

Are Persons Property?

*Legal debates about
property and personality*

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Ngaire Naffine*



Ashgate
Dartmouth

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Series Preface

The objective of the Dartmouth Series in Applied Legal Philosophy is to publish work which adopts a theoretical approach to the study of particular areas or aspects of law or deals with general theories of law in a way which focuses on issues of practical moral and political concern in specific legal contexts.

In recent years there has been an encouraging tendency for legal philosophers to utilize detailed knowledge of the substance and practicalities of law and a noteworthy development in the theoretical sophistication of much legal research. The series seeks to encourage these trends and to make available studies in law which are both genuinely philosophical in approach and at the same time based on appropriate legal knowledge and directed towards issues in the criticism and reform of actual laws and legal systems.

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TOM D. CAMPBELL
Series Editor
The Faculty of Law
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1 Persons as Property: Legal and Philosophical Debates

Are Persons Property?

The central question we pose in this book is ‘Are persons property?’. There is perhaps a deliberate provocation intended in this simple inquiry — a provocation to lawyers and also a provocation to the political sensibilities of the citizenry at large. For it may seem that we are asking whether persons in the ‘free’ common law world are in some way still to be regarded as slaves, when surely our law and our society have long condemned slavery. Indeed the idea that persons are now all free and equal is supposed to be fundamental to modern liberal legal systems — the free person is not only the basic legal unit¹ but also the very *raison d’etre* of our law.

So were our question to have only this one meaning, were we only asking about the retention of explicit and legal forms of slavery, it would seem that there is necessarily only a brief reply to be given and hardly a book in it. For the short answer is that we do not recognise slavery; one person cannot own another. It is regarded as an abomination to commodify another human being in this manner.² The Western democracies outlawed slavery in the nineteenth century, though as Russell Scott has observed, it has ‘not all disappeared from the Eastern world, nor from the African and South American continents’.³ Indeed it seems that English common law never openly countenanced slavery, even though England was home to a number of slavers who derived immense wealth from a traffic in persons (English slavers wisely conducted their trade in other parts of the world).⁴ As Rosemary Owens explains, ‘In the famous *Sommersett’s Case* [of 1772], English law decided against slavery, proclaiming its allegiance to the Enlightenment person and promising a protection for freedom’. In *Sommersett’s Case*, it was concluded that there was no ‘positive, or legislative, authorisation of slavery in England’.⁵

It could therefore be said with some confidence that Anglo-Australian law is in accord with the views of two of the leading philosophers of political and legal liberty, John Locke and Immanuel Kant,

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who, in different ways, both condemned the idea of treating other persons as property. According to Kant, 'a person cannot be property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property'.⁶ Locke, too, was adamant about the importance of freedom from possession by others. In *The Second Treatise on Government* Locke begins his discourse on slavery by saying that

The *Natural Liberty* of Man is to be free from any Superior Power on Earth, and not to be under the Will ... of Man ... not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another man.⁷

He goes on to say that :

This *Freedom* from Absolute, Arbitrary Power, is so necessary to, and closely joyned with a Man's Preservation, that he cannot part with it, but by what forfeits his Preservation and Life together. For a Man, not having the Power of his own Life, *cannot*, by Compact or his own Consent, *enslave himself* to anyone ... No body can give more Power than he has himself; and he that cannot take away his own Life, cannot give another power over it.⁸

According to modern legal orthodoxy, Locke, Kant and modern law are *ad idem* in that the categories of person and property are now meant to be utterly separate and distinct. To be a person, it is said, is *precisely* not to be property. Thus it might be argued that the one concept negatively defines the other.

This may in large part be true, but in the course of this book we will suggest that, in a number of important respects, persons can still be rendered unfree and effectively reduced to something akin to the property of another in certain situations and under certain conditions. We therefore question the purity of the modern property/personality distinction, even when our starting question is interpreted in this way. Women in particular are still susceptible to certain forms of commodification. For example, as we see in Chapter Four, there have been well-documented recent instances of the autonomy of pregnant women being subordinated to the foetus, through the imposition of unwanted caesarian sections. The woman who is obliged to undergo major medical intervention for the benefit of 'another', her foetus, cannot be said to be a free person (whatever we think of the wisdom of her decision to refuse such treatment) and has even been

characterised as a sort of faulty 'foetal container'.⁹ She lacks the most fundamental common law right consistently asserted for all free persons, the right to exclusive control over her own body.¹⁰ England's most senior judges have recently made just this point, while declaring a number of recalcitrant pregnant women legally incompetent to refuse surgery.¹¹

Another way in which it may be said that modern law commodifies the person is at the end of life. When we die, our bodies acquire a status close to that of property and indeed in the United States a 'quasi-property' interest has been explicitly declared in the dead body (as we will see in Chapter Five). Also in the United States, it has been recognised that people have an alienable proprietary 'right of publicity' over their 'persona' (including their name, their image, and other recognisable aspects of their personality). Where this property has in fact been alienated, or where it becomes part of a person's estate after their death, it may truly be said that one person 'owns' an aspect of another. We will turn to this issue in Chapter Six. On a broader scale, the patenting of biotechnological processes and products based upon human genetic material may be characterised as creating property in human life. Although such a characterisation is highly controversial, and does not necessarily lead to the conclusion that any individual is in any way 'owned', human biotechnology patents do undeniably involve ownership of material closely connected with the human species. We will consider this controversy in Chapter Seven.

Consequently, it cannot be said that in the modern 'free world' persons are never the property of others. Slavery may be unlawful, but it is still possible to identify other ways in which persons continue to assume some of the incidents of property.

The Person as Self-Proprietor

However our question is susceptible of at least one other interpretation. If it is not taken to be a question about the legal currency of slavery, about whether one person can own another, it may be asking instead whether we are in some way our own property: whether persons are property in the sense that we are somehow the proprietors of ourselves. Certainly this was a welcome idea to Locke. For, although he rejected the idea that persons could be the property of others, Locke explicitly endorsed the idea that we own ourselves — our persons and our labours.

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Though the Earth, and all inferior Creatures be common to all Men, yet every Man has a *Property* in his own *Person*. This no Body has any Right to but himself. The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his.¹²

Locke famously employed the argument that we all naturally own ourselves as a justification for private appropriation of the commons. As is well known, Locke's view was that once we mix our labour (which we own naturally) with an object in the commons, we gain property in it. Self-ownership therefore provides a foundation for ownership of the external world.

Hegel also developed an account of property that linked it to self-ownership.¹³ Hegel argued that in becoming a person one must put oneself into the external world and then reappropriate the self through the appropriation of objects in the world. Taking the world unto ourselves is our method of completing our subjectivity and individuality, because it involves the purely subjective person externalising their personality and re-grasping it in the form of an external object. Property is 'embodied personality',¹⁴ that is, property is only property insofar as it is occupied by a person's will. Property gives us the means of forming contractual relations with others — through ownership we are able to recognise others as owners, and exchange our property, and therefore our persons, in contractual relationships. Property is therefore essential to the formation of social relationships. At the same time, it is important to place Hegel's account of property within the larger framework of his *Philosophy of Right*. The acquisition of property for Hegel is only one preliminary 'moment' in the constitution of free subjectivity.

Hegel's account of the sovereign individual is therefore quite different from Locke's. For Locke, the free and complete self-owning individual labours and, through labour, becomes an owner. For Hegel, it is only through the act of appropriation that a person realises their subjectivity, and becomes free: 'Personality is that which struggles . . . to claim the external world as its own'.¹⁵ The person therefore does not start as a self-owning entity.

Both personality and property in Hegel's account are complex entities, formed dialectically. We begin, in Hegel's account, with pure subjectivity and pure objectivity, which may appear to be a relatively simple distinction between persons and the external world of objects. However, persons become self-owning by externalising themselves through the appropriation of objects. The person therefore becomes both

pure subject, and object.¹⁶ Similarly, the object, which starts as a mere thing, having no end-in-itself, becomes invested with the will and spirit of the appropriator. As long as the person's will remains in the object, it is property. When abandoned, it returns to its former state of meaninglessness.

The Possessive Individual and Liberal Legal Philosophy

There is therefore a paradox to be observed here. The firm response to our first question was that persons are not property: to be a person is precisely not to be reduced to the property of another. And yet it has been said by influential Western thinkers that in some way we own ourselves, which logically necessitates a view of the person, or at least of parts of the person, as property, albeit one's own. If this is so, then the idea of the person is in fact deeply imbued with the idea of property. To be a person is to be a proprietor and also to be property — the property of oneself.

The concept of the person as self-proprietor, as we will see in Chapter Three, has a secure place within our modern liberal political theory and liberal jurisprudence. It has become a convenient way of highlighting the freedoms enjoyed by the modern individual, a sort of legal shorthand, a rhetorical device, which serves to accentuate the fullness of the rights enjoyed by persons in relation to themselves and to others. 'To be a full individual in liberal society', as Katherine O'Donovan observes, 'one must be an appropriator, defined by what one owns, including oneself as a possession, not depending on others, free'.¹⁷

The story of the emergence of modern law and its reliance on relations based on contract, as told by the legal historian, Henry Maine,¹⁸ is the story of the man who quite naturally has property in his person, who has self-ownership. Thus he has the right to his capacities and to the products of his labours.

The appeal that the concept of property-in-self might hold to modern liberals, under the influence of Locke, is revealed by a brief inquiry into the etymology of the word 'property'. As Kenneth Minogue explains, '[t]he etymological root of the term (*proprius* — one's own), gives us the sense of the connection between property and what possesses it',¹⁹ that is between the possessing subject and the object or thing possessed by that subject. Or as Gray and Symes put it, 'semantically, 'property' is the condition of being 'proper' to (or belonging to) a particular person'.²⁰ The properties of persons, the attributes they possess, render them distinctive.

That which is proper to a person delimits and individuates the person, marking the borders between him²¹ and the rest of the world.²²

If we examine the modern legal meaning of property, we can see its enduring appeal as a means of asserting the autonomy of the individual. Briefly, property describes a legal relationship *between persons in respect* of an object, rather than the relation between a subject and the objects possessed as property of the person.²³ A property right enables the proprietor to exercise control over a thing, the object of property, against the rest of the world. Property thus defines the limits of our sphere of influence over the world; it defines the borders of our control over things and so marks the degree of our social and legal power. The claim of property in oneself is an assertion of self-possession and self-control, of a fundamental right to exclude others from one's very being. It is a means of individuating the person, of establishing a limit between the one and the other: between thine and mine; between you and me.

In the modern legal literature, property and personhood have been connected in at least two ways. Property in things other than oneself has been said to enhance personhood, because it establishes an extended sphere of non-interference with one's person. Margaret Jane Radin, in a modern rendition of Hegel's thought, has called this 'property for personhood'.²⁴ Property and personhood have also been linked in a more intimate manner by the assertion that persons may also be said to have property in themselves. Common to both approaches has been a desire to show how property interests express and secure the autonomy of the individual and hence their very personhood.

Property for Personhood

Some Anglo-American interpreters of Hegel's explanation of property have tended to over-emphasise his explanation of the relationship between property and the person. To focus primarily upon this aspect of his *Philosophy of Right* is to neglect the fact that Hegel presents this as only one part of a much larger picture, incorporating relationships with others in moral life, through the family, and finally as part of the state.²⁵ However this limited reading of Hegel, which highlights his explanation of the role of private property in strengthening the personality, resonates strongly with modern liberal notions of the self. Property is seen as an extension of the person and as a means by which the person can relate freely and transparently with others. Property is seen to mediate our social relationships. According to Charles Reich, 'Property draws a circle around

the activities of each private individual ... property performs the function of maintaining independence, dignity ... by creating zones within which the majority has to yield to the owner'.²⁶ To Alice Tay, 'Property is that which a man has a right to use and enjoy without interference; it is what makes him as a person and guarantees his independence and security'.²⁷

Perhaps the leading theorist of property for personhood is Margaret Radin, who has used Hegel's account of the property/person relationship as a point of departure for her theory of property for personhood. Accordingly, she argues that in order 'to achieve proper self-development — to be a person — an individual needs some control over resources in the external environment'.²⁸ If property that is intimately connected to, and valued by, the person is taken away, then the person is concomitantly reduced as a person.²⁹ Indeed property is so important for personhood that 'certain categories of property can bridge the gap, or blur the boundary, between the self and the world, between what is inside and outside, between what is subject and object'.³⁰

One of Radin's goals has been to develop a way of thinking about property which does not permit the commodification of persons as the property of others, and hence to counteract what she and others perceive as a tendency towards universal commodification, especially within the law and economics school of thought.³¹ At the same time, she accepts that there is a relationship between persons and property. Radin therefore distinguishes between two types of property: property for personhood and fungible property. Property for personhood, as the term implies, is property that a person uses in their self-construction and self-identification. It is a relationship to an external thing that contributes to a person's feelings of well-being, freedom, and identity. The body is foremost in this category of external things, but Radin also mentions a person's primary place of residence, whether owned or rented, cars, and objects such as wedding rings, which may have a particular sentimental value. Fungible property is property that is interchangeable with any other, and exists mainly for wealth-creation. Radin argues that property which contributes to personality is socially more important than fungible property, and deserves greater legal protection. She also finds support in some US Supreme Court decisions, arguing that they reveal a judiciary that is more willing to protect personal property than fungible property.

The feminist dimension of Radin's work arises in what one commentator has described as her attention to 'the daily realities of human experience' and her acknowledgement of the 'tangible reality of gender and power'.³² Although Radin's focus is not primarily on gender, she does

attempt to locate property within real human relations, rather than in abstractions which may lead to universal commodification, including commodification of the female body. Whereas modern accounts of property emphasise the legal relationships between persons, Radin focuses upon the relationship between person and thing, attempting to strengthen this connection by arguing that the object is part of the person's identity. Like Hegel, Radin sees property not simply as an object that is owned by a subject, but as something that bridges the gap between object and subject. The subject finds herself in objects, and becomes object to herself in ownership.

Radin's analysis of property for personhood raises many interesting questions. For instance, what type and quantity of property would be regarded as property for personhood? One person may feel that *all* of the external objects which they have under their control — including six cars and three houses — are absolutely necessary to their self-perception and their worth as a human being. Another person may have what Radin considers to be a more 'normal' relationship to their property. Radin therefore distinguishes between personal property relationships that are genuine and those that are based on fetishism. She says

We can tell the difference between personal property and fetishism the same way we can tell the difference between a healthy person and a sick person, or between a sane person and an insane person. In fact, the concepts of sanity and personhood are intertwined: at some point we question whether the insane person is a person at all.³³

This method of distinguishing property for personhood from fetishism, or health from sickness, or sanity from insanity, raises an obvious question — who is included in the 'we' who makes such judgements?³⁴ And who is excluded? Given the legal and social histories of Western liberal democracies, which have often pathologised and de-personified women, it is surely wise to be cautious about any 'objective' means of distinguishing the normal from the deviant that relies primarily upon consensus. One person's normality might be another's fetishism.

Radin's account of property for personhood is intended to offer resistance to the commodification of the person, by distinguishing property which is essential to the person from property which is not. It is as though people have personal properties, which identify them and are intrinsically inalienable, as well as property, which is just fungible wealth. (What you

have is what you are.) The person is not severable from their properties, and in particular from their body, and it would therefore not be possible to appropriate a person's properties, without commodifying or diminishing their person. In consequence, there must be some restriction on the free marketability of such property (or properties). The paradox within Radin's work is that it sets property against property. The self is understood as a function of property, and this propertied self is in turn expected to protect against the commodity form of the person.

Radin's thesis has been influential, but it has also had its critics.³⁵ Perhaps the greatest weakness of the thesis lies in Radin's acceptance of the view that personal identity is derived from relationships with objects, rather than with other subjects.³⁶ In her account, even the self becomes an object, because it finds itself in the external world of objects. In defending herself against her critics, Radin explains that her position is a pragmatic one:³⁷ she is not claiming that personality is always and inevitably a relationship to property, but rather that in the current (Western) social context, property and personality are in fact linked in this way. In her view, policy makers need to recognise this context, and use it to strengthen existing liberal rights.

Persons as Property

The idea that persons secure their personhood not only through property interests in external resources but also through property in themselves has also been stated in different ways. Paraphrasing the Lockean formulation, John Christman states that '[a] powerful way of expressing the principle of individual liberty is to claim that every individual has full "property rights" over her body, skills and labour'.³⁸ John Frow suggests that personhood plays a founding role as a category of property. In his view, the Western view of property 'is based on self-possession, a primordial property right in the self which then grounds all other property rights'.³⁹

The modern interpreter of Locke, CB McPherson, has described the story of contract as the story of the rise of the 'possessive individual'.⁴⁰ The 'possessive quality' of the individual of modern liberal theory, according to McPherson, derives from his essential character as proprietor 'of his own person or capacities, owing nothing to society for them'.⁴¹ As McPherson further explains:

since the freedom, and therefore the humanity, of the individual depend on his freedom to enter into self-interested relations with

other individuals, and since his ability to enter into such relations depends on his having exclusive control of (rights in) his own person and capacities, and since proprietorship is the generalized form of such exclusive control, the individual is essentially the proprietor of his own person and capacities.⁴²

In this liberal interpretation of the person, ownership is all-defining. Thus the being who emerges as the central character of modern market society is no longer regarded as a part of a broader community but rather a discrete being: 'owner of himself'. Ownership is 'the critically important relation' which determines the realisation of freedom and one's 'potentialities'. Accordingly it is 'read back into the nature of the individual ... The human essence is freedom from dependence on the wills of others, and freedom is a function of possession'.⁴³

Other analysts of liberal theory have provided similar accounts of its conception of the person as self-proprietor. Arneson sees the principle of self-ownership as 'foundational for one tradition of political liberalism running from Locke to Nozick'.⁴⁴ Or as Cohen, affirming Nozick, expresses it, the person 'possesses over himself, as a matter of moral right, all those rights that a slaveholder has over a complete chattel slave as a matter of legal right'.⁴⁵

Certain liberal theorists have also been alert to the negative connotations of property-in-self. Immanuel Kant found the idea particularly troubling (and so rejected it) because it suggested to him a commodification of the person, the reduction of the human being to thing.

Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership.⁴⁶

The idea of property-in-self is, to many, still suggestive of an unsavoury and illiberal past when persons could be slaves.⁴⁷ As Margaret Davies has remarked, if persons can objectify their selves they become susceptible to objectification by others.⁴⁸ The new medical technologies, which have allowed for the removal of parts of the person without the total destruction of the person, and which have also generated enormous economic potential in those parts,⁴⁹ pose new possibilities of human commodification and so have revived the Kantian concern about regarding persons as property.⁵⁰ So

to suggest that property-in-self is a means of expressing human autonomy is, paradoxically, also to threaten liberty.

The well-known Californian case of *Moore v Regents of the University of California* raises precisely this issue. John Moore was a patient of a David Golde at the University of California Medical Center, and was diagnosed with hairy-cell leukaemia in 1976.⁵¹ Golde subsequently recommended that Moore have an operation to remove his spleen and Moore consented to this treatment. Before the operation was performed, Golde — who was aware that Moore's cells might have some scientific and commercial value — made arrangements with a co-researcher, Shirley Quan, to obtain samples of the spleen upon its removal. Their intentions in obtaining the samples allegedly had nothing to do with Moore's medical treatment. Rather they wished to use the tissue in their research. Moore made a number of trips from Seattle to Los Angeles for further treatment, and on these occasions further samples of blood and other tissue were taken. At no time did Moore consent to his tissue samples being used in research. Indeed, he was not even asked for his consent to the research on his tissue until much later. Golde developed a cell-line based upon Moore's cells in 1979, and the University of California applied for, and was granted, a patent on the cell-line in 1981. Commercial exploitation of the cell-line was negotiated between the University and two biotechnology companies (Genetics Institute Inc., and Sandoz Pharmaceuticals). Finally, Moore discovered the uses to which his body tissue had been put and sued Golde, Quan, the Regents of the University, Genetics Institute and Sandoz.

Moore alleged both breach of fiduciary duty (or lack of informed consent) and conversion. The claim of breach of fiduciary duty was readily accepted by the majority of the Supreme Court of California, which held that 'a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgement'.⁵² The claim for conversion, however, was far more controversial. Conversion protects possession or, where possession has been willingly surrendered, it protects property. In this case, since Moore had consented to the removal of his tissue samples, the question was whether he still had an ownership interest in them after their removal. The majority decided he did not. In a separate concurring judgement, Arabian J objected in striking terms to any blurring of the boundary between person and property, saying that Moore was asking the court to 'to regard the human vessel — the single most venerated and protected