EMBRYONIC PROPERTIES AND FETAL FRONTIERS: POTENTIAL LIFE IN U.S. PROPERTY LAW

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ABSTRACT

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Within the English common law tradition, there is a principle which prohibits property of the human body. Taking property to be a protean concept, this paper examines how property is defined and applied in recent legal disputes in the United States over "potential life" entities, such as embryos and fetuses. A brief genealogy of theoretical and common law approaches with respect to property of the body highlights an analysis of six U.S. legal cases in which sperm, zygotes, embryos and fetuses have become new legal subjects of property against the background of assisted reproductive technologies. This paper concludes that property can operate not just in order to privatize, commodify and circulate, but in order to bring "potential life" entities closer to people and deeper into relational networks.

Keywords: property, body, embryos, personhood.

It is almost impossible to get through the day near the end of the Second Christian Millenium in the United States without being in communication with the public fetus".
(Donna Haraway, *Modest __ Witness@Second Millenium*, 1997, p. 201–202).

I thought, wryly, at the outset of this project on fetuses and property that the last thing the world needs is greater circulation of commodified fetuses for they are ample enough. I assumed wrongly that property, with is deeply capitalist roots, meant privatizing materials to just return them to the market, with a price tag. In

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reading U.S. case studies that thrust embryos and property in the same courtroom, I realized property could operate to bring the 'potential life' entity closer to people, deeper into relational networks and nearer to the self. This paper traces a brief genealogy of theoretical and common law approaches to property in the body before considering the fetal subject as a legal subject of property. Analysis of six diverse U.S. legal cases concerning sperm, zygotes, embryos and fetuses forms the second half of the paper with Margaret Radin's (1993) theory of property for personhood at its core. Most of the cases concern *ex utero* (outside the uterus) products of new reproductive technologies, and two are reserved for entertaining cases of fetal properties within the body.

For our purposes, 'potential life' broadly represents the gametes (sperm and ova), blastocysts, embryos and fetuses in legal dispute in my analysis. I use 'potential life' to describe all of these entities, and maintain the terms used within the cases when I can. Otherwise, I interchange embryo and fetus when it's unclear what 'stage' the entity has reached or they are my own thoughts. The following definitions follow a scientifically plotted ladder of development whose descriptors are not value neutral. *Gametes* are the reproductive materials, sperm and ova, which combine through fertilization to form a single celled organism, or *zygote*. *Blastocysts* are multi-celled organisms that form four days after fertilization and are most often mislabeled as 'frozen embryos,' which are cryopreserved entities of new reproductive technologies. Two weeks after fertilization and at the development of the primitive streak (what will develop into the neural system), the organisms are called *embryos*. *Fetus* is reserved for entities between eight weeks after fertilization until birth. (Berg 2007: 21 fn 87).

BODY AS PROPERTY – HISTORY

To contextualize how property rights and interests have intersected the fetus with in U.S. case law, I briefly survey the terrain of property rights in the body both historically and contemporarily. John Locke's famous political treatise, *On Property*, deviates from other natural law theorists by locating property in nature, rendering it pre-social, pre-market and pre-government. Man himself and the commons are God-given, as is his right and ability to create private property. Fundamental to his political project is the notion of autonomy, in part explaining his location of property outside of the social and especially prior to government. All ownership derives initially from the property individuals possess in their person, which some argue includes their body. He writes: "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" (Locke 1964: p. 287–188). Many turn to Locke as the progenitor of economic and political property, but can we also consider this work an early development of property in one's body?

Although this passage is not explicit on this point, some convincingly argue that Locke held a disembodied notion of the person whose primary property is his body. The Cartesian notion of the body treats it "as 'proper to' or belonging to its subject mind" (Morgan 2001: p. 91). It constructs a boundary between the person/self and body/object, rendering the body alienated, fetishized, and the object of the person. Locke's emphasis on the immaterial, transcendent *person* as "a thinking intelligent being, that has reason and reflection, and can consider itself as itself, the same thinking thing in different times and places" (Radin 1993: p. 39) echoes this dualism. Also, Locke's use of 'man' and masculine pronouns should not be read as neutral or universal for all mankind, but representative of a deeply gendered view of a self-owned person. Naffine cleverly points out that "while the male body may have been rendered external to the male, the female remained firmly under Locke and key" (Morgan 2001: p. 91). In other words, implicit in Locke's notion of property is a certain type of person and body: masculine, autonomous, rational, land-owning and of chief significance, laboring.

Although he argues Locke's work does *not* imply property in one's body, Waldon agrees that *person* as a rational, self-conscious actor cannot be confused with or collapsed into Locke's notion of *body* (Waldon 1991: p. 178). For example, while accepting that a creator achieves 'the utmost property' in his creation by mixing his labor with resources, Locke rejects this authorial power in terms of his and other's bodies; rather, he attributes the creation of human bodies to the work of God. This leads us to wonder if in Lockean property logic individuals have absolute property rights in their bodies, or if they are mitigated in some fashion. Rao perceives a 'special sort' of ownership the Lockean person has in his body that is more appropriately described as being 'held in trust' (Rao 2000: p. 367). He is a steward of his body, entrusted with its care, in which God is the ultimate owner (Campbell 1992: p. 39). For instance, Locke acknowledges restrictions to one's body, including suicide (disposal) and voluntary or contractual enslavement (sale and transfer)[1]. Thus, a gradating notion of strong to limited property is latent in Locke's theory[2]. The type of property one achieves through mixing one's labor with things is absolute and private while ownership in one's body is simultaneously fundamental to **all** ownership *yet* limited because owned by God.

In answer to my initial question, Lockean property theory does provide compelling material for this section's exploration of legal property metaphors and bodies. The following points suggest a few ways his work surfaces in my later

[1] "For a Man, not having the Power of his own Life, *cannot*, by Compact, or his own Consent, *enslave himself* to any one, nor put himself under the Absolute, Arbitrary power of another, to take away his life when he pleases. 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" (Locke 1967: p. 302).

[2] A common symbol for property is a 'bundle' of rights, powers, privileges, and obligations with respect to things. Bundled together are a variety of rights, including: possession, exclusion, alienation (sell, exchange, gift), usage, enjoyment and management, destruction, and profit (Honoré 1961: p. 113).

discussions of fetuses and property. Campbell argues that Locke is a 'foundational figure' for a neo-Lockean tradition of self-ownership that included full property rights over one's body as a right of autonomous individuals (Campbell 1992: p. 39). In many of the later arguments *for* property in the body and its parts, autonomy and individuality figure prominently, a tradition due in part to Locke's work. Additionally, contemporary debates, with the notable exception of Margaret Radin's work (1993), often cast personhood and property in binary and exclusive terms. Locke's argument that one holds property *in* one's person offers a historical instance to compare the development of property discourse in relation to other constructs, like personhood, privacy, life and choice. Also, Locke's economic development of property, particularly in reference to value and scarcity, loom large on new technological frontiers as body parts, not just acorns, are 'harvested,' propertized, privatized and commodified by major corporations, governments, and universities[3].

English common law provides insight into another type of body constructed through property discourse – the corpse. With the rise of grave robbing in late seventeenth and early eighteenth century England, the legal status of the corpse came under scrutiny. From this emerged the 'no-property' principle that the body and its parts cannot be owned. The *Haynes Case* is the earliest case referenced in support of this principle. In 1614 in Leicester, England, Haynes was charged with the theft of sheets wrapping the bodies of four interred corpses. The court ruled that the corpses had no property in the sheets nor could not receive them as gifts, thus Haynes thieved not from the corpses but the persons who supplied the sheets. The dead body cannot own.

Sir Edmund Coke, arguably the progenitor of the 'no-property' principle, confusingly references *Haynes* to support his assertion that corpses and their parts cannot themselves be owned (which is an inverse of the *Haynes* ruling that cadavers cannot own things). In *Institutes* (1644), he argues that cadavers are "*nullius in bonis*" (Coke 1669: p. 203), which means 'belonging to no one.' Through this passage, Coke introduced the 'no-property' principle into English legal tradition based on a case that doesn't logically support it. Still, this principle went largely unquestioned and broadly embraced[4]. For example, William Blackstone, another chief English legal thinker, furthered Coke's position by stating, "Though the heir has property in the monuments and escutcheons of his ancestors…he has none in their bodies or ashes" (Blackstone 1977: p. 429). In spite of observations that the legal foundations for this principle is "a bit thin on the ground" (Grubb 1998: p. 313), if not a misunderstanding entirely (Matthews 1983),

[3] Blood is a chief example of bodily material that is constructed and circulated as a commodity that can be owned (Rao 2000; Hyde 1997).

[4] It should also be noted that until 1804, English creditors could arrest dead bodies for debt, which Andrews reads as a type of property right in the corpse that common law otherwise disallowed (Andrews 1986: p. 34).

resistance to finding property in the human body and its parts has a strong tradition in contemporary American law[5].

While corpses and burials were originally handled under ecclesiastical courts in England, U.S. common law assumed these duties, forcing them to contend with the 'no-property' principle in a new context. Most cases grappling with the 'no-property' tradition maintained this principle, yet established 'quasi-property' rights in dead bodies[6]. A refereed report to the New York Surrogate Court in an 1856 case argued that next of kin have limited rights in the dead body through right of possession, right to protect and right to bury (Boulier 1995: p. 708). This report maintained the 'no-property' in corpses principle, but its precedent of limited property-like rights later inspired recognition of rights against obstruction to possess and, more recently, rights to donate organs of the deceased .

Taking the common legal metaphor of property as a bundle of rights possessed by persons with respect to things, one could view 'quasi-property' as having "some but not all of the sticks in the bundle" (Bray 1990: 220 n.77). The 1872 ruling of *Pierce v. Proprietors of Swan Point Cemetery* explains the difference between property and 'quasi-property' in this way:

> Although, as we have said, the body is not property in the usually recognized sense of the word…we may consider it as a sort of quasi property, to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner of it in any sense whatever; *he holds it only as a sacred trust* for the benefit of all who may from family or friendship have an interest in it (*Pierce* 1872, p. 9–10, *emphasis added*).

Stewardship over the dead body as 'sacred trust' draws a compelling parallel to the Lockean body entrusted to Man by God. But note that the 'sticks' of rights in each instance are different. The Lockean body cannot dispose of its body whereas this is the primary right and duty of the next of kin. Importantly, neither body can be sold. If property is a 'bundle' of rights, how do we understand the process of selecting which 'sticks' to include or exclude, and what roles 'life' and 'death' play in these decisions? These questions have bearing on my later investigations.

Furthermore, the distinction and purpose for 'quasi-property' is not clear to all. Some in favor of property rights in the body interpret this move from no-property to quasi-property as bringing the body closer to "the realm of property"

[5] In the words of one American judge: "Coke was understood to say that a 'dead body was the property of no one.' No matter what he did say; this understanding, or misunderstanding, has come down to us *as* law." *Griffith v. Charlotte*, C & A.R.R., 23 S.C. 25, 32 (1884).

[6] A notable exception is the nonprecedential 1860 *Bogert v. City of Indianapolis* case which argues *for* full property in dead bodies: "We lay down the proposition, that the bodies of the dead belong to the surviving relations, in the order of inheritance, as property, and that they have the right to dispose of them as such, within restrictions analogous to those by which the disposition of other property may be regulated" (Boulier 1995: p. 711).

(Boulier 1995: p. 711). One judge insists the body is already there by deeming 'quasi-property' a rhetorical ploy for what in practice is property: "Whether, however, the rights be called 'property' or not is manifestly a question of words, rather than of substance"[7]. Some suggest 'quasi-property' was manufactured to avoid treating the body as property, and others see it as artificially concealing real social matters, like mental anguish and suffering when harm is done to a loved one's corpse: "It seems reasonably obvious that such 'property' is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer" (Prosser & Keeton 1955: p. 43–4; Bigelow 1934: p. 110).

Nevertheless, the resonance of this principle in contemporary new reproductive technology debates (NRTs) invites some key questions for this paper. With the dead body having intersected with property discourse and law, one wonders if/how the 'living' body and its parts have been propertized? How have entities that buck simple categorization as 'alive' or 'dead', such as corneas, limbs, organs, gametes, embryos and DNA, intersect with property metaphors and relations? With the exception of the first *Moore v. The Regents of the University of California* (1988) decision, which observed a general property right in one's body in respect to a patient whose excised spleen was used to develop a lucrative and patented cell line, the courts have been reluctant to protect living bodies through property law.

BODY AS PROPERTY – CONTEMPORARY DEBATES

Having briefly examined Locke's political theory of property and common law legal history, I turn to contemporary approaches that consider the potentials and consequences of bodies and parts as property. The literature is monumental, thus what follows is only a selection. Much of the literature favoring property in body and parts focuses on Lockean notions of autonomy, control and protection against invading outsiders – state, market, medicine, technology, and others. Primarily, though, property in the body is invoked to discuss its parts. For example, theft or damage done to extracorporeal parts is deemed hard to litigate without the right to exclude or be compensated for damages (Andrews 1986: 29; Matthews 1983). Andrews introduces her article, 'My Body, My Property' (1986) describing the increasing growth of university patents derived from the tissues and fluids of patients, an unrestrained trend she attributes to the absence of property rights in body parts. In her view, patients are being robbed of potential economic compensation, dispositional authority, and control over products not entirely detached. Echoing Radin's concept of 'personal property,' some emphasize the risk

[7] *Pettigrew v. Pettigrew*, 56 A. 878 at 879 (Pennsylvania 1904).

of psychological damage and emotional distress by having her ova, amputated leg, or cornea circulated outside the body without protection as property. One's attachment to the parts isn't so easily 'severed' (Everett 2007), and so deserve protection.

Part of the logic for sanctifying property in one's body in law is that these materials are in practice already treated like property. For example, tort law allows recovery for harm done to one's child as well as autopsies performed without the consent of the decedent's family (Andrews 1986: p. 29). Conversely, under some state law, corneas and other organs are permitted removal without the consent of families, treating corpses as a type of *res nullius* or communal resource (Rao 2000: p. 317). Blood and sperm are purchased and sold on the market as any other commodity. And ironically, federal and state statutes prohibiting the sale of organs on the market "perversely reaffirm this vision of the body as property by intimating that body parts would be subject to sale in the absence of such statutory prohibitions" (Rao 2000: p. 371).

While the intact body has historically been constructed in terms of privacy rights because of its capacity to protect the body's 'territorial integrity' (geography metaphor!), with property generally reserved for the extracorporeal parts, some intrepid scholars propose property rights for the intact body. One of them is Rosalind Petchesky (1995), who forwards a feminist, non-Lockean argument for self-propriety by rethinking the meaning and rhetoric of property. While recognizing the vigorous influence of Locke's theory of property in modern law, politics, capitalism and practice, she is not content with his radical possessive individualism and masculine model dominating the language of property. Her work enters into dialogue with feminist scholars who recoil at the idea of property in one's body in disgust of its Lockean implications and history, and she prods them to expand their "narrow conceptual framework" beyond this tradition (Petchesky 1995: p. 388). She views property language not as a description of the real world, but as a socially and historically specific construct crafted to meet certain ends. For Locke, the disembodied, masculine self owned a body linked primarily with its capacity to labor, thus constructing a consuming, commodifying, and industrial image of man. Thus, Petchesky endeavors to construct a language of property that serves her political project of increased bodily integrity and collectivity.

Rather than reject property language entirely, she turns to alternative visions of self-ownership to "enlarge [the] frame of reference, to broaden who and what counts as owners" (Petchesky 1995: p. 400). Her main examples express the diversity of body-as-property views, including cases from Melanesian non-capitalists, early modern European radicals (Levellers), feminists of color and slave narratives. Common to all is the theme of self-propriety and caretaking that has meaning only in the context of the collective. For example, the Levellers' idea of self-propriety emerged among people in opposition to invading market relations and public authorities into one's sexual life. Leveller women petitioned the government through a language of self-propriety that connected "individual bodily

integrity with the collective common rights of families and communities" (Petchesky 1995: p. 393). For Petchesky, abandoning property language is possibly abandoning a critical site for political struggle to achieve secure access to common resources, care-based connection to the larger community and protection for one's bodily integrity as she imagines it.

Those resistant to propertizing the body might find Petchesky's position to dangerously underestimate the power of the alienating, individualistic, masculine, commodifying property regime. Property's deep entanglement with capitalism provokes concern for further exploitation, alienation, and cooptation of bodily resources, especially of women. These views tend to collapse property relations with the objects of property, and so imagining property in the human body means becoming an object, fundamentally undermining human dignity and worth. Others find property ill-equipped to resolve the challenges posed by new reproductive and genetics technologies in the form of frozen embryos or clones (Knowles 1990: 40). Is a seventeenth century construction too clunky to confront the shadows between life and death our contemporary technologies are bringing to the light of day (Guzman 1997: p. 204)? For another observer, property "fails to capture what we actually care about in the situation," which for the author is relationships (Nedelsky 1993: p. 358).

As it stands, the law is in a "state of confusion and chaos" in terms of categorizing the human body and its parts (Rao 2000: p. 363). As Hyde (1997) demonstrates, the human body is conceived through innumerable metaphors and images – as space, sacred, person, machine, narrative, amorphous, natural, or property, to name a few – both within and outside the law. This facilitates the body being deemed property in one instance, quasi-property the next, and often something else entirely. As new reproductive and genetic technologies continue to probe new 'frontiers' within the human body, society is 'grappling anew' with the bodies as sites of property interests and relations. I depart from this broad historical and contemporary discussion of the Western property construct and its intersection with the human body to present the key positions regarding a new object of knowledge, the fetal body, and its potential within property relations.

PROPERTY OR PERSONS? CATEGORICAL DIFFERENCES

> Legal thought, is in essence, the process of categorization. – Kenneth Vandevelde, 'The New Property in the Nineteenth Century,' p. 327.

By inhabiting spaces between life and non-life, human and machine/animal, tangible and intangible, it is no surprise that fierce debate over the status and legal approach to embryos/fetuses is trapped in an artificial echo chamber of personhood versus property. Are they kids or commodities? Does one have a right to control

them, or do they have interest of their own, such as to be born, that ought to be protected? These questions don't seem so silly when edging toward defining the basic relationship between fetus and woman – is it a part of her body or separate from her? – to which an answer would have significant ramifications for both. Although they have been constructed antagonistically, at this moment in time, the fetus needs the woman; any definition or treatment of fetus has consequences for the body it inhabits.

With this in mind, let us turn to some key 'fetal' positions. Moral, legal and academic explorations of how to define and approach rights in regards to the fetus have led to the follow four main arguments: (1) fetus as person; (2) fetus as property; (2) fetus as neither person nor property, but a special or interim category; and (4) fetus as both person and property. Since the rest of the paper is devoted to cases where fetuses intersect with property law and relations, I address the other three positions in turn.

FETUS AS PERSON

> A fetus lies in the penumbra region where our concept of a person is not so simple. – Jane English, *Abortion and the Concept of a Person*, p. 235.

What defines a person in U.S. law? This too is not so simple. The Constitution provides no definition, the Supreme Court hasn't offered one, and state and federal law define 'person' every which way, rendering not a comprehensive 'personhood law,' but an amalgamation of many different definitions. Some sense a coherent theory and pattern of practices from this collection, while others see endless contradiction (Berg 2007: p. 3–4, esp. n.10). What *can* be said is that "persons have rights, duties and obligations" (Berg 2007: p. 4) whereas 'things' do not. Also, while there are many types of persons in U.S. law, the natural and juridical person are fundamental. The natural person refers simply to a human being, with *Roe v. Wade*'s qualification that persons *must be born* according to the Fourteenth Amendment, thus excluding fetuses. And, juridical persons are non-human entities that are treated as natural persons, such as corporations (Berg 2007: p. 5–7).

Like property, I understand personhood to be a construction and performance, and though many advocates for fetal personhood root it in nature, I focus on the cultural strategies (including the use of science) for making persons that undoubtedly inform political and legal activism. Many of the strategies used in day to day life to personalize ourselves, our children, and our belongings are also employed to person-alize fetuses. For example, some rituals include sexing, naming, photographing, surgically altering, speaking and listening to the fetus (Michaels & Morgan 1999: 6). Layne's (1999) work with pregnancy loss patients

highlights how consumerism, particularly the acquisition and exchange of goods during and after pregnancy, help construct fetal personhood. She explains the making of fetal persons as "a process by which individuals and their social networks materially and socially produce (or opt not to produce) a new member of the community" (Hartouni 1999: p. 299). Not to be underestimated is the powerful role of globalized visual media representations of the fetus in its continued construction as person. Also, a curious medical and scientific discourse of 'possessive individualism' has come to define the fetus as autonomous, active, and aware of its own interests (Hartouni 1999: p. 300–301; Franklin 1991). The purpose of this portrayal is to discursively sever the fetus from the maternal body by mirroring the Lockean, self-owning subject, in which personhood is tightly bound. Finally, scientific knowledge, and biology in particular, provides an origin story for Western culture and is mobilized to designate the basic criteria of persons, including "the capacity of the individual body to perform specific functions" (Layne 1999: p. 253). These criteria are most vociferous at the thresholds of life, death and impairment, where the fetus has come to discursively reside.

Categorizing fetus as *person* in law promotes certain legal treatment. Berg (2005) explains that if the fetus is analogized to the child, if follows that the law applies custody theory, 'best interests' tests, and protects its rights to property, privacy, and other conceivable interests children and adults share. Harm done to a fetal-child-person falls under criminal or tort assault with its destruction deemed homicide or alternative categories, such as assisted suicide or removal from 'life support' (Guzman 1997: p. 205). Lastly, appropriation or refusal to return the fetus to guardians would be kidnapping. The United States has been more willing to define and treat the fetus as person than other common law countries (Minkoff & Paltrow 2006)[8]. For instance, fetuses have achieved rights of persons in cases of posthumous inheritance, criminal and prenatal injury, and child welfare (i.e., putting her fetus at risk by refusing consent to medical treatment, such as blood transfusion or caesarian section, or lifestyle choices during pregnancy that put the fetus at risk, such as excessive drug or alcohol consumption)[9].

Fetal inheritance is worth expanding on for it represents a type of fetal intersection with property law with the interesting effect of enhancing its claim to personhood. Fetal inheritance rights date back to the Roman Empire, from where it was adopted by English and, later, American common law (Schroedel 2000: p. 31). These 'rights' were intended to keep property within the family as fetuses had to be

[8] A recent federal law and ongoing pro-life activism have codified a redefinition of 'child' to include the developmental spectrum from zygotes to fetuses. The Unborn Victims of Violence Act (2004) has made it a crime to harm a 'child *in utero*,' and to treat them as 'independent victims' in an assault on the pregnant woman.

[9] As of 2000, thirty-seven states recognize the fetus as 'person' in tort law, although most states "refuse to extend protection of the criminal law to the fetus" (Schroedel 2000: p. 31). Berg argues that these instances represent legal acknowledgement of a weak category of personhood – juridical personhood – by granting fetuses specific, but limited, rights (2007: p. 32).

born within ten months of its parent's death. In 1994, the American Bar Association clarified current legal practice: "Relatives of the decedent conceived before his death but born thereafter inherits as if they had been born in the lifetime of the decedent" (Schroedel 2000: p. 33).

The customary ten-month grace period is complicated by new reproductive entities. To my knowledge, no inheritance cases in the U.S. have arose in regards to the potential 'children' latent in sperm, ova, and frozen embryos, though they fundamentally challenge basic concepts, such as child, parent, conception, gestation, survival, life and death (1993: p. 223). Is the parent the contributor of reproductive material, the gestational mother, or the social parent? Would conception begin at consultation with the IVF clinic, contract signing, masturbation or egg cultivation, in the petri dish, freezing, or implantation into a womb? Would the child be the sperm or ova, frozen or implanted embryo? (Guzman 1997: p. 224). Given the looseness of the Bar Association's definition, these 'potential life' entities have plausible inheritance rights claims, drawing them closer to the status of legal owning persons with property interests. Conversely, with the expanding legal definition of *child*, the inheritance claims of 'potential life' entities strengthen. Through personhood, one can secure property, or through property, one can secure personhood. Perhaps personhood and property are not pure opposites.

FETUS AS BOTH PERSON AND PROPERTY

As the previous example suggests, the relationship between personhood and property is not inevitably discrete. Jessica Berg (2005; 2007) develops a legal framework positing overlapping interests in/of offspring through *both* property and personhood. She elects to stay within the frameworks of person and property for pragmatic reasons; they already exist to be put to use (Berg 2007: p. 210). Rather than focus on the status of the fetus, Berg investigates interests, asking *if* there are interests in the entity that are definable as property and interests of the entity definable as person (2005: p. 170). To this she answers *yes*, though she explains the existence and application of these interests through a timeline of the physical development of embryos into fetuses and ultimately children and adults.

In asking what interests exist in and of embryos, Berg argues genetic progenitors certainly have property interests whereas pre-sentience embryos do not have interests (as a person) in themselves just yet. Thus, in the earliest stages of development, she argues that property law prevails as the most appropriate and 'accurate' framework for resolving disputes over the embryo and fetus. As the fetus achieves sentience and is born, it will develop interests that will limit the parents' continuing property interests in their offspring. This model illustrates a transition of interests and balancing of emergent personhood interests with

waning[10] property claims in offspring as the fetus grows (Berg 2005: p. 216). As might be anticipated, Berg accepts a property model of parenthood extending until legal maturation[11].

FETUS AS NEITHER PERSON NOR PROPERTY

> Pre-embryos are not, strictly speaking, either 'persons' or 'property', but occupy an interim category that entitles them to special respect because of their potential for human life. *Davis v. Davis*, 1992, p. 597.
>
> Perhaps it is time to reassess the rigid dichotomies between life/death and person/property to recall that what is owned may have rights and accept that at least some rights in life may be owned. – Kathleen Guzman, 'Property, Progeny, Body Part,' p. 250.

Proponents for 'none of the above' are typically disappointed with the fabricated binary between property and personhood that assumes if something isn't a person, it is probably a type of property and vice versa. This is obnoxious; light, which is not legally definable as *person*, is neither property (not yet, anyway). The 1973 *Roe v. Wade* decision legalizing abortion maintained that a fetus is not categorically a legal 'person,' though this has certainly not rendered it the woman's property in theory or practice. Even Al Gore in his role as a U.S. Senator chimed in: "I disagree that there's just a sliding scale of continuum with property at one point along the spectrum and human beings at another. I think there's a sharp distinction between something that is property and something that is not…" (Guzman 1997: p. 198). In the absence of appropriate or beneficial frameworks for treating fetuses as legal subjects, some offer alternative approaches.

Acknowledging that her suggestion might not translate easily into law, Fox (2000) emphasizes the need to re-embed fetuses within a 'complex network of relations' and 'biotechnological milieu.' Property and personhood models contribute to a detached, free-floating representation and treatment of fetuses (both *in* and *ex utero*) that betray all social connections. Thus, Fox focuses on feminist efforts to relocate the fetus in webs of familial and technological relations among parents, scientists, researchers. Also, by recognizing that extracorporeal embryos and fetuses are *still* located somewhere – in labs, freezers, petri dishes, under

[10] Parents' property interests in their offspring wane only in terms of strength of application; their interests themselves are still very much present, Berg argues (2005: p. 213).

[11] She footnotes an excerpt from Locke exhibiting a similar stance: "[P]arents have a sort of rule and jurisdiction over [children] when they come into the world, and for some time after, but it is but a temporary one. The bonds of this subjection are like the swaddling clothes they are wrapped up in and supported by in the weakness of their infancy; age and reason, as they grow up, loosen them, till at length they drop quite off and leave a man at his own free disposal" (Berg 2005: 216 n.236).

microscopes – invites fruitful exploration through a chief biotech metaphor, the cyborg. Her hope is that this process helps reformulate a more fitting framework for treating embryos and fetuses that can translate into law.

Litman and Robertson (1993) recommend the development of legislation that characterizes reproductive materials as *sui generis* with detailed policy directive as a guide for the court. *Sui generis* means unique and is both a categorization and legal method that enables the court to piece together the most suitable metaphors, theories and policies to resolve the dispute. It is by definition loose and uncertain, and permits flexibility in place of a rigid, and what they describe as misunderstood, property framework. Judge Pannelli explains the majority's rejection of a property interest in Mr. Moore's cell line by likening it to common legal treatment of human tissues through *sui generis*. Although fetuses are included in the list, among organs, blood and cadavers, the policy referenced involves dead fetal tissue, not the 'potential lives' I'm exploring. While the arguments presented here are overly schematized, they arise in the following legal cases in which 'potential life' entities – gametes, zygotes, embryos – are thrust into the courtroom with property.

EX UTERO FETAL PROPERTIES – PROPERTY IN POTENTIAL LIFE?

> Until now the law has never had to consider the existence of embryos outside the mother's uterus…. We recommend that legislation be enacted to ensure that there is no right of ownership in a human embryo. – *Warnock Report*

> The closer we get to the living creature of a fetus, the more we are reluctant to regard it as property. – Daniel Sperling, *Management of Post-Mortem Pregnancy*, p. 67.

As a discursive strategy, property is neither the inevitable nor the most appropriate framework for handling the dispute. My chief interest is in how property operates within the highly medicalized and moralized realm of pre/potential-life entities to bring them closer to one's self. Spleen cells and spermatozoa cases bridge the exploration of three diverse cases involving Petri dish blastocysts, 'pre-zygotes,' and frozen embryos. Importantly, all cases deal with *ex utero* entities.

Property law governs rights and interests in things through relations. As we have seen, U.S. law has been hesitant to grant property rights and interests in human bodies or body parts, with the notable development of quasi-property interests in corpses. The famous 1990 *Moore* decision rejecting the claim of conversion of personal property was among the first legal considerations of whether a living person has property interests, and therefore rights, in their extracorporeal body parts. In this case, the multi-billion dollar cell line developed from Mr. Moore's rare excised spleen cells without his consent was at issue. In

filing a breach of disclosure and conversion of property[12], Moore desired compensation. The California Court of Appeals (1988) determined that Moore did have a property interest in his cells, thus deserving compensation and potential future profits, whereas the California Supreme Court majority rejected his conversion claim[13]. They founded their decision on the following grounds: the Moore's cells at the time of excision were fundamentally different from the patented Mo cell-line and could not be claimed as property; extending conversion to his human materials risked hindering scientific research and advancement; and lastly, his rights were adequately protected under the doctrine of informed consent. While denying Mr. Moore's ownership claim to cells from his excised spleen, the court upheld the university's firm patent hold on the Mo-line. Ultimately, the court recommended legislation that deals explicitly with these issues, described by concurring Judge Arabian in this way: sometimes, "the most important thing we do, is not doing." (*Moore* 165)

Although gametes are a type of genetic material, like spleen cells, they contain the potential to produce a human being. By preventing Deborah Hecht access to the donated sperm willed to her by her deceased partner, the relationship of property rights and interests to gametes was brought to court[14]. Unlike *Moore*, this case originated in probate law (wills and testaments) with the task of determining if Mr. Kane, the decedent, had a property interest in his sperm prior to death and, if so, what were his intentions for its use. Interestingly, the court argued that Mr. Kane's underlying interest expressed in his will was the inalienable right to procreate, which is not among the 'bundle' of property rights. It is, though, central to one's right to privacy[15]. Additionally, the court observed that the sperm vials were not appropriately deemed 'assets' of the estate, and thus rejected Hecht's property rights to sell, transfer or dispose of the sperm (*Hecht* 1996: p. 226)[16]. But, the court concluded that sperm, like other genetic materials, is a 'unique' form of property and is transferable, with restrictions, only to realize his fundamental right to procreate. For this reason, they ruled that Mr. Kane had rights to control the posthumous disposition and use of his sperm (*Hecht* 1996: p. 226). It was his desire that Hecht try for a child, and so she was granted the quasi-property right of use.

[12] Conversion is treated under tort theory and is defined as interference of ownership depriving owner of use and possession.

[13] Judge Mosk's dissent sides with the Court of Appeals in supporting Moore's claim of property and argues he deserves economic compensation. He writes: "every individual has a legally protectable property interest in his own body and its products" (*Moore* 1990, p. 271)

[14] *Del Zio v. Columbia Presbyterian Hospital*, No. 74-3558 (S.D.N.Y. November 14, 1978).

[15] See (*Davis* 1992: p. 600), which served as a resource for the *Hecht* decision.

[16] The California Court of Appeals (1993) did consider the sperm vials as assets of the state, and thus granting Hecht increased property rights, which was overturned by the California Supreme Court in the way described above.

Paired together, these cases pose serious questions for the operation of property within disputes over zygotes, embryos and fetuses. In what instances have living persons (like Moore) expressed property interests in their extra-corporeal reproductive matter (like Kane and Hecht)? What kinds of relations are established with fetuses and embryos? How does property operate? The following case studies trace such questions.

Claiming both conversion of property and emotional damages, Mr. and Mrs. Del Zio sued a university hospital in 1978 for 'destroying' the experimental *in vitro* culture of their gametes without their consent[17]. They asked the jury: are our extracorporeal sperm and ova our property, as well as the potential zygote/embryo incubating in the petri dish? The jury answered by awarding Mrs. Del Zio $ 50,000 for emotional damages, Mr. Del Zio $ 3.00, and rejecting their claim of conversion (Andrews 1986: p. 30). For some, this case is of no value in determining the legal status of the extra-corporal embryo (Litman & Robertson 1993: 256)[18], whereas the decision is clear for others – no property in embryos. I disagree on both counts.

As in *Moore*, the Del Zio's explicit property claim is expressed through conversion, though I argue it's possible to interpret a type of property in personhood interest through their claim of emotional damages. Nedelsky rejects this unnecessary "reach[ing] for language of property" to define a violation of a novel right, which she calls the right to the protection of attachment (1993: p. 357). In her defense of attachment, she speculates into the many hopes and emotional investments the Del Zios placed in the petri dish experiment and its potential life. Perhaps taking Radin's (1993) theory of property in personhood beyond her scope of agreement, it seems damage to the incubating 'potential life' entity could be emotionally injurious because it is a property close to personhood. In other words, it seems possible that a self-constituting identity – such as the status of *parent* for a sub-fertile couple – was lost down the drain with the *in vitro* experiment. In sum, it appears the jury was uncomfortable awarding financial compensation for entities of attachment, but generously (though unequally) awarded the Del Zios under the guise of emotional attachment. This case suggests that property-like interests need not fall under the rubric of property law and can operate within alternative spheres and claims. In this instance, the metaphor of property could have been too detached from the suffering couple's narrative to be effective in court.

Like the Del Zios, the Yorks were united in 1989 in their case against a fertility institute for breach of contract and tort of detinue when their request to transfer one of their pre-zygotes to another clinic for *in vitro* was denied[19]. The court ruled in favor of the couple on both counts. Tort of detinue is a form of property protection and is proved if an owner requests their property back from a

[17] This jury-decided case is unreported, so my commentary is derived from legal and academic observations of the case. Also, it is the first *in vitro* related case.

[18] Litman and Robertson hold this position because it was a jury trial.

[19] *York v. Jones (*No. 33455 (E.D. Va. 1989) 717 F.Supp. p. 421

holder and is denied (Litman & Robertson 1993: 257; *York* 1989: p. 427). While detinue is an explicit expression of a strong property interest, the court grounded its decision that the pre-zygote is the property of the Yorks through their analysis of breach of contract. The fertility institute required the Yorks to sign their contract detailing, among other things, their rights and restrictions, using property language[20] to describe pre-zygotes as the property of the clients'. The court determined that this contract establishes a bailor-bailee relationship, meaning an agreement for a party to hold a belonging of another's in trust with the duty of return when the bailment is terminated (*York* 1989: p. 425). By refusing to transfer the pre-zygote to the Yorks' new clinic, the institute was in breach of the property relationship they had established in their contract.

Property language was imported through the fertility institute's legal document. Of great interest to me is the process the institute's leaders participated in to negotiate the legal language for their contract. Who suggested property metaphors to describe their clients' relationship to the pre-zygotes, and why? What other frameworks or discourses did they consider, ignore, and gloss over? What cultural debates were occurring in Virginia and the country regarding new reproductive technologies that fostered these choices? Has the language in this contract been revised since this case, and if so, toward what direction? A property paradigm is a strategic choice and one of many options within the law.

In this case, both parties had competing property claims – the clinic's right to possess and the Yorks's right of return of their possession. Although the pre-zygote was relocating to another clinic across the country, the establishment of a property interest in their pre-zygote allowed them to bring the embryo to a more successful clinic, ushering them nearer to their desired status as parents.

The final case – *Davis v. Davis* – takes on the messiness of divorce court in which husband and wife disagree over the future of their shared marital 'possession' in limbo, the frozen embryos. Just months after the Yorks were awarded the transfer of their pre-zygote to their new clinic in California, Mary Sue and Junior Davis were gearing up in Tennessee for what would be a three year, multi-court battle over seven cryo-preserved microscopic matters. Mary Sue wanted to implant the embryos for a chance to birth a child and Junior was unresolved on what should happen to them, so argued in favor of treating them as joint property to be held in the freezer until they could come to an agreement. Mary Sue saw them as lives with potential, and Junior as just potential lives.

The Tennessee Supreme Court ultimately brought the case to the essence of property as relations between people. Before getting there, the Davis divorcees endured a definitional ricochet – are they embryos persons, property, or something

[20] In addition to explicit use of the terms 'own' and 'property, the contract used possessive language (our zygote), required that ownership of the zygote must be treated in a property settlement in the event of divorce, and stipulated that clients have the "principal responsibility to decide the disposition" (*York* 1989: p. 426).

else? It was in this order they reconceived there decisions, and I treat each in turn. The Circuit Court (1989) sided with Mary Sue, ruling that embryos are not property, but *were* persons whose lives began at conception[21]. As 'children,' the court applied family law of custody to determine which parent would meet the children's needs best. Consequently, Mary Sue was awarded custody of all seven frozen embryos "for the purposes set-forth hereinabove" (*Davis* 1989: p. 11), in a way mandating their implantation.

By the time the appellate case was scheduled, Mary Sue had remarried and revised her request to implant for the right to donate the embryos. Junior was also remarried and preferred disposal. The Court of Appeals (1990) rejected the lower court's designation of embryos as persons in favor of a "suspiciously property-like" (Litman & Robertson 1993: p. 260) model. Based on the Davis's undefined "shared interest," they achieved "joint control" over the embryos and an "equal voice over their disposition" (*Davis* 1990: p. 3). In support of this 'shared interest,' the court cites the *York v. Jones* case investing the Yorks with property interests in their pre-zygotes. Instead of supporting Mary Sue's right to procreate (recall the *Hecht* case), Junior's right to *not* parent was protected instead. Both of these are fundamental rights to privacy that the final court uses to weigh the burdens of parenthood for both parties to decide who has greater decisional authority (in the absence of an IVF contract). Until then, the embryos were fated for the freezer should the Davises jointly resolve what to do with them.

In 1992, the Tennessee Supreme Court "sided fully with neither" lower court (Strathern 1999: p. 136)[22]. They agreed with the appellate court's rejection of personhood but criticized their failure to define 'shared interests' (though they reek of property). Finding both positions too extreme, the Supreme Court concluded: "pre-embryos are not, strictly speaking, either 'persons' or 'property', but occupy an interim category that entitles them to special respect because of their potential for human life" (*Davis* 1992: p. 597). The court explains that there is no intrinsic value in the embryo, but value arises once individuals decide together to become parents. In essence, they shift the focus away from the object (embryo) and back to the parents (relations), from which this potential-property, potential-person first originated.

How might we understand the function of property in the Davis's encounter with the law? In a way, rather than bring the embryos closer to either Mary Sue or Junior, their quasi-property served to bring *them* closer together by joining their interests. Many commentators who are disenchanted with property as a meaningful legal category often prefer an emphasis on relations, attachments, or networks (Nedelsky 1993; Fox 2000). Although all property deals with relations, not all deal with 'relationships' (Strathern 1999: p. 140), The California Supreme Court's

[21] Judge Young: "By whatever name one chooses to call the seven frozen entities – be it preembryo or embryo – those entities are human beings; they are not property" (Davis 1989: p. 9)

[22] Tennessee Supreme Court 1992 Davis v. Davis **842 S.W.2d 588)**

explicit acknowledgment and legal facilitation of the Davis's relationship is its mark of brilliance.

FETUS *IN UTERO* – BODILY PROPERTIES: SURROGATE MOTHERHOOD AND POST-MORTEM PREGNANCY

Most authors concerned with the intersection of fetal bodies and property law focus on the embryos in the freezer instead of the embryos 'in the oven' (the maternal body). An understandable reason might be the lack of theorization of properties crossing the bodily 'threshold' compounded by an even greater lack of litigation to cut our teeth on. Even more likely is what Radin senses as a general feeling that property is naturally 'out there' on the other side of a dim, though perceptible, boundary (1993: p. 41). What would it mean if property came inside the body? Is this possible, and more importantly, desirable? What kinds of bodies might property inhabit? My curiosity is fundamentally different from the type of property in persons and their bodies on which slavery was premised. This final section entertains this potential in two instances – surrogate mothers and brain-dead pregnant women.

SURROGATE MOTHERHOOD – GESTATING BABIES OR BOOKS?

In 1993, the California Supreme Court reaffirmed two lower court rulings that Crispina Calvert was the genetic, biological, and natural mother of her son. Although another woman, Anna Johnson, gestated and delivered the infant as her surrogate, Mark, her husband, and Crispina passed the court's 'test of intent' by having had the original idea; their son originated first in their imagination, was authored with their intent and commissioned by the Calverts, to extend the metaphor, to be 'published'. When genetics and gestation do not coincide in the same woman, the court established this rule of intent to serve as a tie-breaker. In other words, her 'brain child' is her natural child (Rose 1996: p. 631). My play with the 'author' metaphor is to highlight the non-inevitability of legal discursive decisions such as these.

On the other hand, Judge Kennard's dissent deals seriously with the implications of the property-like metaphors latent in the court's test and concept of intent. She argues that at root, 'intent' is based on legal principles more appropriately suited for intellectual property ownership and the movement of goods in commercial contract, and not the "fate of a child" (*Johnson* 1993: p. 118). For example, she interprets the 'originator of a concept' idea to egregiously imply property rights in children:

> Although the law may justly recognize that the originator of a concept has certain property rights in that concept, the originator of the concept of a child can have no such rights, because children cannot be owned as property (*Johnson* 1993: p. 114).

Additionally, children are neither personal property nor deliverable through commercial contract negotiation (*Johnson* 1993: p. 115). Instead of these ill-chosen principles, Kennard argues that family law and the 'best interests of the child' model more equally value the contributions of genetic *and* gestational mothers.

At the same time I value her careful analysis and productive outrage, I take issue with what appears to be a conflation of property as things and property as rights and interests in things. Implying that a parent has a property-like interest or right in her child doesn't mean the child *is* property and subject to the commonly invoked evils of baby selling, contracting into servitude, disposal, etc. Works on surrogacy commonly make this mistake by equating the formation of contracts that delineate the parties' interests with the commodification of one's womb or child. In my view, these relationships are often scapegoats for a shared "fragility [in] our belief that we do not treat people as commodities" (Rose 1996: p. 632).

If we concede that 'author' metaphors and their implications of property-like interests in one's offspring are not too far off base, then we have arrived at my chief question: are surrogates gestating property interests? Recall the Del Zios, who I argued had a property for personhood interest in their *in vitro* culture and the possibility it contained for them to become parents. Although extra-corporeal parts, as we have seen, are more available to property discourse in law because of their detachment from the human body, I think it is plausible that the implantation of a couple's genetic material into surrogate's womb does not snuff their interest in the fetus as a property for personhood. Perhaps this bodily interior enhances this interest. Of deepest empirical curiosity is the surrogate's existential experience of embodying a property interest of another's in the form of a fetus, which is to say gestating someone's network of relations. One ethnographer of surrogacy explained that Julie, her informant and surrogate mother, conceived of her self-body as an "'inclusive' and 'extensive' moral space" (Goslinga-Roy 2000: 123), which is fittingly akin to Petchesky's (1995) concept of 'self-propriety.'

POST-MORTEM PREGNANCY – THE LIVING (IN THE) DEAD

Drawing from my earlier discussion of quasi-property in corpses, I wonder: do pre-dead persons have quasi-like property rights in their post-mortem bodies? Can individuals decide how their bodies are treated in death? Historically, they have not, though recent statute, such as the Uniform Anatomical Gift Act (1968 and 1987), supports control over the post-mortem disposition of one's body

through will and testament. Prior to this type of statute, "laws relating to wills and the descent of property were not intended to relate to the body of a deceased"[23]. Despite legally honoring the deceased's will, countless have been challenged in court in light of competing interests between the decedent, families (who have quasi-property rights in the deceased too), hospitals, and the state (Bray 1990: p. 224).

A decedent's disposal interest in her body is further circumscribed by states in certain circumstances. By virtue of being pregnant, thirty-three states (as of 2000) prevent the removal of a pregnant woman from life support, overriding wishes expressed in her will and the wishes of her designated decision-maker, should they be to the contrary (Rao 2000: 361 n.6). An example of this is found in the Uniform Rights of the Terminally Ill Act of 1989 (URTIA), an act adopted by many states to help people specify the circumstances when they want to continue or forego lifesaving treatment.

> This Act requires that life-sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with continued application of life-sustaining treatment (Rao 2000: p. 411).

Not all statutes imply a gestational age or level of development, and even if they do, viability is an unstable biomedical boundary. Only two states protect a woman's right to decide whether or not to prolong her life via life support (Rao 2000: p. 412). With cases ranging in duration from a couple weeks to multiple months, why endure the emotional and financial expense? The rationale is to give the fetus a chance at survival.

Rao observes a dominant property ideology within these statues that exempt brain-dead pregnant women from the bodily autonomy afforded others and treat them as objects of the state. With death, the Constitutional protection of bodily autonomy lapses, and these newly dead women "may be drafted into service as fetal incubators of the state" (Rao 2000: p. 410). Considering the property language within the laws and the quasi-property rights that emerge in next-of-kin at death, it is surprising that so few commentators on post-mortem pregnancy discuss property (save Jordan 1988). Instead, most analyze these cases through the privacy right of bodily autonomy. Additionally, Rao found only two published cases confronting the constitutionality of these statutes, and both focus on privacy (2000: p. 314).

My three-fold interest in post-mortem pregnancy currently lacks a presence in case law: does a post-mortem pregnant woman have a property interest in her fetus? Does a fetus have a property interest in its mother's body? And do next of kin have property interests in her fetus? Brain-dead mother and pre-born fetus

[23] *Estate of Moyer,* 577 P.2d 108, 110 (Utah 1978).

simultaneously occupy the shadows between life and death where few legal categories sit comfortably, and property, as we have seen, is chief among them. Both woman and fetus are at the cusp of transition into more socially intelligible forms. In asking if there exist property interests in these entities, one must intuit the plethora of possible relations for this frontier has not yet been met by the law. Pairing the issues previously discussed about surrogacy with the tragic instance of post-mortem pregnancy sends a chilling image of a possible property frontier, as haunting a thought it is.

CONCLUSION – IN BRIEF

> For better or for worse, we have irretrievably entered an age that requires examination of our understanding of the legal rights and relationships in the human body. – *Moore v. Regents of California*, 1990.

In what amounts to a cursory examination of literature at the intersections of property, 'potential life' and bodies, and a paper focused mostly on the *life* (be it by way of the dead), I have excluded from my analysis the intensely controversial and lucrative type of propertized fetal body – the dead one. Vast markets exist for fetal remains intended for stem cell, biomedical and pharmaceutical research, not to mention curios, museums and other grisly places.

Instead my focus has been on 'potential life,' which I have only become comfortable calling zygotes, embryos and fetuses in the writing of this paper. Although I did not anticipate it, property appears to operate in some courtroom instances by bringing these potential lives and people closer through relations. Moreover, the quasi-propertized sperm, pre-zygotes, and embryos are treated as properties for personhood, meaning their proximity to the body facilitates the person's sense of self. Ought we read this desire to bring back into one's body the materials extracted as a response to the ever fragmentation people in our society experience? The implication is profound for understanding this terrain called body and our experience of its limits, and the answer is an empirical one.

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