity and dignity free from violence. But law does its own interpretive

39. “Violence and the Word” is Robert Cover's well known article at 95 YALE L.J. 1601 (1986). This section is adapted, with permission, from Peter Halewood, *Violence and the International Word*, 60 ALB. L. REV. 565 (1997).

40. Margaret Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982); Radin, *Market-Inalienability*; Stephen Munzer, *An Uneasy Case Against Property Rights in Body Parts*, in PROPERTY RIGHTS 259 (Ellen Paul et al. eds., 1994).

41. PETCHESKY, *supra* note 2, at 396, citing, inter alia, PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991). This position amounts to “a critique of the critique” of the body as property; in other words, liberal humanist readings reject the extension of the property paradigm to the body so as to protect individual worth (read the “sacred” body), but Petchesky and other counter-critics charge that property in the body, in the form of a revised and responsible self-ownership, serves as a profound recognition of autonomous personhood, especially in persons who have not historically enjoyed self-ownership: women, peoples held in slavery, etc.

and real violence to persons (and bodies)—the violence of law itself, the specific harms which law either itself causes or in which it acquiesces.⁴² Robert Cover claimed that the language of law and of legal interpretation imports real violence against law's subjects.⁴³ The normativity (and to some extent the legitimacy) of the law, Cover argued, lies in its ability to coerce a defendant's compliance with judicial pronouncement, by actual violence when necessary and always by implication.

Legal interpretive acts signal and occasion the imposition of violence upon others:

A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life. . . . When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from one another.⁴⁴

The defendant's acquiescence to his "official" role as defendant, and his apparent recognition of the legitimacy of the theater of his own trial, at least in the form of his physical presence in the courtroom, is not, Cover said, the product of his principled acceptance of the legitimacy of the law.⁴⁵ Rather, it is the result of his calculation that resistance is futile, escape impossible and that violence, perhaps even death, would follow any direct challenge to or rejection of the validity of the proceedings or of the law itself.⁴⁶

This understanding of legal normativity evolves from the work of Michel Foucault, who found in the history of criminal courts and prisons a set of normalizing practices aimed at disciplining, surveilling and ultimately reconstituting the individual, the body, the human subject of the law.⁴⁷ Foucault pioneered the notion that the medical and social scientific discourses accompanying early modern judicial and penal practices (for example, psychiatry; psychopharmacology; abnormal, forensic and social

42. See, e.g., Phillip R. Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 833-34 (1990) (arguing that international law does not so much restrain unruly governments as it consolidates and extends state power, including power over human rights matters). Wherever state action is not compelled to confront an assault on human dignity, international law is complicit in permitting state inaction, for example, in the failure of the international community to respond adequately to the lack of enforcement of laws against domestic violence in societies around the world. See, e.g., Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613, 628-29 (1991) (noting that domestic violence does not qualify as "torture").

43. See Cover, *supra* note 39, at 1610 ("Legal Interpretation is (1) a practical activity, (2) designed to generate credible threats and actual deeds of violence, (3) in an effective way.").

44. *Id.* at 1601.

45. See *id.*

46. See *id.* at 1607-08.

47. See MICHEL FOUCAULT, *DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON* (Alan Sheridan trans., Vintage Books ed. 1979).

psychology) were themselves practices (“discursive practices”) which exerted a productive or constitutive form of power over subjects (persons) in attempts to rehabilitate them.⁴⁸ To conceptualize law and power as productive and constitutive of subjects and persons, rather than destructive of them, was a novel idea. The latter approach, that of destructive sovereignty, had been the conventional view of power, most often manifest as coercion or elimination of a sovereign’s enemies or of social undesirables. Accordingly, Foucault pointed out that in earlier periods this destructive sovereignty required that the prescriptive and punitive be, quite literally in some cases, inscribed upon the bodies of the condemned, as in the case of “Damien the regicide,”⁴⁹

condemned on March 2, 1757 to be taken to the Place de Gréve, where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulfur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes thrown to the winds.⁵⁰

Here, the torture⁵¹ of the condemned was a ritual with social and normative significance. Not only was the condemned justly punished, but the spectacle of his corporal obliteration restored the legitimacy and righteousness of the social order. The body, as signifier of the crime against order, was sacrificed to right the social balance. Rehabilitation or conservation of this body was neither desirable nor thinkable; law demanded the public and visible erasure of the criminal body. Only with modernity did law, psychology and penology begin to consider the virtues of reconstituting the body and soul of the condemned through discipline, surveillance and labor. But both the modern and pre-modern conceptions of legal legitimacy and legal interpretation defined themselves against the

48. *See id.* at 304-05.

If [the human sciences] have been able to be formed and to produce so many profound changes in the episteme, it is because they have been conveyed by a specific and new modality of power: a certain policy of the body, a certain way of rendering the group of men docile and useful. This policy required the involvement of definite relations of knowledge in relations of power; it called for a technique of overlapping subjection and objectification; it brought with it new procedures of individualization. The carceral network constituted one of the armatures of this power-knowledge that has made the human sciences historically possible. Knowable man (soul, individuality, consciousness, conduct, whatever it is called) is the object effect of this analytical investment, of this domination-observation.

Id. at 305.

49. *Id.* at 3.

50. *Id.* (citations omitted).

51. For recent legal scholarship on torture, see DARIUS REJALI, TORTURE AND DEMOCRACY (2007); TORTURE (Sanford Levinson ed., 2004); and THE TORTURE DEBATE IN AMERICA (Karen Greenberg ed., 2006).

backdrop of the body, the corporal subject of punishment, discipline and confinement. Thus, both of these conceptions of law enact violence against bodies in a way Cover recognized in contemporary criminal sentencing.⁵²

While Cover addressed domestic criminal law and sentencing, his assessment of the interface in legal interpretation of the concrete and the normative, the material and the intellectual, the practical and the principled, can be applied to the context of property law and legal theory. The forms of violence to which law can (and does, to varying degrees) address itself are many: violence against women by domestic partners; against sexual minorities; against indigenous peoples, including cultural appropriation⁵³ and “cultural genocide;” against racial and religious minorities; and even the violence perpetrated by the removal, consensually or otherwise, of organs from the poor.⁵⁴ Each form of violence inscribes the bodies of its victims with its own logic (even where this logic is, as Elaine Scarry writes of torture, to destroy logic and normative community itself, to erase the common bonds of language by reducing the screaming victim to something sub-literate, and to reduce community to savagery).⁵⁵ Her work affirms the biologicistic notion of the body as the subject most in need of defense. Perhaps we must admit that at the limits—with torture, for example—there is a necessary gap between theorizing the body as constructed discursively, and applications of that theory in the legal sphere where the biologicistic body presents strong claims for protection.

Legal theory, in searching for the sources of law and legal obligation, demonstrates important tensions and fractures in relation to corporeality, as I shall demonstrate momentarily. In particular, the tensions between

52. See Cover, *supra* note 39, at 1618-28 (discussing the imposition of criminal sentences, including the death penalty, from the judge’s perspective).

53. See ROSEMARY COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998); Rosemary Coombe, *Marking Difference in American Commerce: Trademarks and Alterity at Century’s Ends*, CAN. J.L. & SOC’Y, Fall 1995, at 119, 127 (describing corporate owned, trademark protected stereotyped images of Native American life such as “Red Man® chewing tobacco, Indian Spirit® air freshener, Indian style™ popcorn, Braves® and Redskins®”).

54. An international trade in organs which have either been forcibly removed or purchased from poor people in developing countries has been documented by the United Nations and some countries either have or are considering criminalizing these practices. See Halewood, *supra*, note 5, at 1334 n.8; *German Cabinet Backing Law on Human Organ Trade*, CHI. TRIB., Sept. 20, 1994, at 7 (approving a draft law which would recommend jail time for people caught trafficking in organs); Chris Hedges, *Egypt’s Desperate Trade: Body Parts for Sale*, N.Y. TIMES, Sept. 23, 1991, at A1 (reporting that the exploitation of poor people where organ sales are legal or tolerated is common); *Organ Trade Criticized*, WASH. TIMES, Apr. 29, 1995, at A10 (reporting that the U.N. Human Rights Commission found that “[s]ome Brazilian children are adopted by foreigners for the express purpose of taking their organs”); *Poverty Stricken Iraqis Offer to Sell Kidneys for Transplants*, CHI. TRIB., Dec. 3, 1993, at 7 (noting that over the years newspaper advertisements have appeared offering body parts for sale).

55. “Prolonged pain does not simply resist language but actively destroys it, bringing about an immediate reversion to a state anterior to language, to the sounds and cries a human being makes before language is learned.” Cover, *supra* note 39, at 1603 (quoting ELAINE SCARRY, *THE BODY IN PAIN* 4 (1985)).

positivism and naturalism and between the public and the private have been formative for legal doctrine with respect to the body. Consent-based, positivist and statist models compete with naturalist, supra-consensual, normative models in the attempt to ground legal obligation.⁵⁶

These conventional paradigms have recently been challenged, perhaps most notably in critical international law scholarship. Critical Legal Studies critiques argue that the positivist and naturalist models each fail because of the impossibility of their respective claims. The doctrinal house of cards built by positivist and naturalist theories of law collapses because of the indeterminacy of both, and because of their hidden, unspoken reliance upon each other for coherence.⁵⁷ In domestic (and international) law, feminist legal theory challenges the self-imposed necessity of the separation of public from private in law, arguing that this separation is false and that it has, by definition, prevented law from addressing the specifically private forms of harm to which women and women's bodies are subject.⁵⁸ Neo-Kantian critiques take issue with the predominance of statism in legal positivism and insist on "normative individualism," i.e., the extent to which the person is categorically protected as an end in itself, as the essential normative index by which law's legitimacy can be measured.⁵⁹ The New Haven School developed its "policy-oriented approach" which rejected the mechanical formalism of classical international law and sought to promote the use of international law to foster desirable substantive outcomes in the international arena in such areas as human rights, democracy, self-determination and economic development.⁶⁰ These various critiques have done much to expand the horizons of law and legal theory, international and domestic, and to put persons and bodies at the center of a discourse no longer paralyzed by

56. This debate is most explicit in the context of international law: See e.g. JAMES L. BRIERLY, *THE LAW OF NATIONS* 49-54 (Humphrey Waldock ed., 6th ed. 1963) (comparing the positivist and naturalist models).

57. See, e.g., David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988) (exploring the rhetorical inconsistencies of positivist and naturalist "discourse of sources" of international law). In crucial doctrinal areas, treaties, customary law, general principles, *jus cogens* and so on conflicting views are constantly presented as "correct" normative outcomes. Each general principle seems capable of being opposed with an equally valid counterprinciple. Moreover, these conflicting views and principles are very familiar and attempts to overcome the conflicts they entail seem to require returning to "theory" which, however, merely reproduces the conflicts at a higher level of abstraction. MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT*, at xv (1989). See also Gerry Simpson, *Imagined Consent: Democratic Liberalism in International Theory*, AUSTL. Y.B. INT'L L. 103, 111 (1994) (citing KOSKENNIEMI, *supra*).

58. See, e.g., Charlesworth et al., *supra* note 40, at 638-43 (discussing how the public/private dichotomy has ignored the needs of women and thereby undermined the operation of international law).

59. See, e.g., Fernando R. Tesón, *The Kantian Theory of International Law*, 92 COLUM. L. REV. 53 (1992); Fernando R. Tesón, *International Obligation and the Theory of Hypothetical Consent*, 15 YALE J. INT'L L. 84 (1990).

60. See Lung-chu Chen, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE* 11-16 (1989).

public/private gyrations.

The tensions in law between positivism and naturalism, between public and private spheres, are partially resolved by the recognition of prohibitions against violence against bodies as a proper concern for law. A legal focus on violence against the bodies of persons arguably conflates the opposition between public and private: the violence of states and the violence of private rights violators now share an analytically common component for purposes of attaching a legal obligation. This means that the private has come to permeate the formerly pristine public sphere to which law classically restricted its application. The biologism implicit in legal claims about the sanctity of the body and of bodily integrity can be employed tactically to defeat positivist justifications for the state to stay clear of a particular rights controversy involving the human body. This “embodiment” of formerly disembodied legal justifications partially resolves some of the theoretical distance between the discourses competing for authority in the quest for the sources of law’s legitimacy. If the backbone of legal normativity is said to be a Kantian concern for individual human rights, then focusing on the most foundational source of norms for human rights law — bodily integrity and dignity — is a sound theoretical prescription. It is clear, however, that to the extent violence against bodies is a valid concern within law, this reflects an important recognition of the body as a subject of law that makes a return to classical, disembodied statism unlikely.

Now we have an overview of the concerns animating law’s implicit focus on and construction of violence, the body and the legal subject — the individual body as both an object of law and as a normative source for law. But the body is always discursively established in law, and in turn has affected importantly the language of the law. The violence so done to the body, and the to the person or subject “behind” the body, is therefore of utmost importance. I now turn to two discursive constructions of the body in law: property rights (intellectual and otherwise) for profit in human tissue; and the fragmentation of the body by genetic technologies and the patenting of human genes.

III. SELF-OWNERSHIP V. BIOTECHNOLOGY: DISCURSIVE RUPTURE

The body can be reconfigured by both awful⁶¹ and ordinary⁶² technologies, with both awful and ordinary results. The decision in Moore

61. One example of this is torture. Another example is the forced, nonconsensual removal of organs (e.g., corneas, kidneys) for the international trafficking in organs.

62. For example, the discipline imposed upon bodies by such everyday technologies as the chair constitutes an ordinary technology (see Marcel Mauss, *Techniques of the Body*, in *INCORPORATIONS* 454 (Crary & Kwinter eds., New York: Zone Books 1992); also carpal tunnel syndrome suffered by many clerical workers (and academics) caused by long hours typing into a computer.

v. Regents of the University of California⁶³ is at once an ordinary dispute about consent and profit, and a strange story of profanity and sacredness, abandonment and salvation, dismemberment and attachment, authorship and exclusion, injury and healing, truth and virtue, slavery and freedom. It represents an important (and baffling) moment in judicial, jurisprudential,⁶⁴ and scholarly grappling with the social meaning of the body, its relationship to the self, and the rights the body enjoys or conveys.

John Moore, the plaintiff in this litigation, was diagnosed in 1976 with hairy-cell leukemia. His doctors sampled various body tissues in the course of treating him, ultimately concluding that his spleen cells were potentially of enormous research and commercial value. His spleen was removed for therapeutic reasons, and sections of the spleen were analyzed at the University research unit for possible commercial development. Moore was never told about the commercial possibilities his condition presented. Moore's doctors subsequently developed and patented a T-cell line, which they named the "Mo-cell" after Moore, based on the cells from Moore's spleen. The doctors contracted with two biotech companies to commercially produce and develop the line, which in 1983 had a value of more than three billion dollars.⁶⁵

Moore sued the doctors and the University for conversion of his spleen.

63. 793 P.2d 479 (Cal. 1990), *cert. denied*, 111 S. Ct. 1388 (1991).

64. See generally Peter Vallentyne, *Natural Rights and Two Conceptions of Promising*, 81 CHI.-KENT L. REV. 9 (2006); Kaimipono David Wenger, *Slavery as a Takings Clause Violation*, 53 AM. U. L. REV. 191 (2003); J.W. Harris, *Are Persons Property?*, 17 INT'L. J.L. & POL'Y & FAM. 244 (2003) (book review); E. Richard Gold, *BODY PARTS: PROPERTY RIGHTS AND THE OWNERSHIP OF HUMAN BIOLOGICAL MATERIALS* (1996); See also *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991) (holding that wife has a "legitimate claim of entitlement" in dead husband's corneas); *United States v. Garber*, 607 F.2d 92 (5th Cir. 1979) (hearing a tax evasion case against a woman who sold her blood which contained highly valuable antibody).

Legal scholarship on commercialization of the body lines up on two sides of a stale debate, with law and economics scholars typically arguing that "neutral" market principles pose no threat to autonomy or equality (or indeed buttress those interests because of their presumed neutrality), and liberals on the other who do not extend their usual enthusiasm for the market to this sacred object. See generally Patricia Lacy, *Gene Patenting: Universal Heritage vs. Reward for Human Effort*, 77 OR. L. REV. 783 (1998); Kermit Roosevelt, *The Newest Property: Reproductive Technologies and the Concept of Parenthood*, 39 SANTA CLARA L. REV. 79 (1998); Keith Aoki, *Authors, Inventors and Trademark Owners: Private Intellectual Property and the Public Domain: Part II*, 18 COLUM.-VLA J.L. & ARTS 191 (1994); Note, *Brotherton v. Cleveland: Property Rights in the Human Body — Are the Goods Off Interred with Their Bones?*, 37 S. DAKOTA L. REV. 429 (1992); Catherine Tallerico, Note, *The Autonomy of the Human Body in the Age of Biotechnology*, 61 U. COLO. L. REV. 659 (1990); Bernard Dickens, *The Control of Living Body Materials*, 27 U. TORONTO L.J. 142 (1977); Erik Jaffe, Note, *She's Got Bette Davis['s] Eyes: Assessing the Nonconsensual Removal of Cadaver Organs under the Takings and Due Process Clauses*, 90 COLUM. L. REV. 528 (1990); Lloyd Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1 (1989); Thomas P. Dillon, *Source Compensation for Tissues and Cells Used in Biotechnical Research: Why a Source Shouldn't Share in the Profits*, 64 NOTRE DAME L. REV. 628 (1989); Beverley Burlingame, Note, *Commercialization in Fetal-Tissue Transplantation: Steering Medical Progress to Ethical Cures*, 68 TEXAS L. REV. 213 (1989); Nancy E. Field, Note, *Evolving Conceptualizations of Property: A Proposal to De-Commercialize the Value of Fetal Tissue*, 99 YALE L.J. 109 (1989); Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182 (1974).

65. Michelle Bourianoff Bray, Note, *Personalizing Personalities: Toward a Property Right in Human Bodies*, 69 TEXAS L. REV. 209, 222 (1990).

His case was dismissed at trial, but an appellate court reversed and recognized his conversion claim.⁶⁶ The court recognized a property right in one's own body,⁶⁷ a right of dominion over one's own flesh. The appellate court based this extension of the property regime on cases recognizing an accused's property right in his excrement against unlawful search and seizure, the right to refuse treatment, and quasi-property possessory rights to the corpse of a deceased family member for purposes of burial.

The California Supreme Court reversed,⁶⁸ holding that Moore had no cause of action in conversion, but that his doctors had been under a tort law duty to disclose fully to Moore in advance of his surgery their research and commercial interests in his spleen as part of obtaining his informed consent.⁶⁹ The majority relied upon three arguments: first, that the absence of previous judicial decisions recognizing a property right in body parts foreclosed extending such a right to Moore here; second, that regulations imposed on body tissues and fluids by Federal⁷⁰ and California statutory schemes⁷¹ effectively extinguished any property rights in a "source"; and third, that the existence of a patent recognizing the doctors' invention rather than the uniqueness of Moore's spleen trumped Moore's conversion claim. Furthermore, on policy grounds the court decided that extending the doctrine of conversion to cover one's body parts would endanger the commercial incentive for researchers to engage in research for the public benefit.⁷²

In a concurring opinion, Judge Arabian emphasized "the moral issue that informs much of the opinion but finds little or no expression therein:"

Plaintiff has asked us to recognize and enforce a right to sell one's own body tissue for profit. He entreats us to regard the human vessel — the single most venerated and protected subject in any civilized society — as equal with the basest commercial

66. 249 Cal. Rptr. 494 (Cal. App. 2 Dist. 1988).

67. This has been criticized on many grounds. For a compelling critique on philosophical grounds, see generally Barry Hoffmaster, *Bodies, Property, and Patents in the Moore Case*, 7 I.P.J. 115 (1992) (arguing that the appeals court relied on misguided "essentialist" view of property; that property is not a unified concept, but rather is, as described by Hilary Putnam, a "cluster concept," comprised of a variety of contributory characteristics; and that viewing the body as raw material erodes traditional respect for personhood); and Joan Gilmour, "Our" *Bodies: Property Rights in Human Tissue*, 8 CAN. J.L. & SOC. 113 (1993) (advocating a regulated, altruistic, non-commercial property right in tissue).

68. Moore, 793 P.2d 479 (Cal. 1990), cert. denied, 111 S.Ct. 1388 (1991).

69. For an extended discussion of the disclosure and consent issue, see generally Sharon Nan Perley, Note, *From Control Over One's Body to Control Over One's Body Parts: Extending the Doctrine of Informed Consent*, 67 N.Y.U. L. REV. 335 (1992).

70. Most centrally, the National Organ Transplant Act, 42 U.S.C. § 274 a-e (1988) and the Uniform Anatomical Gift Act(s), 8A U.L.A. 15 (Supp. 1990). Note that the Uniform Anatomical Gift Act bans the selling of body parts for transplantation or therapy, but it does not expressly ban sales of body parts for research or educational purposes.

71. Including CAL HEALTH & SAFETY CODE § 7054.4.

72. 51 Cal. 3d 120, 130-47.

commodity. He urges us to commingle the sacred with the profane. He asks much.⁷³

The judge, somewhat dramatically, invokes the iconic, romantic rhetoric of the sacredness (and corresponding profanity) of the body as the “vessel” of the soul.⁷⁴ In this language of sacredness there is a hint of primal violence: a prospect of awful, physical punishments for defiling something sacred. His language unconsciously reflects the actual violence beneath the sterile, legalities of property and tort he thinks he is addressing—the amputation of limbs, incisions made to harvest corneas and kidneys, market transactions steeped in blood.⁷⁵ In the case of international organ trafficking,⁷⁶ clearly commodification has been achieved with unspeakable physical violence and at incalculable moral cost: desperate Cairo fathers sell their kidneys to buy food for their children,⁷⁷ Brazilian mental patients, eyes gouged out to be sold for cornea transplants, are left to die in a city dump buzzing with flies.⁷⁸ Whether in the form of barbaric organ theft or nominally compensated, exploitative surgeries, these procedures remind us that language and law are causally linked to violence, that our “interpretive commitments . . . are realized . . . in the flesh.”⁷⁹ Biotechnology’s commodification of the body, however benign in purpose, can be fraught with malign consequences for those vulnerable persons who become the sources of the new bioscientific

73. *Id.* at 148 (emphasis added).

74. See generally Symposium *The Sacred Body in Law and Literature*, 7 YALE J.L. & HUMAN. 75 (1995).

75. The body is, not surprisingly, central to theoretical literature on violence. See generally René GIRARD, *VIOLENCE AND THE SACRED* (Patrick Gregory trans., 1977) (violence is the product of mediated or mimetic desire; we desire what another desires, rather than the object itself. Violence results in the attempt to erase the other’s desire.) On violence and law, see generally Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986); Austin Sarat & Thomas Kearns, *A Journey Through Forgetting: Toward a Jurisprudence of Violence*, in THE FATE OF LAW 209 (Austin Sarat & Thomas Kearns eds., 1991).

76. MICHELLE GOODWIN, *BLACK MARKETS: THE SUPPLY AND DEMAND OF BODY PARTS* 10–12 (2006).

77. Chris Hedges, *Egypt’s Desperate Trade: Body Parts for Sale*, N.Y. TIMES, Sept. 23, 1991, at A1. The exploitation of poor people where organ sales are legal or tolerated is common. See WORLD HEALTH ORGANIZATION, *HUMAN ORGAN TRANSPLANTATION* 7 (1991); WHO *Resolution Preventing the Purchase and Sale of Human Organs*, in Law Reform Commission of Canada, *Procurement and Transfer of Human Tissues and Organs* 202-3 (Working Paper 66) (1992). The 14th International Congress on Penal Law in 1989 (Int’l Ass’n of Penal Law) resolved that “commercialization of human organs and tissues should be prevented, if necessary by penal sanctions.” WHO, *HUMAN ORGAN TRANSPLANTATION*, *supra*, at 14–15 (citing Joan Gilmour, *supra* note 65). See also David Price & Ronnie Mackay, *The Trade in Human Organs*, NEW L.J., Sept. 20, 1991 at 1272, and Sept. 27, 1991, at 1307 (examining the British Human Organ Transplants Act of 1989).

78. THE BODY PARTS BUSINESS (CBC/National Film Board of Canada, 1993). For an introductory look at international legal norms set out in the Universal Declaration of Human Rights relating to buying and selling (or stealing) organs, see Remarks by Richard Lillich, *Health, Human Rights and International Law*, in 82 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 122, 130 (1988).

79. Cover, *supra* note 39, at 1605. It may be noteworthy that the torture and murder of political dissidents by fascist regimes is frequently justified using a medical metaphor, for example, ‘ridding the social body of a cancer.’

commodity. Where the body is concerned, one should beware the violence and inequality of property relationships which threaten even the formal equality of contractual relationships. Law, economy, the state, and the body are structurally linked, and we must excavate these linkages. Judge Arabian's dichotomization of profanity and the sacred body, the latter threatened by property rights (though, strangely, he is not so fearful of property rights held by the researchers!) suggests a fear of primitive violence to the body. Curiously here, property rights are supposed to be the source of that threat, at least when wielded by a patient "source."

There is, however, an alternative, postmodern interpretation of commodification that merits examination. Donna Haraway claims that the reconstruction of a critical subjectivity, literally "making subjects," is best advanced by focusing on suffering and dismemberment, on disarticulated bodies rather than on the powerful Enlightenment subjects who take themselves as property.⁸⁰ Though Haraway makes the claim with reference to Sojourner Truth and the intersection of sexism and slavery, she hints that the fragmentation of the body by the Human Genome Initiative likewise provides a segue into emancipatory discourses about new subjectivities and new "essences." In abolitionist literature, the contrast between suffering, punished slave bodies and the ideals of self-ownership is a powerful rhetorical engine driving the argument for equality.⁸¹ Self-ownership is the principle which condemns the universal commodification of chattel slavery: the slave's body was "not mine, but his"; "self-right is the foundation right. . .to which all other rights are fastened."⁸² Similarly (and ironically), Moore's conversion claim fragments his body in its attempt to (symbolically) reunite him with his body—while his cells sit "immortalized" in controlled-environment containers, infinitely replicating themselves.⁸³ Thus one can see that, as convertible property, the body becomes not only alienable, but alien. Perhaps this alienation grants society the freedom to remake both body and self—the postmodern freedom to reconstitute what is exposed as already constituted in discourse.

Paul Rabinow points out that the profane/sacred dichotomy is used inconsistently in the *Moore* decision.⁸⁴ A conservative, Judge Arabian

80. Donna J. Haraway, *Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective*, in *SIMIANS, CYBORGS, AND WOMEN: THE REINVENTION OF NATURE* 127 (1991).

81. See text at note 6, *supra*. Frederick Douglass's autobiography makes self-ownership and suffering slave bodies central to the narrative and the normative.

82. *Id.*

83. PAUL RABINOW, *ESSAYS ON THE ANTHROPOLOGY OF REASON* 185 (1996). "Immortalization" is a process by which cell-lines are designed to infinitely reproduce themselves in a research lab under controlled conditions.

84. *Id.* at 181–82.

was concerned with moral degradation⁸⁵ and employed the trope of sacredness to dissuade other plaintiffs who might follow Moore in trying, unconscionably, to secure a share of the profits from biomedical research which used their tissues. Then, however, “acknowledging that links between the sacred and profane must be forged in a capitalist society,” Judge Arabian proposes a profane, modern remedy in the public interest: legislated profit-sharing between donor and researcher.⁸⁶ Furthermore, he concurs in the majority opinion which gives the researchers a (profane?) property interest in the same cells.⁸⁷

Judges Broussard and Mosk dissented on the conversion issue. Judge Broussard argued that, because his doctors interfered with Moore’s common law right to control his tissue before its removal by failing adequately to disclose material information relevant to informed consent, Moore had a right to compensation for the foregone value of his right to control use of his tissue.⁸⁸ Judge Mosk’s central argument is that society has a strong interest in “recognizing that every individual has a legally protectible property interest in his own body and its products” so as to protect the body “as the physical and temporal expression of the unique human persona.”⁸⁹ He also argued that it was inequitable that the doctors but not the patient should profit from this, and complained that the researchers treated Moore’s body as a commodity. It is difficult to see how Judge Mosk’s prescription, that we ought to protect a source’s property right in his or her tissue, counters commodification; rather, it seems to augment it.

Even the majority wavered on the property point, however, holding: “We do not purport to hold that excised cells can never be property. . . .”⁹⁰ The call of the market is strong. Nor did the majority clearly address the moral point raised by Judge Arabian — whether an individual’s physical uniqueness should be treated as fungible produce. The majority instead focused on the public interest in not unduly burdening (increasingly private) biomedical research. It has been proposed, following Margaret Jane Radin’s analysis of market-inalienability, that the best compromise between Judge Mosk’s and Judge Arabian’s concerns is the recognition of a market-inalienable property right in one’s body parts.⁹¹ This would have the dual advantage, it is argued, of providing the necessary amount of

85. For a discussion of the case from the perspective of moral theory, see generally, Carl F. Cranor, *Patenting Body Parts: A Sketch of Some Moral Issues*, in *OWNING SCIENTIFIC AND TECHNICAL INFORMATION 200* (Vivian Weil & John W. Snapper eds., 1989).

86. RABINOW, *supra* note 83, at 181-82.

87. HYDE, *supra* note 5.

88. *Moore v. Regents of the U. of Cal.*, 793 P.2d 479, at 499 (Cal. 1990) (Broussard, J., concurring and dissenting).

89. *Id.* at 515 (Mosk, J., dissenting).

90. *Id.* at 493.

91. Bray, *supra* note 65, at 216-17.

control over one's body, without selling out the body as a fungible commercial item. An inalienable property interest in the body amounts to extending some property principles to the body (the right to exclude, rights of use), but drawing the line at its exchange in contract (the right to include). There may be some pragmatic value in the suggestion, although it is not clear that it provides any protection of autonomy that an expansive duty of physician disclosure and informed consent would not, as the majority itself ultimately concluded. Its utility lies, however, in preventing the feared commodification of body parts which would result from voluntary sales.

The court also appears inconsistent on the point of "abandonment." The majority assumed that Moore had abandoned his spleen and its valuable cells when he consented to its removal.⁹² Since traditionally no property interest exists in abandoned tissues, personalty, or land, Moore ipso facto has no right in his excised spleen. The court had intimated, however, that Moore's consent to its removal was not properly obtained because his doctors had not revealed to Moore their research interest in his cells. How could he have abandoned something, the removal of which he did not consent to?

The majority held that Moore could not sustain a conversion claim based on the theory of a violation of his rights to publicity or privacy.⁹³ The court took the view that everyone has genetic information coded for the manufacture of the types of cells Moore had in his spleen: the particular nature of Moore's was "no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin."⁹⁴ It was Moore's doctors who had made something of the cells, not Moore. As the body is reduced to information, like that mined from Moore's body, ownership comes increasingly to be subsumed under an "ideology of authorship."⁹⁵ In the words of the Court,⁹⁶ Moore becomes a "naturally occurring raw material," whose "unoriginal" genetic material is transformed into something unique and valuable by the "inventive effort," "ingenuity," and "artistry" of his doctors.⁹⁷ The

92. *Moore*, 793 P.2d at 488–89. The court also points out that California statute makes a patient's possession of excised tissue impossible for public health reasons. *Id.* at 491–92.

93. The theory developed around public figures claiming privacy rights in their appearances or stage/screen personalities. See *Lugosi v. Universal Pictures*, 603 P.2d 425 (Cal. 1979) (recognizing Bella Lugosi's privacy right in a particular screen version of Dracula); *White v. Samsung Electronics America Inc.*, 971 F.2d 1395 (9th Cir. 1991), *reh'g denied* 989 F.2d 1395 (9th Cir. 1990) (holding robot replica of Vanna White was not "likeness" for purposes of advertising without consent).

94. *Moore*, 793 P.2d at 490.

95. ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES: AUTHORSHIP, APPROPRIATION, AND THE LAW* (1998); *RETHINKING COMMODIFICATION* (Martha M. Ertman & Joan C. Williams eds., 2005).

96. *Moore*, 793 P.2d at 492–93.

97. See also James Boyle, *A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading*, 80 CAL. L. REV. 1413, 1518 (1992), and Boyle, *supra* note 24.

uniqueness and originality of Moore's cells do not measure up to the "Romantic ideal of authorship," the "arcane labor and dazzling originality" required for a license to information.⁹⁸

The Moore majority also held that it would be contrary to public policy to reward a source with rights in his tissue that might be used to ransom publicly useful research.⁹⁹ On the other hand, (increasingly commercial) research teams must, for the sake of incentive, be rewarded with exactly such a property right in the cells.¹⁰⁰ This seems a rather crass concession to commercialization and of course contributes to the isolating patchwork of private interests that actually retards science. Rabinow attributes the concession to a larger dynamic, evident in the *Moore* decision: late capitalism is "characterized in part by Frederic Jameson as the 'prodigious expansion of capital into hitherto uncommodified areas', specifically nature."¹⁰¹ Rabinow reads the *Moore* decision as a story of modern discomfort with scientific method, a story of the modern epistemological rift between truth and virtue, long since incorporated by science but only now developing a cultural expression. That science would use truth to do evil dawns only slowly on a culture that still reveres the trinity of knowledge, truth, and beauty. The biosciences are becoming rapidly and increasingly commercial; pharmaceutical companies mimic the structure of universities to attract talent; funding is tied to applied results. Funding applies pressure to abandon the conventional scientific search for truth, replacing it with a new commercial focus on producing health.¹⁰²

It is important to remember that the body is constituted in part by the discursive practice of the market; the body is not pristine. Practically, recognition of a market-inalienable property right in one's body could provide people control over their bodies and would also prevent body parts and tissue from becoming a fungible commodity. John Moore would then have the right to control the use of his spleen cells but not to profit from that control. Moore's relationship of trust with his doctors vis-à-vis his person, his body, and their subsequent profit from his cells might ground recognition of an enforceable property right by Moore in his cells as converted into the profitable cell line. His concrete situation in relation to his doctors, trusting them, and vulnerable to their exploitation of his

98. See Boyle, *A Theory of Law and Information*, *supra* note 97, at 1508-20. The Romantic ideal of ownership has its roots in Kant and Hegel. Alan Ryan, *The Romantic Theory of Ownership*, in PROPERTY AND SOCIAL RELATIONS 52 (Peter Hollowell ed., 1982). Strangely, those who criticize intellectual property law's reliance upon the ideology of "romantic" authorship do not explore the significance of Kant and Hegel to the ideology of authorship.

99. *Moore*, 793 P.2d at 494-96.

100. *Id.*

101. RABINOW, *supra* note 83, at 171 (citing Frederic Jameson, *The Cultural Logic of Late Capitalism*, in Frederic Jameson, POSTMODERNISM OR, THE CULTURAL LOGIC OF LATE CAPITALISM 1-54 (1991)).

102. RABINOW, *supra* note 83, at 176.

“resource,” could grant him a reliance interest in his cells to prevent their profiting from him. It also points out how his cells became commodified by his doctors’ exploitation of his ignorance and his condition. But it is critical to note that what undid Moore in the case was not an excess of commodification, but a dearth of it. Had he been able to exercise self-ownership in the form of property rights, with a capacity to exercise rights of inclusion and exclusion, his autonomy would have been strongly augmented, not diminished. The Supreme Court majority’s fear of commodification had the perverse result of depriving Moore of the broad rights of self-determination and autonomy that self-ownership symbolized in the earlier period of degradation of people’s bodies under chattel slavery.

IV. COMMODIFICATION AND THE HUMAN GENOME: FLESH MADE KNOWLEDGE¹⁰³

The postmodern dynamics of information and authorship identified in the *Moore* decision are also evident in gene patenting and the Human Genome Project.¹⁰⁴ Scientists at the National Institutes for Health have been applying for patents on human gene fragments at a rate of thousands a week since 1991; all are pending approval by the US Patent and Trademark Office.¹⁰⁵ Some of these have been granted by the Patent and Trademark Office; most are pending. The Human Genome Initiative, with its three billion dollar projected cost, seeks to identify and catalogue the complete genetic sequence of the human organism. The number of patent applications associated with the Project is staggering; “tens of thousands of genes that are our most intimate genetic heritage, would be owned by a handful of companies and governments.”¹⁰⁶ And of course, what the researchers are seeking to patent are parts of our bodies, not mere mechanical inventions or engineered non-human cells.¹⁰⁷ The technical patent issue presented, since the gene sequences awaiting patent probably satisfy subject matter and novelty requirements, is whether they can be challenged on grounds of obviousness. “DNA sequences whose identification requires the development of new techniques would be held nonobvious and patentable under present law.”¹⁰⁸

103. I invert here the title of the chapter *Knowledge Made Flesh*, in JACK M. BALKIN, *CULTURAL SOFTWARE: A THEORY OF IDEOLOGY* 286 (1998).

104. For an analysis of various theoretical property approaches to genetic information, see Catherine Valerio Barrad, *Genetic Information and Property Theory*, 87 NW. U. L. REV. 1037 (1993).

105. Lisa Belkin, *Splice Einstein and Sammy Glick. Add a little Magellan.*, in N.Y. TIMES MAGAZINE, Aug. 23, 1998, at 26.

106. KIMBRELL, *supra* note 27, at 190.

107. HUBBARD & WALD, *supra* note 27, at 126.

108. Rebecca Eisenberg, *Patenting the Human Genome*, 39 EMORY L.J. 721, 744 (1990). See generally Pamela A. Doherty, Comment, *The Human Genome: A Patenting Dilemma*, 26 AKRON L. REV. 525 (1993); Michael S. Greenfield, *Recombinant DNA Technology: A Science Struggling with*

The jurisprudential basis for patenting life-forms lies in the Supreme Court's decision in *Diamond v. Chakrabarty*.¹⁰⁹ The organism at issue was a crude oil-eating microbe, designed in General Electric laboratories in Schenectady, New York to clean up following ocean oil spills. The microbe eventually proved ineffective for this purpose, but before this was known, General Electric and Mr. Chakrabarty attempted to patent it. The Patent and Trademark Office rejected their application because, while the bacteria did not occur in nature, living organisms of any kind were not patentable at the time the application was filed. On appeal to the U.S. Supreme Court, it was held that a genetically altered organism can be patented as a manufacture under the Patent Act. Under the decision, what distinguishes patentable matter is that it is the product of human intervention. Human gene sequences on this test would seem to be nonpatentable, but in fact may be patentable if presented in a purified form not present in nature.¹¹⁰

From a cultural studies standpoint, the science of genetics is interesting for what it reveals about our hopes, fears, and species-aspirations.¹¹¹ In revealing primal information about how we are assembled, genetics displace divinity. Humanity is revealed as frail and fallen, but perfectible if the right codes are known. Similarly, dangerous or undesirable traits can be eliminated.

In her book on resurrection of the body in Medieval Christian doctrine, Carolyn Walker Bynum writes

Christian preachers and theologians from Tertullian to the seventeenth century asserted that God will assemble the decayed and fragmented corpses of human beings at the end of time and grant to them eternal life and incorruptibility. . . . Scholastic theologians worried not about whether the body was crucial to human nature but about how part related to whole — that is, how bits could and would be reintegrated after scattering and decay.¹¹²

Resurrection was understood literally: “learned debates raged over whether fingernails discarded over the course of a lifetime would be resurrected as a new person on the day of judgment. . . . Augustine and Aquinas took the question of resurrection. . . quite seriously.”¹¹³ The corpse was to be factually reassembled. This literalness and stark materiality of Medieval doctrine on resurrection strikes modern

the Patent Law, 44 STAN. L. REV. 1051 (1992); Rainer Moufang, *Patenting of Human Genes, Cells and Parts of the Body? — The Ethical Dimensions of Patent Law*, 25 I.I.C. 487 (1994).

109. 447 U.S. 303 (1980).

110. Eisenberg, *supra* note 107, at 726.

111. Rochelle Cooper Dreyfuss and Dorothy Nelkin, *The Jurisprudence of Genetics*, 45 VAND. L. REV. 313 (1992) (arguing that genetics comes to function as form of legal doctrine and social control).

112. CAROLYN WALKER BYNUM, FRAGMENTATION AND REDEMPTION 239 (1991), *quoted in* RABINOW, *supra* note 83, at 183-84.

113. RABINOW, *supra* note 83, at 183.

sensibilities as strange. Bynum shows that we must take the doctrine seriously, however, because our own self-conceptions carry within them atavistic remnants of such a literal identification of self, soul, and body.¹¹⁴ She quotes studies revealing a common belief in contemporary America that, in an organ transplant, some vestige of identity is passed on to the recipient along with the organ.

Some have argued that the body is now so fragmented by instrumental atomisation of corporeal information by science that no person as a whole can be said to remain attached to the body.¹¹⁵ This is, I think, an unsatisfactory reading of the postmodern in these scientific and technological practices. Indeed, arguably a high-tech resurrection of the body is the aspiration that underlies some of the fragmenting technologies like genetics. If genetic screening allows identification and prediction of genetic traits and genetic therapy allows alteration of traits, then perhaps the possibility of genetics that is so seductive to our culture is the possibility of a re-assembly of the body in improved form, cleansed of imperfections—a resurrection. The body can be recoded for certain traits, policed and detected through fetal ultrasound and enforced through gene treatment. Cloning is being developed—could one day a breast removed by mastectomy or a failed kidney be replaced with a genetically identical healthy replica? Could the body be made new “after scattering and decay,” perhaps even made immortal if the right code can be identified—granted, as Bynum’s *Medievals* would have had it, “eternal life and incorruptibility?” Genetic science, so understood, provides an example of Haraway’s claim that it is in dismembered, fragmented bodies that one finds liberated subjects—liberated by genetically engineered resurrection. The same resurrective hopes can be identified in other fragmenting technologies: performance enhancement, transexuality, and cosmetic surgery, for instance.

It might be also argued that genetic science represents the possibility of social cleansing through a kind of sacrifice. In *Violence and the Sacred*,¹¹⁶ Rene Girard describes the phenomenon of the sacrificial victim, someone socially marginal who is sacrificed to purge society of its ills. This would seem to be a practice characteristic of primitive, organic societies. But it survives in the modified form of modern genetic science, at least where this tends toward a renewed form of eugenics. Genetic science promises identification, even in utero, of genetic traits that are medically undesirable (or misidentifies social traits as having a genetic origin).¹¹⁷ These traits—and the bodies themselves which manifest them—can then

114. *Id.* at 185.

115. *Id.* at 149.

116. RENE GIRARD, *VIOLENCE AND THE SACRED* (1977).

117. Dreyfuss & Nelkin, *supra* note 111, at 313-16 (critiquing “genetic essentialism”).

be repaired or eliminated, sometimes in utero.¹¹⁸ Abortion (which is of course a dismemberment of fetal bodies) when justified on grounds of genetic disorder, could be interpreted as such a sacrificial practice; so, too, can gene therapy be used to “correct” criminality or homosexuality. Perhaps biotechnology’s lure is in part that it promises just such an anaesthetized form of sacrifice; of course the apparent neutrality of science can mask the political, racial, and other biases inherent in the implementation of any technology.¹¹⁹ Consequently, the sacrifice proffered by biotechnology may find discriminatory applications. But on the other hand, the commodification wrought by biotechnology is indiscriminate, and thus potentially emancipatory in terms of fostering universal self-ownership, at least where it resonates with 18th and 19th century emancipatory abolitionist discourse about slave self-ownership.

Reproductive technologies, like genetic science, raise profound problems with respect to commodification. Reproductive technologies in general, and particularly gestational surrogacy, are frequently cited as examples of technologies which commodify women (and the children whose surrogate production is contracted for).¹²⁰ A strong version of

118. China’s Minister of Public Health proposed such a scheme in December, 1993, but it was later rejected as a result of international pressure. Patrick E. Tyler, *China Weighs Using Sterilization and Abortions to Stop ‘Abnormal’ Births*, N.Y. TIMES, Dec. 22, 1993, at A8.

119. See Lisa C. Ikemoto, *The Racialization of Genomic Knowledge*, 27 SETON HALL L. REV. 937 (1997) (describing the racist implementation of genetic knowledge, characterizations of genetic criminality in populations of color, and the implicit white “racing” of the “normal” genome).

120. See generally Carol Stabile, *FEMINISM AND THE TECHNOLOGICAL FIX* (1994) (exploring how reproductive technologies effect our sense of bodies and the self). For case law, see generally *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993) (awarding sole custody of “test tube baby” to “genetic” parents over genetically unrelated gestational surrogate); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that insurance programs excluding pregnant women do not violate Title VII); *In re A.C.*, 533 A.2d 611 (D.C. 1987) (forcing Caesarean on terminally ill woman, hastening her death), *rev’d*, 573 A.2d 1235 (D.C. App. 1990).

For feminist critiques that view these technologies as a means of gender oppression, objectifying women and diminishing women’s power by appropriating reproductive control, see Gena Corea, *THE MOTHER MACHINE: REPRODUCTIVE TECHNOLOGIES FROM ARTIFICIAL INSEMINATION TO ARTIFICIAL WOMBS* (Harper & Row, 1985); Janice G. Raymond, *WOMEN AS WOMBS: REPRODUCTIVE TECHNOLOGIES AND THE BATTLE OVER WOMEN’S FREEDOM* (1993); Barbara Katz Rothman, *RECREATING MOTHERHOOD: IDEOLOGY AND TECHNOLOGY IN A PATRIARCHAL SOCIETY* 40-64 (1989). See also Emily Martin, *THE WOMAN IN THE BODY: A CULTURAL ANALYSIS OF REPRODUCTION* 139-55 (1987) (discussing Caesarean sections and episiotomies).

Of course, not all feminist analysis opposes reproductive technologies. See, e.g., Lori B. Andrews, *Surrogate Motherhood: The Challenge for Feminists*, 16 L. MED. & HEALTH CARE 72, 78 (1988) (arguing that feminist rationales opposing surrogacy “could undermine a larger feminist agenda”); Lynn M. Paltrow, *Test-Tube Women: What Future for Mother-hood?*, 8 WOMEN’S RTS. L. RPTR. 303, 303 (1985); reviewing *TEST TUBE WOMEN: WHAT FUTURE FOR MOTHERHOOD?* (Rita Arditta et al. eds., 1984) (criticizing some feminists’ condemnation of new reproductive technologies for being based on “a false view of women as powerless in a monolithic patriarchy”); Michelle Stanworth, *Birth Pangs: Conceptive Technologies and the Threat to Motherhood*, in *CONFLICTS IN FEMINISM* 288, 295-96 (Marianne Hirsch and Evelyn Fox Keller eds., 1990) (criticizing some feminists’ opposition to new reproductive technologies as not being the best way to help women of all social groups).

For liberal defenses of reproductive technology, arguing that it promotes individuals’ right to procreate without government interference, see, e.g., Lori B. Andrews and Lisa Douglass, *Alternative Reproduction*, 65 S. CAL. L. REV. 623, 640 n.56 (1991); John A. Robertson, *CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES* 22-42 (1994); John A. Robertson,

market alienability¹²¹ would have it that surrogacy ought to be freely marketable due to property interests each of us holds in our reproductive capacity. Margaret Radin has argued, to the contrary, that surrogacy devalues women's personhood and commodifies women's bodies and identities. Therefore, she has argued, surrogacy should be market-inalienable personal property. But a postmodern or pragmatic analysis less attached to a liberal notion of a foundational, natural, and authentic person and body—i.e., one constituted in (legal) discourse—offers a different analysis: one that recuperates self-ownership and property rights in the person selectively, strategically, so as to promote strong autonomy. Thus construed, one can see technological fragmentation and commodification of the body as less of a threat, indeed possibly even a boon, to autonomy and personhood. Of course, a middle position, partial market-inalienability (wherein we might recognize property rights in human genetic information, but not allow it to be sold) is possible and may strike the optimal balance between commodification which promotes self-ownership and autonomy and an inappropriate commodification which facilitates exploitation of subordinate groups.

Take, for example, the widely known Baby M decision.¹²² Mary Beth Whitehead, a gestational surrogate, contracted to bear a child created from her ovum fertilized by the contractor's sperm. She decided to contest the contract so as to keep the child herself. The New Jersey superior court held that the contract was not illusory and that Whitehead was bound by its terms. This liberal freedom of contract approach replicates the strongly dichotomous subject/object structure of liberal legalism's property regime:¹²³ Whitehead's reproductive capacity and the child were construed as objects, the "father" as subject, and thus Whitehead could market her services as a child producer. Women's relation to pregnancy is viewed in curiously market-oriented terms by the lower court, denying the unique relationship between a woman and fetus in pregnancy, inside her body. Viewed as an intimate relationship unique to women's personhood, pregnancy (even as a gestational surrogate) ought to be protected by a woman's property rights in her reproductive capacity (i.e., a strong self-ownership right) that ought to trump market rights contracted for by the sperm donor. This relationship itself in turn, and the property rights and

Procreative Liberty and the State's Burden of Proof in Regulating Noncoital Reproduction, 16 L. MED. & HEALTH CARE 18, 19 (1988), in Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 212 n.9 (1995).

121. Whether liberal or conservative depends upon the gendered context of a dispute. Conservatives, for example, might not favor strong market alienability in the context of reproduction on the paternalistic view that law should protect women from their own bad choices regarding their bodies.

122. *In re Baby M*, 217 N. J. Super. 313 (Ch. Div. 1988), 525 A.2d 1128 (1987), *rev'd* No. A-89 (N.J. Feb. 3, 1988). Many of the same underlying issues arise in the sales of human eggs, for which there is a thriving market.

123. Halewood, *supra* note 5, at 1338.

self-ownership which protect it, should be recognized as discursively constructed, contingent, subject to change and therefore liberating. A postmodern analysis of the relation between the contracting man and the service-producing woman in surrogacy dismantles the ideological overlay of politically neutral, contractual transfer of the woman's personal property, that is, her reproductive capacity, which the court has imposed on the facts here. The commodification of Whitehead serves to raise the real property issue to the fore: whether self-ownership is indeed universal as claimed by liberal theory, or whether its historically skewed distribution will finally be recognized by law. Her commodification forces a confrontation over contradictions in liberal legalism's promises of self-ownership, and the most powerful rhetorical weapon at Whitehead's disposal here is precisely what she hopes to gain: self-ownership.

CONCLUSION: RECONCILING SELF-OWNERSHIP AND COMMODIFICATION

This Article has made a case for a newly invigorated jurisprudence of self-ownership prompted by the discourse of property rights in body parts, commodification, and biotechnology. The conversion of the body to information, flesh made knowledge, which process intellectual property law seeks to protect as forms of scientific authorship of the human organism, seems the paradigmatic postmodern practice. As Jean Baudrillard wrote of postmodernity, we only recognize the real in its image:¹²⁴ biotechnology serves up the body as knowledge and information, commercially produced and disseminated for public consumption, its "inventors'" commercial monopoly protected by law. Corporeality is problematized by corporeal information: the body becomes a body of information rather than of flesh and bone. The jurisprudential disembodiment and de-physicalization of property in Kant, Hegel, Hohfeld, and in intellectual property itself, is manifestly evident in recent applications of the property paradigm to the human body and its components. But reconstructions of property rights and self-ownership in terms less atomistic and abstract, more relational and embodied, can facilitate a more generous, humanistic, and emancipatory project of self-ownership.

The conventional objection to bringing property rights and the market to bear upon the human body is that it facilitates commodification of the person that is fundamentally at odds with human dignity and the notion of the body as vessel of the soul. This is supposed to be so, in part, because commodification is thought to undermine that strain of our liberalism that stresses self-ownership as a means to protect autonomy and sovereignty. But the historical, imperfect distribution of the rights of self-ownership,

124. JEAN BAUDRILLARD, *SELECTED WRITINGS* 145–46 (Mark Poster ed., 1988).

reserved for white men as it has for the most part been, is emphatically highlighted in the renewed debates over commodification. The general or universal commodification of the human body by biotechnology makes possible a more democratic distribution of self-ownership, and with it a reconciliation of self-ownership and commodification. If we take care to prevent its disproportionate impact on subjugated groups, perhaps by imposing partial market-inalienability upon some human genetic information or tissue, then commodification can in fact contribute to a renewed, emancipatory conception of self-ownership through law. The most salient objection to commodification, that it will threaten autonomy and self-determination, is thus brought seriously into question.