

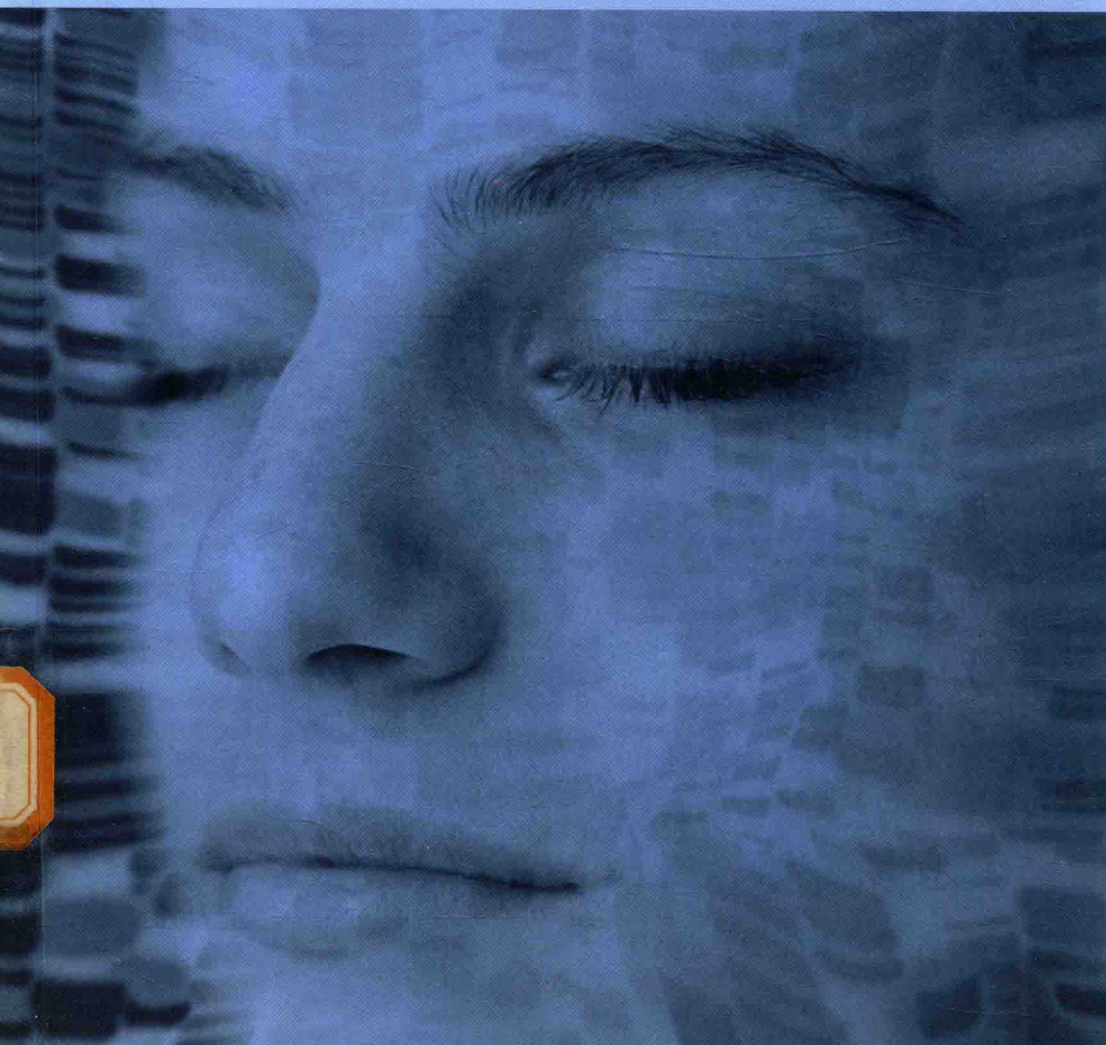
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Property in the Body

Feminist Perspectives

Donna Dickenson



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Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org

Information on this title: www.cambridge.org/9780521687324

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First published 2007

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing-in-Publication data

Dickenson, Donna.

Property in the body : feminist perspectives / Donna L. Dickenson.

p. cm. – (Cambridge law, medicine, and ethics)

Includes bibliographical references and index.

ISBN-13: 978-0-521-86792-4 (hardback)

ISBN-10: 0-521-86792-4 (hardback)

ISBN-13: 978-0-521-68732-4 (pbk.)

ISBN-10: 0-521-68732-2 (pbk.)

1. Biotechnology – Moral and ethical aspects. 2. Body, Human. 3. Feminist theory.

I. Title. II. Series.

TP248.23.D53 2007

174'.957 – dc22

2006035152

ISBN 978-0-521-86792-4 hardback

ISBN 978-0-521-68732-4 paperback

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Property in the Body: Feminist Perspectives

New developments in biotechnology radically alter our relationship with our bodies. Body tissues can now be used for commercial purposes, while external objects, such as pacemakers, can become part of the body. *Property in the Body: Feminist Perspectives* transcends the everyday responses to such developments, suggesting that what we most fear is the feminisation of the body. We fear our bodies are becoming objects of property, turning us into things rather than persons. This book evaluates how well-grounded this fear is, and suggests innovative models of regulating what has been called 'the new Gold Rush' in human tissue. This is an up-to-date and wide-ranging synthesis of market developments in body tissue, bringing together bioethics, feminist theory and lessons from countries that have resisted commercialisation of the body, in a theoretically sophisticated and practically significant approach.

DONNA DICKENSON is Emeritus Professor of Medical Ethics and Law at the University of London. She received the 2006 international Spinoza Lens Award for contribution to public debate on ethics, becoming the first woman to receive the award.

This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law's complex and troubled relationship with medicine across both the developed and the developing worlds. In the past twenty years, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as the WHO and UNESCO now regularly address issues of medical law.

It follows that we would expect ethical and policy questions to be integral to the analysis of the legal issues discussed in this series. The series responds to the high profile of medical law in universities, in legal and medical practice, as well as in public and political affairs. We seek to reflect the evidence that many major health-related policy debates in the UK, Europe and the international community over the past two decades have involved a strong medical law dimension. Organ retention, embryonic stem cell research, physician-assisted suicide and the allocation of resources to fund health care are but a few examples among many. The emphasis of this series is thus on matters of public concern and/or practical significance. We look for books that could make a difference to the development of medical law and enhance the role of medico-legal debate in policy circles. That is not to say that we lack interest in the important theoretical dimensions of the subject, but we aim to ensure that theoretical debate is grounded in the realities of how the law does and should interact with medicine and health care.

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Acknowledgements

Grateful acknowledgement is made to the *Journal of Bioethical Inquiry* for permission to reprint sections of my article 'The lady vanishes: what's missing in the stem cell debate' in chapter 3, and to *Medical Law International* for permission to reprint sections of an article which appeared in (2005) 7(1), as part of chapter 7. Shorter sections of chapter 8 also appeared in (2005) 1(1) *Genomics, Society and Policy*. Parts of chapter 2 appear in several chapters of my earlier *Property, Women and Politics* (Cambridge, Polity Press, 1997), but without the links to modern-day biotechnology.

Preface

In the two years since I started writing this book, property in the body has become the most topical of topics. Two recent scandals, in particular, have elevated it to a dubious pre-eminence: the theft of the late broadcaster Alistair Cooke's bones by a criminal ring which sold them for US\$7,000 to a dental implants company, and the revelation that the supposed stem cell breakthroughs by Prof. Hwang Woo Suk used 2,200 ova in the course of research that turned out to be entirely fraudulent. From its earlier low obscurity, property in the body has risen to such heights of interest that the reader could be excused for asking, 'What more could I possibly want to know about this topic?'

Luckily, or unluckily, there is still a great deal to bring to light, and a particular kind of illumination required. The rise of private umbilical cord blood banking, for example, has not yet made the media headlines. What coverage it has received in the popular and scholarly literature has been based on false assumptions, including what I present in chapter 4 as the mistaken presumption that the cord blood is the baby's and not the mother's, even though she puts effort into its extraction. Why that assumption has taken root has to do, along with other large misconceptions and abuses such as those perpetrated by Hwang, with particular blind spots: gendered ways of thinking about property in the body. As I argued in my earlier *Property, Women and Politics*, the common law, liberal and Marxist political theory, and even many second-wave feminists have presented women as having no relation to property except as its objects. Here, in this new book, I build on that insight, and on the counter-attempt I made in *Property, Women and Politics* to lay the foundations for a theory of property that would count women in. Property in the body was not my sole concern there; here it is, but the practical questions about ethics, law and politics of human tissue raised in this book are analysed using the philosophical and jurisprudential model I developed earlier.

But my theoretical thinking did not come to a premature halt ten years ago. This book takes both the theory and the practice further, with the applied questions compelling further refinement and rethinking of

the model towards which I was groping then. That sort of symbiosis between theoretical and applied ethics is what I always aim to do: call it phenomenology, narrative ethics, feminist ethics, casuistry, Aristotelian *phronesis*, or what you will. I have never accepted that theory can flourish apart from practice, or the reverse.

The theoretical foundations which I laid almost ten years ago are now urgently required to deal with the welter of practical issues that have arisen in recent biotechnology. With its novel and solid feminist theoretical position, I hope that this book will transcend two dominant but ill-thought-out responses to the private enclosure of the genetic commons and tissue in the body. These are, first, the cynical shrug: 'we live in a capitalist society, so what do you expect?'; secondly, its neo-liberal counterpart: 'we live in a capitalist society, which will bring us great medical and scientific progress if we just leave well enough alone'. Both responses are far too simple and in fact pernicious. The rest of this book will show why.

I have benefited throughout the writing of this book from the generosity of many colleagues, who have manifested the altruistic qualities of a genuine 'gift relationship' in making their expertise, advice and kindness freely available to me. During my stay in 2004 at the Columbia University Institute for Scholars at Reid Hall, Paris, where this book was begun, I was given a great deal of support by Danielle Haase-Dubosc and Mihaela Bacou. Former and current members of the French CCNE (Comité Consultatif National d'Ethique) were equally generous with their time: among them, Nicole Questiaux, Simone Bateman and Anne Fagot-Largeault, to whom I am also grateful for her invitation to present a seminar on my work in progress at the Collège de France. Jean-Paul Amann, her deputy, was enormously helpful in setting up and chairing the session. At the CCNE library near the Invalides, I was warmly welcomed by staff and benefited from their excellent collection of bioethics literature, as well as from the specialised search facilities which they graciously make available to foreign scholars. Jennifer Merchant, professor at the Université de Paris II Panthéon-Assas, gave me a very great number of valuable 'leads' into the French bioethics and biolaw literature, which is still too little known outside France.

Chapter 8 could never have been written without the remarkable opportunity graciously afforded me by Nga Pae o te Maramatanga, the New Zealand National Institute for Research Excellence in Maori Development and Advancement. Their conference on 'Research ethics, tikanga Maori/indigenous and protocols for working with communities', held in Wellington in June 2004, was not just a scholarly gathering, but rather a collaborative venture with Maori communities all over Aotearoa/New Zealand. Invited speakers were sent into local groups to work together

in identifying the most pressing research ethics questions, then brought back to the plenary conference together with their hosts for an open discussion. I have never before given a conference paper which was followed not by the attack-and-defence style of questioning all too common among philosophers, but rather by a song from my hosts on the platform. It was one of the most moving experiences of my academic life, because it was much more than just academic. My deepest thanks to my hosts at the Bluff *marae*, Te Runanga o Awarua, particularly Sumaria Beaton, and to Mera Penchira, Sharon Hawke and Paul Reynolds of Nga Pae o te Maramatanga for their good company and excellent organisational skills. My deepest thanks also to Lopeti Senituli for presenting me with a copy of his paper on Tonga at this conference and for his helpful answers to my questions. I am grateful as well to John Pennington, Executive Officer of Toi Te Taiao/the Bioethics Council, who was hospitable and helpful in providing me with materials and explanations concerning the human gene transplantation consultation exercise. Most of all, I am very deeply honoured to have been ritually welcomed into the Bastion Point and Bluff *marae* by my hosts, the *tangata whenua*: *karanga mai, mihi mai*.

Rightly or wrongly, I like to think that my slant on bioethics issues is unusually global, but I could never have transcended the narrow bounds of liberal Anglo-Saxon thought without help from many friends abroad. Besides my Maori and French colleagues, I would particularly like to thank the organisers of several European Commission projects in which I have been involved, particularly Heather Widdows, Caroline Mullen, Helen Harris, Itziar Alkorta Idiakez, Aitziber Emaldi Cirion, Urban Wiesing, Christian Byk and Ruth Chadwick. It was thanks to my dear friend Ron Berghmans of the University of Maastricht that I first made these Europe-wide acquaintances. Other Dutch and Belgian colleagues also deserve a mention, particularly Ruud ter Meulen, Geertrui van Overwalle and Guy Widdershoven, all of whom have been, as the saying goes, a great pleasure to work with. I would also like to express my deepest thanks to the jury and organisers of the international Spinoza Lens award, particularly Marli Huijter and Rene Foqué, for the way in which they have helped me to see continuities in my work, of which I myself had been unaware, and to venture further into the Forbidden Forest of phenomenology.

I owe a very great deal to Dr Susan Bewley, chair of the Royal College of Obstetricians and Gynaecologists Ethics Committee, without whose assistance I would never have had access to the clinical evidence base about cord blood, used in chapter 4. I respect a great many clinicians for their commitment to serious ethical debate, but perhaps Susan most of all. My thanks should also go to the librarians at the Royal College,

to my colleagues on the Ethics Committee, and to my former student Saskia Tromp for first alerting me to the issue of cord blood during our supervisions.

I am also very grateful to Onesimus Kipchuma, associate editor of the *University of Nairobi Law Journal*, for providing me with a copy of the journal containing an article on 'The tragic African commons' by Prof. H. W. O. Okoth-Ogendo, which I found invaluable in writing chapter 8. Among many other colleagues whose comments have helped me to refine my ideas, I would particularly like to thank Catherine Waldby, Lori Andrews, Susan Dodds, Francoise Baylis, Carolyn McLeod, Catriona MacKenzie, Jane Kaye, Mary Mahowald, Carole Pateman, Alan Ryan, Jennifer Hornsby, Diana Coole, Susan James, Ingrid Schneider and Sarah Sexton. Thanks should also go to anonymous referees at Cambridge University Press, as well as to Margaret Brazier, Finola O'Sullivan and Brenda Burke.

And finally, once more with feeling, *con brio, affettuosamente*: to Chris, Anders and Pip.

DONNA DICKENSON
Beckley, Oxford
June 2006

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1 Do We All Have 'Feminised' Bodies Now?

It is widely feared that we no longer possess a property in our own bodies. Instead, it has been argued, 'what we are witnessing is nothing less than a new gold rush, and the territory is the human body'.¹ Tangible rights in human tissue and intangible rights in the human genome have been said to be the subject of a new enclosure movement by researchers, biotechnology corporations and governments.² Commodification of the body, broadly construed to include private property rights by third parties in tissue, DNA samples, umbilical cord blood and other substances derived from individuals' bodies, has caused great, if sometimes belated, outrage among patients' rights organisations, academic commentators, journalists and the general public, in both the developing and the developed worlds.³

¹ Suzanne Holland, 'Contested commodities at both ends of life: buying and selling embryos, gametes and body tissues' (2001) 11 *Kennedy Institute of Ethics Journal* 283–4.

² James Boyle, 'The second enclosure movement and the construction of the public domain' (2003) 66 *Law and Contemporary Problems* 33–74.

³ In a large literature, see e.g. James Meek, 'Why you are first in the great gene race', *The Guardian*, 15 November 2000, p. 4; Nuffield Council on Bioethics, *The Ethics of Patenting DNA* (London, Nuffield Council on Bioethics, 2002); Danish Council of Ethics, *Patenting Human Genes* (Copenhagen, Danish Council on Ethics, 1994); Bartha M. Knoppers, 'Status, sale and patenting of human genetic material: an international survey' (1999) 1 *Nature Reviews Genetics* 23; B. M. Knoppers, M. Hirtle and K. C. Glass, 'Commercialization of genetic research and public policy' (1999) 286 *Science*, 5448, 2277–8; Lopeti Sentituli, 'They came for sandalwood, now the b...s are after our genes!', paper presented at the conference 'Research ethics, tikanga Maori/indigenous and protocols for working with communities', Wellington, New Zealand, 10–12 June 2004; Donna Dickenson, 'Commodification of human tissue: implications for feminist and development ethics' (2002) 2(1) *Developing World Bioethics* 55–63; Commission on Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy* (London, Department for International Development, 2002); Comité Consultatif National d'Ethique, *Umbilical Cord Blood Banks for Autologous Use or for Research* (Report no. 74, Paris, CCNE, 2002); Margaret J. Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Cambridge, MA, Harvard University Press, 1996); and David Resnik, 'The commodification of human reproductive materials' (1998) 24 *Journal of Medical Ethics* 288–93.

An eBay auction for a healthy human kidney attracted global bids up to US\$5.75 billion. The leg bones of the late broadcaster Alistair Cooke were stolen by a criminal ring as his body lay in a New York funeral home, and subsequently sold, like those of an estimated 1,800 others, for processing into dental implants. Advertisements regularly circulate in US college newspapers, offering egg 'donors' amounts varying between US\$5,000–\$50,000,⁴ depending on 'desirability': blond, tall, athletic and musical donors command the higher prices, at considerable risk to themselves. One report documented the taking of seventy eggs at one time from a 'donor' who nearly died in the process;⁵ another, the international trade for beauty treatments of fetuses from Ukrainian women paid £100 to have an abortion.⁶ The commodification of genetic research, it has been alleged, extends beyond the issues of patenting gene sequences or harvesting DNA, to the way in which the very agenda of research is dictated by corporate requirements.⁷ If this is true, the scientific method has itself become a commodity. Even more broadly, both donors and recipients can be seen to become part of the 'phenomenology of exchange'.⁸

As in the old agricultural enclosure movement, 'things that were formerly thought to be uncommodifiable, essentially common or outside the market altogether are being turned into private possessions under a new kind of property regime'.⁹ Throughout the world a series of legal cases, statutes and patenting conventions such as the European Biotechnology Directive of 1998, appear to have generated an unstoppable momentum towards the transfer of rights over the body and its component parts from the individual 'owner' to others: for example, the *Moore* case, in which

⁴ Susan Weidman Schneider, 'Jewish women's eggs: a hot commodity in the IVF marketplace' (2001) 26(3) *Lilith* 22.

⁵ Allen Jacobs, James Dwyer and Peter Lee, 'Seventy ova' (2001) 31 *Hastings Center Report* 12–14.

⁶ Tom Parfit, 'Beauty salons fuel trade in aborted babies', *Guardian Unlimited*, 17 April 2005, available at www.guardian.co.uk. The report alleged that women were paid extra to have late abortions, since fetuses at an advanced stage of development were thought to have greater restorative powers. In a context where abortion was, until recently, the normal mode of 'contraception', vulnerable women may feel fewer qualms about this procedure; corrupt doctors, it is alleged, are even advising women to have a termination on grounds of fetal abnormality where none exists. An illicit trade between Ukraine and Russia provides the fetuses to Moscow beauty salons, where they are sold for up to £5,000 each.

⁷ Dorothy Nelkin, 'Is bioethics for sale?' (2003) 24 *Tocqueville Review* 2, 45–60.

⁸ Diane Tober, 'Semen as gift, semen as goods: reproductive workers and the market in altruism' (2001) 7 *Body and Society* 137–60.

⁹ James Boyle, 'Fencing off ideas: enclosure and the disappearance of the public domain', *Interactivist Info Exchange*, available at <http://slash.autonomedia.org/analysis>, accessed 10 September 2004, p. 5.

an immortal cell line was created from the T-cells of a patient who was held to have no further rights in that cell line.¹⁰

Most people are surprised and somewhat shocked when they learn that Moore apparently did not 'own' his body. Legal doctrines under both civil and common law systems have left us with something of a vacuum. In fact, we do not own our bodies in law: they are not the subject of property rights in any conventional sense, although traditionally they have been shielded to some extent by what James W. Harris calls 'protected non-property holdings'.¹¹ Thus while corpses cannot be owned at common law, those charged with their disposal – hospitals, families and public or religious authorities – are restricted by certain duties and endowed with certain powers, although these are not ownership privileges and powers. Once tissue is separated from the living body, however, the common law generally assumes either that it has been abandoned by its original 'owner', or that it is and was always *res nullius*, no one's thing, belonging to no one when removed.¹² Under previous circumstances, the tissue would have been presumed to have been removed because it was diseased, and thus of no further value to the person from whom it was extracted. Civil law systems such as that of France typically view the body as *une chose hors commerce*, or *res extra commercium*: a thing not subject to contract or exchange.¹³ Similarly, under French law, tissue removed during a procedure is considered to be abandoned, *res derelictae*. In both cases, contracts in bodily tissue and materials are difficult or impossible to enforce, although for different reasons. In both systems, patients have

¹⁰ *Moore v. Regents of the University of California*, 51 Cal. 3d 120, 793 P. 2d, 271 Cal. Rptr. 146 (1990). This well-known case concerned a man diagnosed with leukaemia who underwent a splenectomy for therapeutic purposes. He was subsequently asked to return to the hospital several times to donate further tissue samples unrelated to the spleen. It transpired that his unusually active immune cells had been used to produce an immortal cell line with an estimated commercial value of US\$3 million. Moore sued to establish proprietary rights in the cell line and the researchers' and clinicians' failure to obtain his informed consent to the further extractions.

¹¹ James W. Harris, *Property and Justice* (Oxford, Oxford University Press, 1996), p. 351.

¹² Jean McHale, 'Waste, ownership and bodily products' (2000) 8(2) *Health Care Analysis* 123–35.

¹³ For example, an influential and determinative early report of the French Comité Consultatif National d'Éthique (CCNE) (French National Consultative Ethics Committee) states: 'Il faut dresser une digue contre cette marchandisation de la personne, et il n'en est pas d'autre que le principe intangible selon lequel le corps humain est hors commerce.' ('We must set up a bulwark against such commodification of the person, and the most fitting is the intangible principle according to which the human body is beyond commerce.') CCNE, *Recherche biomédicale et respect de la personne humaine* (Paris, DF, 1987), cited in Anne Fagot-Largeault, 'Ownership of the human body: judicial and legislative responses in France' in Henk ten Have and Jos Welie (eds.), *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Dordrecht, Kluwer, 1998), pp. 115–40, at p. 130.

no further property rights in their tissue once an informed consent to its extraction or donation has been given.¹⁴

But why should it be so widely assumed that we do own our bodies? Why does it matter so much? A large part of what disturbs people about commodification of the body appears to be the way in which it transforms us into objects of property-holding, rather than active human subjects. (For the time being, I will not distinguish between objectification and commodification; chapter 2, however, will tease out some important differences between these two core concepts.) In the French context, this concern is clearly stated in several opinions of the national ethics commission, which has consistently declared that human dignity and subjectivity are incompatible with selling oneself or parts of oneself as objects. 'Trading persons, or parts of persons, or elements of persons in the market place, would turn subjects into objects, that is, subvert the foundations of the social order. Preserving the freedom of subjects involves maintaining (so to speak) all parts and bits of subjects within the realm of persons.'¹⁵ The sociologist Dominique Memmi has characterised the French national ethics committee's response to commodification of the body or genome as grounded in fear of a threat 'to the totality of the subject . . . of an intrusion into what appears to be the most secret and intimate area, that of the body or gene'.¹⁶ In the common law context, the emphasis on human dignity is less pronounced and a libertarian rights-based discourse more frequent.

Although some Anglo-American commentators argue that our rights as moral agents and human subjects actually require us to have the free right of disposal over our bodies,¹⁷ the common law posits that something can be either a person or an object – but not both – and that only objects can be regulated by property-holding. The implication is clear: to the extent that persons' body parts can be regulated by property-holding,

¹⁴ In France, the CCNE Avis on products derived from human materials (no. 9, February 1987) stipulates that products of commercial benefit derived from donated tissues should be sold at a market price which only reflects the researchers' and manufacturers' labour, and that the patient should have no right to any financial benefits. See Fagot-Largeault, 'Ownership', p. 131.

¹⁵ *Ibid.* p. 137. See, in particular, opinion no. 21, 'That the human body should not be used for commercial purposes' (1990) and opinion no. 27, 'That the human genome should not be used for commercial purposes' (1991).

¹⁶ Dominique Memmi, *Les gardiens du corps: dix ans de magistrature bioéthique* (Paris, Editions de l'Ecole des Hautes Etudes en Sciences Sociales, 1996), p. 18.

¹⁷ For arguments in favour of removing or modifying legal prohibitions on commodification of human tissue, see e.g., David B. Resnik, 'The commercialization of human stem cells: ethical and policy issues' (2002) 10 *Health Care Analysis* 127–54, and Stephen Wilkinson, 'Commodification arguments for the legal prohibition of organ sale' (2000) 8 *Health Care Analysis* 189–201.