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Sperm, Spleens, and Other Valuables: The Need to Recognize Property Rights in Human Body Parts

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NOTE

SPERM, SPLEENS, AND OTHER VALUABLES: THE NEED TO RECOGNIZE PROPERTY RIGHTS IN HUMAN BODY PARTS

> For better or worse, we have irretrievably entered an age that requires examination of our understanding of the legal rights and relationships in the human body and the human cell.[1]

> Immediately the human corpse rises to a dignity and importance in the commercial world which it may not have possessed in its lifetime. It is a *commercium*, a thing of value, a subject of political economies, perhaps to be bought, sold, and exchanged, and subject to the rules of supply and demand. . . . The whole foundation of law and custom is shaken. It becomes a serious question how it shall be rebuilt. A new civilization calls loudly for new definitions of the rights and duties of society to the dead body. Up to the present writing they have not been satisfactorily given.[2]

INTRODUCTION

Without a doubt, society is now experiencing a period of unprecedented technological innovation. Perhaps the most extraordinary of these advances have been in the related fields of medicine and biotechnology. Due to these advances, doctors can now keep alive, and often restore to full health, patients who not that long ago might have been doomed.[3] Perhaps the most problematic of these recent advances involve the transplantation of organs, which has progressed such that now there are frequent transplants of many different organs with

1. Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494, 504 (Ct. App. 1988), *modified*, 793 P.2d 479 (Cal. 1990).

2. Francis K. Carey, *The Disposition of the Body After Death*, 19 AM. L. REV. 251, 252 (1885). This article was written at a time when the supply of cadavers to medical schools was a current problem due to scientific advances. *See id.* at 253.

3. One particularly relevant example is the treatment of hairy cell leukemia. Once a rare but deadly form of cancer, it is now usually easily cured due to recently approved therapies. *See* Daniel C. Weaver, *The Secret in the Marrow*, DISCOVER, Jan. 1994, at 26, 27-28.

increasing success.[4] Similar advances have also allowed the preservation of body products, such as blood, ova, and semen, for later use, whether to save an accident victim or to help an infertile couple. Biotechnology has produced some of the most innovative results of all. In this field, scientists and researchers have been able to use once useless body products to develop life saving medicines and therapies.[5] Indeed, biotechnology in the United States alone has become a billion dollar industry.[6]

As a result of these new technologies, human body parts[7] have taken on a new value above and beyond any sentimental, dignitary, or elemental value.[8] Although this process began long ago,[9] it has accelerated greatly in the last few decades with the pace of the new technologies. Indeed, as a result of these advances, body parts have been treated more and more like property by the ordinary person

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4. *See, e.g.*, Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U. L. REV. 681, 682 & n.7 (1988) (describing success under current procedures in the context of recommending the conscription of organs to supply the need caused by this success).

5. For example, researchers are currently experimenting with using the blood left over in the umbilical cord at birth to treat other children born with immunodeficiency diseases. *See* Kathy Svitil, *Help for Kids With SCIDs*, DISCOVER, Jan. 1994, at 91; *see also*, Leon Jaroff, *Battler for Gene Therapy*, TIME, Jan. 17, 1994, at 56 (mentioning experiments with gene therapy for the same purpose).

6. The federal government alone spent over two billion dollars on research and development in biotechnology in 1987. *See* U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: U.S. Investment in Biotechnology-Special Report OTA-BA 360, at 3 (1988) [hereinafter OTA: U.S. Investment]. Plenty of state and private sector funding also exists. *See id.* at 9-13. The commercial value of products made from one highly unusual spleen was at one time projected to be worth three billion dollars. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 482 (Cal. 1990), *cert. denied*, 499 U.S. 936 (1991).

7. The term body parts as used in this Note is intended to include the body, its parts, and its products, so as to encompass cadavers, tissues and organs, as well as blood and semen. Fertilized eggs and embryos are excluded because of the possibility that they are a separate life, and thus do not belong to anybody.

8. *See* RUSSELL SCOTT, THE BODY AS PROPERTY 14-22 (1981). One commentator, in assessing the possible tax consequences of organ sales, relied on the figure of $653.50 as the market value of the constituent minerals in the body including blood serum. *See* Note, *Tax Consequences of Transfers of Bodily Parts*, 73 COLUM. L. REV. 842, 860 (1973) (citing *Chemical and Engineering News*, Nov. 13, 1972, at 60, col. 2). While not current, this would only need to be adjusted for inflation to reflect the current elemental value.

9. Russell Scott documents the first rise of commercial value in the human body, beginning several hundred years ago, with the rise of medicine which resulted in a demand for cadavers for autopsy. This led to grave robbing, and ultimately procurement through murder, which caused a public outcry which changed the law at that time. *See* SCOTT, *supra* note 8, at 5-12; *see also* Carey, *supra* note 2 (discussing the history of grave robbing and current laws against it).

faced with these issues.[10] All of these conditions have resulted in conflicts with which the law is now confronted. Such demands on the legal system seem to be on the rise,[11] and they will likely continue to increase at an ever more rapid pace. Unfortunately, the law is often slow to come to grips with technology, especially when technology advances so quickly. Indeed, one accurate observation is that "the law marche[s] with medicine, 'but in the rear and limping a little.'"[12] It is time that the law began to catch up to the present reality.

Part I of this Note will discuss the most recent addition to the growing list of conflicts involving the body, new technologies, and the new value of body parts as detailed in the case of *Hecht v. Superior Court*.[13] Specifically, it will examine the decision in *Hecht* that a testator had an ownership interest in his sperm which amounted to a right in property under state probate law.[14] This decision is noteworthy because courts have traditionally been reluctant, for various reasons, to call any interest in a person's body parts a property interest.[15] This part will also briefly look back at the landmark case of

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10. As evidence of this, over the past few decades advertisements have appeared offering the sale of various parts. *See, e.g.*, SCOTT, *supra* note 8, at 1-2; Jesse Dukeminier, Jr., *Supplying Organs For Transplantation*, 68 MICH. L. R. 811, 811 n.1 (1970); Will Bennett, *Advert "Offered £10,000 for a Kidney"*, THE INDEPENDENT, Jan. 10, 1990, at 2; *Poverty-Stricken Iraqis Offer to Sell Kidneys for Transplants*, CHICAGO TRIBUNE, Dec. 3, 1993, at 7 [hereinafter *Poverty Stricken*]; Andy Riga, *Man on Dole Offers Kidney for a Job*, THE GAZETTE (MONTREAL), March 12, 1994, at A3. Reports of the wholesale international trade in body parts for transplant and research have flourished. *See, e.g.*, SCOTT, supra note 8, at 1-3 (discussing kidneys shipped for research); David Adams, *The Organ Theft Scandal*, THE TIMES, Nov. 18, 1993, at 18; Tim McGirk, *India's Poor Sell "Bits of Their Bodies" to the World's Rich*, INDEPENDENT, Aug. 13, 1994, at 8; Hugh O'Shaughnessy, *Murder and Mutilation Supply Human Organ Trade*, THE OBSERVER, Mar. 27, 1994, at 27; Charles P. Wallace, *For Sale: The Poor's Body Parts*, L.A. TIMES, Aug. 27, 1992, at A1.

11. *See* U.S. Congress, Office of Technology Assessment, New Developments in Biotechnology: Ownership of Human Tissues and Cells-Special Report OTA-BA 337, 25-26 (1987) [hereinafter OTA: Ownership of Human Tissues].

12. SIR ZELMAN COWEN, REFLECTIONS ON MEDICINE, BIOTECHNOLOGY AND THE LAW 5 (1986).

13. 20 Cal. Rptr. 2d 275 (Ct. App. 1993), *review denied*, 1993 Cal. LEXIS 4768 (Sept. 2, 1993).

14. *See id.* at 281.

15. The classic statement of this sentiment, which continues to be reflected in the law and in writings on the topic, is that the "buriall [sic] of the Cadaver (that is, *caro dara vermibus*) is *nullius in bonis*, and belongs to Ecclesiastical cognizance." 3 EDWARD COKE, INSTITUTES OF THE LAWS OF ENGLAND *203 (1644); *see infra* part II; *see also* Roy Hardiman, *Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue*, 34 UCLA L. REV. 207, 226 (1986). Read literally, *nullius in bonis* means in the goods of no one.

Moore v. Regents of the University of California.[16] *Moore*, cited by the Court of Appeals in *Hecht*, was the first major case dealing with modern technology and body parts as property.[17]

Part II will consider the treatment historically afforded body parts with respect to property law, and will describe how body parts are usually treated as *sui generis* and governed by rules designed around the particular part to meet policy goals.[18] The goal of this part is to provide a history and overview of the present inconsistent system, and of how ill suited it is to operate in a modern, biotechnologically advanced society.

Part III of this Note recommends that courts recognize that there can be a true property interest in the human body, particularly one's own, and place body parts more squarely under the well developed and generally consistent law of property. The court in *Hecht* has taken but a small step in this direction. This recommendation will be accompanied by arguments as to why such a recognition is desirable and practical. Reasons behind this recommendation include the legal protection, fairness, and uniformity offered by property law. In light of the present state of technology, the recognition of the body as property will allow the legal system to better handle the new demands with which it is faced, and allow people to be sure of control over their own bodies despite the tides of technology.

I. *HECHT V. SUPERIOR COURT* AND THE BRAVE NEW WORLD

A. *Hecht v. Superior Court*

William Kane, a divorced man from Malibu, California with two college-age children, laid the foundation for the controversy in *Hecht v. Superior Court*[19] when he wrote his will. In this will, he directed that his sperm, which he had stored in a sperm bank, was to be given to Deborah Hecht, his girlfriend.[20] Kane had been "assiduously generating"[21] this sperm, probably in contemplation of his death at

16. 793 P.2d 479 (Cal. 1990), *cert. denied*, 499 U.S. 926 (1991).

17. In *Moore*, the California Supreme Court held that a man did not have a sufficient interest in his excised spleen cells to sustain a cause of action for conversion, a property based cause of action. *See id.* at 497.

18. *See id.* at 489.

19. 20 Cal. Rptr. 2d 275 (Ct. App. 1993), *review denied*, 1993 Cal. LEXIS 4768 (Sept. 2, 1993).

20. *Id.* at 276. Hecht and Kane had been living together for about five years. *Id.*

21. *Id.* at 277 (these are Kane's own words).

his own hand.[22] Indeed, about a month after he executed this will, Kane drafted a letter to his children which reflected an intention to shortly take his own life.[23] Kane killed himself in Las Vegas nine days later.[24]

Kane's will was filed with the probate court and a special administrator was appointed to deal with the estate.[25] Kane's children each promptly filed a will contest,[26] alleging undue influence on the part of Ms. Hecht. There were several attempts at conciliation between Ms. Hecht and the children, with two settlement agreements introduced to the court.[27] The first agreement failed due to a dispute over whether or not the sperm was included in the assets of the estate.[28] The second agreement sought to correct this problem by giving Ms. Hecht a percentage of the sperm.[29] Unfortunately for the parties, a creditor intervened before the agreement was finalized, the children sought to withdraw from the agreement, and all efforts at conciliation generally broke down.[30] Approximately one year after Kane's death, the special administrator filed a petition with the court, asking for instructions on what to do with the sperm in light of these circumstances.[31] Apparently, he was hoping to finally settle the issue of who was to receive the sperm.[32] The Kane children filed a state-

22. *See id.* In a letter "addressed to his children [Kane] stated: 'I address this to my children, because, although I have only two . . . it may be that Deborah will decide—as I hope she will—to have a child by me after my death. I've been *assiduously generating* frozen sperm samples for that eventuality.'" *Id.* (emphasis added).

23. *See id.* at 277. Kane wrote: "So why am I checking out now? . . . I'd rather end [life] . . . on my time, when and where I will . . . . In truth, death for me . . . is a form of life's punctuation." *Id.*

24. *Id.* In a wrongful death suit against Hecht, Kane's children alleged that he travelled to Las Vegas by a one way airline ticket, which Hecht had helped him purchase, and that she even drove him to the airport. *See id.* at 279, n.2.

25. *Id.* at 276, 277.

26. *Id.* at 277. The children had already filed suit against Hecht for wrongful death and intentional infliction of emotional distress, alleging that Hecht knew of his plans, encouraged him to transfer property to her inter vivos and in the will, and assisted him in the events leading to his death. *See id.* at 279, n.2. As a side-note, one of the children was represented by the mother, Kane's ex-wife. *See New Claim Made On Estate Delays Sperm Case Ruling*, L.A. TIMES, Oct. 10, 1992, at B2 [hereinafter L.A. TIMES].

27. *Hecht*, 20 Cal. Rptr. 2d at 277-78.

28. *Id.* at 278.

29. *Id.*

30. *Id.* at 279-80. This creditor was Kane's former business partner, who needed to pay off some of their outstanding debts. *See* L.A. TIMES, *supra* note 26, at B2.

31. *See Hecht*, 20 Cal. Rptr. 2d at 278-79.

32. *Id.* The administrator asked that the court either order the sperm destroyed or provide for a preliminary distribution. *Id.*

ment expressing their wish that the sperm be destroyed.[33] They argued that such a disposition would further good public policy by preventing both the birth of fatherless children and the disruption of the family by after-born children.[34] Ms. Hecht also filed a petition. She urged that the sperm be distributed to her because it was gifted to her when deposited in the sperm bank,[35] or alternatively, that the sperm be distributed to her under the will, or under the second settlement agreement.[36]

In December 1992, the probate court summarily ordered that Kane's sperm be destroyed.[37] Hecht sought a writ of prohibition from the California Court of Appeals to prevent execution of the destruction order.[38] This is the appeal addressed in *Hecht v. Superior Court.*

The court of appeals first decided the threshold matter of jurisdiction because "[t]he power of the probate court extends only to the property of the decedent."[39] Therefore, for the probate court to have jurisdiction to deal with the semen at all, the semen would have to be considered property, at least under the probate code.[40]

The Kane children argued that the probate court's decision was entirely proper under the California Supreme Court's prior decision in *Moore v. Regents of the University of California.*[41] They maintained that *Moore* precluded a property interest in one's own body parts, and thus would prevent Kane from distributing his sperm through his will.[42] The court dismissed this argument, finding Moore to be dis-

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33. *Id.* at 279.

34. *Id.*

35. *Id.* When Kane left the sperm in the bank, he authorized release of the specimens to Deborah Hecht. *Id.* at 276.

36. *Id.* at 279.

37. *Id.* The court recognized the need for an appellate decision in the case. In answer to a request for a legal basis, the court stated, "if I am wrong, I am wrong. . . . Obviously we are all agreed that we are forging new frontiers because science has run ahead of common law. . . . [W]e have got to have some sort of appellate decision . . . ." *Id.* at 280, n.3.

38. *Id.* at 280.

39. *Id.*; *In re* Lee, 177 Cal. Rptr. 229, 232 (Ct. App. 1981); *see also*, WILLIAM H. PAGE, THE LAW OF WILLS 347 (2d ed. 1926) ("Nothing can pass by will which is not the subject of property.").

40. *Hecht*, 20 Cal. Rptr. 2d at 280.

41. 793 P.2d 479 (Cal. 1990). The court in Moore decided that Mr. Moore had no ownership or possessory interest in his spleen tissue once it had left his body. *See id.* at 488-89.

42. *Hecht*, 20 Cal. Rptr. 2d at 280-81. Some earlier commentators shared this view with respect to the corpse. "The view maintained by some of these authorities is . . . there is no property in a dead body; that it is not part of the estate of the deceased person; and that a

tinguishable.[43] The court also pointed out that use of the argument in this way would be self defeating because, if true, it would mean that the semen was not part of Kane's estate, and therefore the probate court would have had no power to order its disposal.[44]

The court of appeals found that *Moore* did not resolve the debate over the extent of a property interest in one's body, nor did it prevent the court from holding that the semen was property.[45] Indeed, *Hecht* primarily dealt with *Moore* in a footnote in which the court distinguished the dismissal of Mr. Moore's conversion claim.[46] Mr. Moore had no expectation of exercising control over his excised cells, therefore he had no interest. William Kane's situation was different in that the sperm bank agreement was evidence that he expected to retain an interest.[47] He had an ownership interest in his sperm to the extent that he had a decision making authority over the sperm's disposition after his death.[48] In the end, the court concluded that

> at the time of his death, decedent had an interest, in the nature of ownership, to the extent that he had decision making authority as to the sperm within the scope of policy set by law. Thus, decedent had an interest in his sperm which falls within the broad definition of property in Probate Code section 62, as "anything that may be the subject of ownership and includes both real and personal property and any interest therein."[49]

The court of appeals also rejected several policy arguments, advanced by Kane's children, concerning sperm banks and unwed motherhood.[50] It ordered the probate court to vacate its previous order, to deny the petition, and to conduct further proceedings in the case.[51] At the time of this writing, it remains to be seen how the ultimate issue in *Hecht v. Superior Court* will be resolved.[52]

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man cannot by will dispose of that which after his death will be his corpse." GEORGE W. THOMPSON, THE LAW OF WILLS 640 (2d ed. 1936); *see also* PAGE, *supra* note 39, at 64.

43. *See Hecht*, 20 Cal. Rptr. 2d at 280-81.

44. *See id.* at 281.

45. *Id.* At least one commentator had similarly suggested that Moore is not so comprehensive. *See* Bernard M. Dickens, *Living Tissue, Organ Donors, And Property Law: More on Moore*, 8 J. CONTEMP. HEALTH L. & POL'Y 73 (1992).

46. *Hecht*, 20 Cal. Rptr. 2d at 280 n.4.

47. *Id.* at 280 n.4, 281.

48. *Id.* at 281.

49. *Id.* (citation omitted).

50. *Id.* at 281-90.

51. *Id.* at 291.

52. While the Kane children may yet prevail if they can show that the settlement agree-

Thus, the court to some extent advanced the idea that persons can and do have some sort of property interest in their bodies. However, the court did fall far short of recognizing a comprehensive property right in the body. In this way, it resembles to some extent the quasi-property approach to dead bodies, which will be discussed below.[53] Most importantly, while the court did hold that the semen was property for the purposes of devise and probate jurisdiction, it declined to apply more general property principles, specifically the law of gifts of personal property, to the transaction between Kane and Ms. Hecht.[54]

However, the court of appeals did not rule out the possibility that other body parts might be treated more like property. Much of the court's concern was that gametic material be used as the donor intended. Indeed, the cases of *Davis v. Davis*,[55] and *York v. Jones*,[56] were significant in the court's decision. From this emphasis, one could infer that the decision not to apply the law of gifts of personal property occurred not because the court was dealing with a body part in general, but rather because sperm is a body part capable of generating life.[57] While the court in *Hecht* did not take all of the steps

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ments were never validated and that Hecht unduly influenced their father, the real possibility exists that Hecht could come into possession of the semen and bear a child. This possibility raises many issues that will not be explored here. Among these are contractual issues involving the relationships between sperm banks and donors, and the rights of the after-born child as a pretermitted heir, as well as the operation of the rule against perpetuities in such situations. For a discussion of these issues as raised by *Hecht*, see Sheri Gilbert, *Fatherhood from the Grave: An Analysis of Postmortem Insemination*, 22 HOFSTRA L. REV. 521 (1993).

53. *See infra* part II.C.

54. *See Hecht*, 20 Cal. Rptr. 2d at 283. *See also*, CAL. PROB. CODE § 5700 (West 1992) (gifts *causa mortis*).

55. 842 S.W.2d 588 (Tenn. 1992) (holding that the parents of frozen pre-embryos had a decision making authority, an interest in the nature of ownership, to order their disposition), *cert. denied*, 122 L.Ed. 2d 352 (1993).

56. 717 F. Supp. 421 (E.D. Va. 1989) (holding that the donors of gametes have the right to decide their disposition within medical and ethical guidelines).

57. *See Hecht*, 20 Cal. Rptr. 2d at 283. "In view of the nature of sperm as reproductive material which is a unique type of 'property', we also decline [Hecht's] invitation" to apply gift law. *Id.* Indeed, gametic material is often considered to involve special considerations, although here it is submitted that it too should be property. As one commentator put it,

> [o]ne simply does not care if ejaculates or ova are lost—provided that they are *actually* lost and that their information content, their genetic potential, is not going to be realised [sic] in a way one's not happy with. . . . This potential should always remain the responsibility, the provenance, the dominion, *perhaps the property*, of the donor.

Robert P.S. Jansen, *Sperm and ova as property*, 11 J. MED. ETHICS 123, 125 (1985) (second

that it could have in recognizing property rights in body parts, it did not necessarily prohibit lower courts from fully recognizing other body parts as property.

In the final analysis, *Hecht v. Superior Court* does take a significant step forward in recognizing body parts as property by recognizing semen as property, even for the limited purposes of probate jurisdiction and under this limited holding. This accords well with some modern trends.[58] Unfortunately, the court fell short of recognizing a comprehensive property right by refusing to apply the law pertaining to gifts of personal property. The court should have taken this step because a property rule, in today's technologically advanced society, would be the most suitable solution to face the problems society is experiencing with the possibility of exchanges in body parts.[59]

B. A Look Back at Moore

One of the chief obstacles to Ms. Hecht's claim was the decision by the California Supreme Court in *Moore v. Regents of the University of California.*[60] *Moore* is the most important, and virtually the only, case on the subject of the ownership of body parts in light of the new value of the human body.[61] The court of appeals' distinguishing of *Hecht* from *Moore*,[62] and the importance of *Moore* with regard to the subject in general, and in *Hecht v. Superior Court* in particular, justify a brief look back at the details of the case.

Mr. Moore's ordeal began in 1976, when he was diagnosed as having hairy cell leukemia. This condition necessitated the removal of his spleen, which was recommended by a doctor at the UCLA Medical Center. Moore consented to have his spleen surgically removed. However, what Mr. Moore did not know was that his spleen was promptly taken to his doctor's research lab, and that the doctor began

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emphasis added).

58. See discussion of the treatment of body parts as quasi-property, *infra* part II.C.

59. *See* discussion, *infra* part III.

60. 793 P.2d 479 (1990), *cert. denied*, 499 U.S. 936 (1991).

61. There was a great deal of commentary on the subject of ownership of human body parts spurred by Mr. Moore's case at all stages of its progress through the courts. *See, e.g.*, Karen G. Biagi, *Moore v. Regents of the University of California: Patients, Property Rights, and Public Policy*, 35 ST. LOUIS U. L.J. 433 (1991). For a commentary, apparently borne out by *Hecht*, that suggests *Moore* was not very limiting with respect to property rights, see Dickens, *supra* note 45.

62. *See supra* notes 46-47 and accompanying text; *see also Hecht*, 20 Cal. Rptr. 2d at 280-81.

research involving various cells contained in the excised spleen. For the next seven years, Mr. Moore returned to the doctor to have various blood and tissue samples taken, with the understanding that these medical procedures were necessary to his health and well being.[63]

Moore apparently did not know, or even suspect, that his doctor was actually furthering his own continuing research. The doctor had managed to use Moore's spleen and other tissues to establish a cell line,[64] which he subsequently patented.[65] This cell line, derived from both Mr. Moore's cells and the doctor's hard work, was at one time estimated to be worth over three billion dollars due to the variety of rare products it is capable of producing.[66]

When Moore found out what was happening, he sued all those involved, alleging thirteen causes of action, including conversion,[67] which is a common law tort protecting persons against interference with their personal property.[68] The trial court dismissed his suit for failure to state a cause of action for conversion.[69] Moore appealed, and the decision was reversed, holding that the complaint stated a valid cause of action for conversion.[70] In a well reasoned opinion, the California Court of Appeals held that the conversion claim could stand because there was no reason to think that Moore did not have a sufficient property interest in his own cells to sustain the claim.[71] This common sense decision was a significant step towards recognizing a property right in human body parts, and one which generated a great deal of commentary.[72] However, this precedent did not last long.

On further appeal, the California Supreme Court reversed and

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63. *Moore*, 793 P.2d at 481.

64. A cell line is "[a] sample of cells that has undergone the process of adaptation to artificial laboratory cultivation and is capable a sustaining continuous, long term growth in culture." OTA: Ownership of Human Tissues, *supra* note 11, at 156.

65. *Moore*, 793 P.2d at 482-83. Living materials became patentable under the rule in Diamond v. Chakrabarty, 477 U.S. 303 (1980). *See also* OTA: Ownership of Human Tissues, *supra* note 11, at 49-50, 70-71.

66. *See Moore*, 793 P.2d at 482.

67. *Id.* at 482 n.4. Moore's other claims included lack of informed consent and breach of fiduciary duty, under which he would ultimately be allowed to proceed. *Id.* at 485.

68. *See* DAN B. DOBBS, TORTS AND COMPENSATION 58-61 (1985).

69. *Moore*, 793 P.2d at 482-83. The rest of the suit was dismissed because the court considered all the other causes of action as incorporating the first of conversion. *Id.* at 482.

70. *Id.* at 483.

71. *See Moore*, 793 P.2d at 503.

72. *See, e.g.*, sources cited *infra* notes 79-80.

again dismissed Mr. Moore's conversion claim.[73] The majority expressed a reluctance to extend property rights into the situation,[74] and seemed to prefer that Moore's rights be protected by upholding his claims for breach of fiduciary duty and lack of informed consent, which the court felt offered adequate protection.[75] The conversion claim was viewed as too problematic because, according to the majority, existing law indicated that Moore had no right to possession of his cells.[76] However, as *Hecht* points out, the holding did not rule out the possibility of there ever being a property right in human body parts.[77] Rather the court preferred not to determine the issue itself and expressed a desire that the legislature act in this area.[78] The crucial distinctions in *Moore*, as far as property rights were concerned, were that Mr. Moore was having the tissue removed for his benefit and did not expect to retain it. The court of appeals relied upon this when it distinguished *Hecht*. This factor is why *Moore* had not reached the subject of body parts as property, despite the California Supreme Court's refusal to uphold the conversion claim.

As previously noted, Mr. Moore's case bred a great deal of commentary at all stages. Many commentators argued that courts should not recognize a property interest, such as the one involved in the conversion claim, generally for similar policy considerations as expressed by the majority in *Moore*.[79] Others were justifiably concerned at the apparent, if not actual, holding that these cells were simply not his property.[80]

Of course, in light of *Hecht* it is patent that the narrow holding

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73. *Moore*, 793 P.2d at 496-97.

74. *See id.* at 493-96.

75. *See id.* at 496-97.

76. *See id.* at 488-93. In particular, a California statue which provided for the disposal of excised tissue seems to have been influential in this conclusion. *See id.* at 488-92; CAL. HEALTH & SAFETY CODE § 7054.4 (West Supp. 1994) (providing for proper disposal to protect the public health and safety); *Moore*, 793 P.2d at 491-92.

77. *See* Hecht v. Superior Court, 20 Cal. Rptr. 2d 275, 281 (1993); *Moore*, 793 P.2d at 493 ("[W]e do not purport to hold that excised cells can never be property for any purpose whatsoever."); *see also*, Dickens, *supra* note 45, at 77-78.

78. *Moore*, 793 P.2d at 496, 498.

79. *See, e.g.*, Paul A. Gerike, *Human Biological Material: A Proprietary Interest or Part of the Monastic Being?*, 17 OHIO N.U. L. REV. 805 (1991); Jennifer Lavoie, *Ownership of Human Tissue: Life After* Moore v. Regents of the University of California, 75 VA. L. REV. 1363 (1989).

80. *See, e.g.*, Gina M. Grandolfo, *The Human Property Gap*, 32 SANTA CLARA L. REV. 957 (1992); K. Peter Ritter, Moore v. Regents of the University of California: *The Splenetic Debate Over Ownership of Human Tissue*, 21 SW. U. L. REV. 1465 (1992).

in *Moore* really had little effect on the recognition of a property right in human body parts, at least above and beyond the generation of debate. However, despite this fact, many similarities exist between the two cases. Both touched upon property interests in human body parts in ways which have rarely been addressed by the case law of any jurisdiction. Before *Moore*, there was a relative vacuum in the case law and commentary on the subject.[81] Now these issues are being faced due to the rise in our society of technology, particularly biotechnology. As previously stated, *Hecht* was a significant but limited step in the right direction, away from an older view of the body being incapable of being property in general, and towards a solution to modern problems.

II. A BRIEF HISTORY OF PROPERTY IN THE HUMAN BODY

The California Supreme Court noted in *Moore v. Regents of the University of California*[82] that traditionally "the laws governing such things as human tissues, transplantable organs, blood, fetuses, pituitary glands, corneal tissue, and dead bodies deal with human biological materials as objects *sui generis, regulating their disposition to achieve policy goals* rather than abandoning them to the general law of personal property".[83] To a certain extent, this statement is true. More accurately, there has been a long tradition resisting property in human body parts. However, court decisions similar to that in *Hecht* are not unheard of and have cropped up in several states at various times in response to changed circumstances. Actually, the true picture of property in human body parts is more uncertain than the *Moore* court recognized; this is very much the product of the law's historical development.

A. Common Law Developments

Prior to the advent of the modern technologies behind *Moore*,

81. Of course, there is a great deal of precedent dealing with the related issue of property in corpses. *See infra* part II.A-C. However, as will be observed, most of these are quite old, and none deal with the modern medical and biotechnological issues society now faces, which make the need for a property right so compelling. Other actions were brought that implicated similar issues of ownership, but these were settled out of court. *See* OTA: Ownership of Human Tissues, *supra* note 11, at 25-26 (presenting three other cases involving ownership interests in cell lines as between researchers and donors).

82. 793 P.2d 479 (Cal. 1990).

83. *Id.* at 489 (emphasis added) (footnotes omitted).

Hecht, and organ transplantation, the only body parts that were of any consequence were the dead cadaver itself and any constituent parts which happened to be severed from it. The primary concern of the law and of society was the decent interment of the corpse.[84] It is from this context that the underpinnings of the current situation and the state of the law arose.

The writings of Sir Edward Coke represent the earliest recorded consideration of the body in a property context at common law. Coke wrote "[t]he buriall [sic] of the [c]adaver (that is *caro data vermibus*) is *nullius in bonis*,[85] and belongs to [e]cclesiastical cognizance."[86] For this proposition, Coke's only justification was a citation to a wholly inapplicable case in which the issue never even arose.[87] Despite this fact, Coke's statement was fated to lay the venerable foundation for the rule in Anglo-American law that human body parts cannot be property.[88] Other influential commentators followed Coke's lead without question.[89] Blackstone, for example, opined "[b]ut though the heir has property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes."[90] Although there were valid criticisms of its basis,[91] the so called no-property rule was established and growing.[92]

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84. Indeed, as one commentator puts it, at a time "before common sense had suggested any doubt as to the certainty of the resurrection of the human body in its original flesh and blood." Carey, *supra* note 2, at 251.

85. Literally, "in the goods of no one."

86. 3 COKE, *supra* note 15, at *203.

87. *See id.* This is *Hayne's Case*, 77 Eng. Rep. 1389 (K.B. c.1614). This was a case of grave robbing, where it was decided that the goods taken from the grave could not belong to the dead man as the dead are not capable of accepting them as a gift. *Id.* Apparently, the concern was over the correct form of the indictment as to from whom the items were stolen. *See id.*

88. Paul Matthews, *Whose Body? People as Property*, 36 CURRENT LEGAL PROBLEMS 193, 198 (Lord Lloyd of Hampsted et al. eds., 1983).

89. Indeed, it does not seem as if anyone even challenged this assertion for a long time, leading to the inference that its support was to be found in popular attitudes of the time. *See infra* notes 166, 175, 247 and accompanying text. However, other commentators did cite Hayne's Case for the correct rule. *See* MATTHEW HALE, HISTORIA PLACITORUM CORONAE *515 (1736); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN *94 (2d ed. 1724) ("[A] dead man can have no property."); *see also*, Matthews, *supra* note 88, at 197-98.

90. 2 WILLIAM BLACKSTONE, COMMENTARIES *429 (1766).

91. *See* Matthews, *supra* note 88, at 197-98 ("The classical writers of the common law, then, for the most part agree that there is no property in corpses, but they either cite each other or the case of a buried corpse where the question did not even arise, much less was decided.").

92. As one American judge later put it, "Coke was understood to say that 'a dead body was the property of no one.' No matter what he did say; this understanding, or misunder-

One of the earliest cases which helped to establish Coke's rule was that of a Doctor Handyside, which also is inadequately reported. The entire record is brief enough to quote completely:

> There can be no property in a dead corpse; and therefore stealing it is no felony, but a very high misdemeanor. In the case of Dr. Handyside, where trover was brought against him for two children that grew together; Lord C.J. Willes held the action would not lie, as no person had any property in corpses. But a shroud stolen from the corpse must be laid to be the property of the executors, or whoever else buried the deceased, and not of the deceased himself.[93]

Thus it can be seen that Coke is followed, and similarly mentioned right alongside the rule in *Hayne's Case*, without thoughtful or helpful distinction.

The few other older English cases that exist on the topic serve as good examples of how the rule was followed, as they are similarly conclusory in stating the no-property rule. In *Williams v. Williams*,[94] where a woman, who disposed of a friend's body by cremation as requested via his will and private conversations, sued the estate for the expenses, it was stated that "[i]t is quite clearly the law of this country that there can be no property in the dead body of a human being."[95] After reiterating this rule a few times, the court dismissed her suit. The court reasoned that if there was no property in a corpse, then it could not be disposed of by will, and thus she had no claim against the estate for doing what decedent had no right to legally order.[96]

One of the authorities cited by the court in *Williams* was *Regina v. Sharpe*.[97] This case was an appeal from a misdemeanor conviction by a man who dug up his mother's body to move her to be with his father in a different burial ground.[98] The court affirmed the convic-

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standing, has come down to us *as law*." Griffith v. Charlotte, C. & A. R.R., 23 S.C. 25, 32 (1884).

93. 2 EDWARD H. EAST, A TREATISE OF THE PLEAS OF THE CROWN 652 (Professional Books Limited 1987) (1803). Trover is an action for interference with or wrongful retention of the personal property of another. BLACK'S LAW DICTIONARY 1508 (6th ed. 1990).

94. 20 L.R.-Ch. D. 659 (1882).

95. *Id.* at 662-63.

96. *See id.* at 665. The fact that she had dug him up and had him cremated, but was not family, does not seem to have helped her case. *See id.* at 666-68.

97. 169 Eng. Rep. 959 (Crim. App. 1857).

98. *Id.* at 959-60; *see* EAST, *supra* note 93, at 652 (stealing a corpse is a high misdemeanor).

tion. "The evidence for the prosecution proved the misdemeanor, unless there was a defence [sic]."[99] After discounting a defense based on the defendant's motives the court went on to state "[n]either does our law recognise [sic] the right of any one child to the corpse of its parent as claimed by the defendant. Our law recognises [sic] no property in a corpse."[100] No authority is cited, not even Coke, which evidences just how much the no-property rule was taken for granted. Admittedly, these cases came about after American law had been given a life of its own, but they are nonetheless useful examples from the same tradition of how pervasive the rule had become.

The no-property rule caused doubt for some time in common law countries as to the legal status of mummies and human organs as preserved specimens. Though these items were commonly treated as property,[101] such treatment seemed to run afoul of the no-property rule despite the fact that they had all of the other indicia of property. Finally, in the case of *Doodeward v. Spence*,[102] an Australian court distinguished these specimens from the corpse in that they were the products of human labor to some extent, and it is this labor which caused them to become property.[103] This rule was enough to settle the apparent discrepancy in the law at that time, though from a practical standpoint the decision probably made little real difference in the way such specimens were obtained and traded. A similar case has not arisen in America.

B. American Developments

American law had to adapt to its own unique conditions, however. In early America, primarily due to the absence of ecclesiastical courts, cadavers and body parts came under the protection of the common law.[104] As a result, courts acquired a limited power to ensure acceptable disposition of the corpse and its subsequent protection.[105] During this period, however, commercial rights did not develop, probably as a result of social mores against desecration of the body as well as the very limited usefulness of a corpse.[106]

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99. *Sharpe*, 169 Eng. Rep. at 960.
100. *Id.* at 960.
101. *See* SCOTT, *supra* note 8, at 187-88.
102. 6 C.L.R. 406 (Austl. 1908).
103. *See id.* at 422-23.
104. OTA: Ownership of Human Tissues, *supra* note 11, at 72; *see infra* note 113.
105. *See* OTA: Ownership of Human Tissues, *supra* note 11, at 72.
106. *Id.*

Once divorced from the ecclesiastical courts, the immediate task the law had to confront was to define the various rights and duties relating to dead bodies in order to ensure proper disposition and due regard.

The first questions the law had to address in America were quite simple: upon death, who had control over the burial of the corpse and what rights existed to protect and govern the corpse after burial? In response, courts recognized various legal rights with respect to burial and the corpse. The most influential writing was a note on the law of burial, prepared from a referee's report to the New York Surrogate's court, and used in resolving a case in which a street was widened over part of a cemetery.[107] After exhaustive discussion and historical review, the writer concluded:

> 1. That neither a corpse, nor its burial, is legally subject, in any way, to ecclesiastical cognizance, nor to sacerdotal power of any kind.
>
> 2. That the right to bury a corpse and to preserve its remains, is a legal right, which the courts of law will recognize and protect.
>
> 3. That such right, in the absence of any testamentary disposition, belongs exclusively to the next of kin.
>
> 4. That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure.
>
> 5. That if the place of burial be taken for a public use, the next of kin may claim to be indemnified for the expense of removing and suitably re-interring their remains.[108]

At a subsequent hearing, the court confirmed these principles in its decision of the case.[109] Other writers and courts adopted these principles, making them a commonly accepted view of the law in this country.[110] In many of these cases, the court continued to indicate

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107. Samuel B. Ruggles, *Law of Burial*, 4 Bradf. 503, 503 (N.Y. Sur. Ct. 1856).

108. *Id.* at 532.

109. *See id.* at 532 n.

110. *See, e.g.*, Enos v. Snyder, 63 P. 170, 171-72 (Cal. 1900) (granting judgement for plaintiff family members for possession of the body despite decedents will which directed burial by defendant); Bogert v. City of Indianapolis, 13 Ind. 134 (1860) (recognizing the relative's rights to the burial in dicta); Snyder v. Holy Cross Hosp., 352 A.2d 334, 340 (Md. Ct. Spec. App. 1976) (recognizing protectable right to ensure decent burial); Birch v. Birch, 204 N.Y.S. 735, 736 (Sup. Ct. 1924) (recognizing right to body for burial belongs to surviving spouse in granting an injunction against the executor of an estate to prevent him from interfering with wife's choice of monument), *aff'd*, 205 N.Y.S. 913 (App. Div. 1924); Darcy v. Presbyterian Hosp., 95 N.E. 695, 696 (N.Y. 1911) (asserting above principles as settled

that there was no property in the human body, but that these rights existed despite the no-property rule,[111] or even irrespective of property.[112] As previously stated, these modifications in the law came about because of changed circumstances.[113]

C. *The Quasi-Property Approach*

It is from these various rights and duties that courts began to move a little closer to a property based approach. From them, courts recognized what has been described as a quasi-property interest in the corpse.[114] Recognized quasi-property interests include the right of the next of kin to possess a corpse for burial, as discussed above, an enforceable right to be free from interference with this possession or with the corpse,[115] and most recently, a right to donate organs.[116]

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law in a suit for unlawful autopsy); Foley v. Phelps, 37 N.Y.S. 471, 478-79 (App. Div. 1896) (holding that the right to possession of corpse without interference is an enforceable legal right despite Coke); Secord v. Secor, 18 Abb. N.C. 78 (N.Y. Sup. Ct. 1870) (holding that rights to bury the dead will be protected); Pettigrew v. Pettigrew, 56 A. 878, 879 (Pa. 1904) (holding that next of kin have a right of control and disposition); Griffith v. Charlotte, C. & A. R.R., 23 S.C. 25, 28 (1883) (holding that the administrator had no right to the body and so could not bring suit for its mutilation); *see also* Frank W. Grinnell, *Legal Rights in the Remains of the Dead*, 17 THE GREEN BAG 345, 347-51 (1905) (describing rights of relatives); R.S. Guernsey, *The Ownership of a Corpse Before Burial*, 10 CENTRAL L.J. 303, 304 (1880) (holding that rights attach to the corpse which the law will protect).

111. *See, e.g.*, *Darcy*, 95 N.E. at 696 (approving the approach taken in *Larson v. Chase*, that although a corpse is not property, next of kin have right to possession); *Secord*, 18 Abb. N. Cas. at 80 (holding that relatives' rights not based on property).

112. *See e.g.*, *Foley*, 37 N.Y.S. at 473 (holding that plaintiff had right to possession "[i]rrespective of any claim of property"); Larson v. Chase, 50 N.W. 238, 239 (Minn. 1891) ("But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense."); *Pettigrew*, 56 A. at 879 ("The right . . . whether called 'property' or not, springs . . . from the legal duty.").

113.

> The repudiation of the ecclesiastical law and of ecclesiastical courts by the American colonies left the temporal courts the sole protector of the dead and of the living in their dead. Inclined to follow the precedents of the English common law, these courts were at first slow to realize the changed condition of things, and the consequent necessity that they should take cognizance of these matters and administer remedies. . . . This has been accomplished by a process of gradual development, and all courts now concur in holding that the right to the possession of a dead body for the purposes of decent burial belongs to those most intimately and closely connected with the deceased . . . and that this is a right which the law will recognize and protect.

Larson, 50 N.W. at 238-39; *see supra* text accompanying notes 104-07.

114. OTA: Ownership of Human Tissues, *supra* note 11, at 72. Perhaps not incidentally, this was just after a period in England which saw the transfer of the law of bodies completely to the secular courts in response to the demands and problems raised by the need of corpses by the medical profession. *Id.*

115. *See id.*; Erik S. Jaffe, Note, *'She's Got Bette Davis['s] Eyes': Assessing The*

The best statement of this approach is to be found in *Pierce v. Proprietors of Swan Point Cemetery*.[117] This case was brought in equity to have a body restored to the grave from which it was removed by the defendant, and to enjoin her from further interference.[118] However, it was claimed that a jurisdictional problem existed in that the court only had jurisdiction over matters affecting rights in property.[119] In order to deal with this situation, and arguably just to achieve the proper result,[120] the court reasoned

> [a]lthough, as we have said, the body is not property in the usually recognized sense of he word, yet 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, and we think that a court of equity may well regulate it as such . . . .
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> . . . .
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> . . . [W]e think there is no doubt of the jurisdiction of the

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Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses, 90 COLUM. L. REV. 528, 543 (1990).

116. Jaffe, *supra* note 115, at 544. All fifty states have enacted a version of the Uniform Anatomical Gift Act, 8A U.L.A. 19 (1993) [hereinafter UAGA], which provides for the charitable disposition of the corpse for research, and of organs for transplant. *See* Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1188 (1974); *infra* notes 132-34 and accompanying text.

These common law decisions seem to be in accord with a sentiment expressed so succinctly by Judge Cardozo, that "[e]very [adult] human being . . . has a right to determine what shall be done with his own body." Schloendorff v. Society of N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914). Cardozo was referring to informed consent, but this idea has been engrafted into the present controversy and extended into the discussion of rights in human body parts. *See* Moore v. Regents of the Univ. of Cal., 793 P.2d 479, 505 (Cal. 1990).

117. 10 R.I. 227 (1872).

118. *Id.* at 227-29.

119. *See id.* at 231-32.

120. In one case it was noted that

> [b]ecause there were no ecclesiastical courts in this country to resolve matters relating to corpses, the courts conceived the notion of "quasi-property right," when referring to the interest of relatives in the bodies of their next-of-kin. Dean Prosser noted: "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."

Georgia Lions Eye Bank v. Lavant, 335 S.E.2d 127, 128 (Ga. 1985) (citations omitted), *cert. denied*, 475 U.S. 1084 (1986).

court in this case.[121]

Thus, the court brought the body a little closer into the realm of property while still espousing the common law no-property rule. Moreover, this approach was assimilated by many courts until it gained widespread acceptance.[122]

At least one court took this progression one step further, however, and found that a person's body could be property.[123] The unequivocal statement of that a body is property[124] can be found in *Bogert v. City of Indianapolis*.[125] In dicta,[126] the court stated

> [w]e 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.[127]

Of no precedential value, this statement does exhibit that as early as 1860, there was a questioning of the no-property rule.

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121. *Pierce*, 10 R.I. at 242-43.

122. *See, e.g.*, Arnaud v. Odom, 870 F.2d 304 (5th Cir. 1989) (Louisiana quasi-property right rises to the dimension of a constitutional property right), *cert. denied*, 493 U.S. 855 (1989); O'Donnell v. Slack, 55 P. 906, 907 (Cal. 1899) (accord); Georgia Lions Eye Bank v. Lavant, 335 S.E.2d 127 (Ga. 1985) (accord); McCoy v. Georgia Baptist Hosp., 306 S.E.2d 746, 747-48 (Ga. Ct. App. 1983) (accepting quasi-property approach); Snyder v. Holy Cross Hosp., 352 A.2d 334, 341 (Md. Ct. Spec. App. 1976) (accord); Larson v. Chase, 50 N.W. 238, 239 (Minn. 1891) (a parallel to *Pierce*); Spiegel v. Evergreen Cemetery Co., 186 A. 585, 586 (N.J. 1936) (quasi-property the prevailing view); Foley v. Phelps, 37 N.Y.S. 471, 474 (App. Div. 1896) (widow's legal right to husband's body was short of property right); Diebler v. American Radiator & Standard Sanitary Corp., 92 N.Y.S.2d 356, 358 (Sup. Ct. 1949) (recognizing dead bodies as quasi-property); Snyder v. Snyder, 60 How. Pr. 368, 371 (N.Y. Sup. Ct. 1880) (accepting *Pierce* approach); *see also* Walter F. Kuzenski, *Property in Dead Bodies*, 9 MARQ. L. REV. 17 (1924) (arguing that a "qualified property interest in trust for burial" exists in the next of kin).

123. *See* Bogert v. Indianapolis, 13 Ind. 134, 138 (1860).

124. Judicial statements exist which appear to recognize a broad property right, but when analyzed more properly, they indicate that the rights enjoyed by the next of kin are property that will be protected. Thus what is really being accepted is the quasi-property approach of *Pierce*, 10 R.I. at 242-43; *see, e.g.*, Dunahoo v. Bess, 200 So. 541 (Fla. 1941) (recognizing a property right analogous to quasi-property).

125. 13 Ind. 134, 138 (1860).

126. *Id.* at 138 (Perkins, J., *gratis dictum*) ("This is a point not necessary here to be decided, and we are not, therefore, in what we say upon it, speaking for the Court.").

127. *Id.* at 138.

D. The Current Situation

In the latter half of this century, there has been an even greater demand for human body parts as a result of medical advances. The law and society have attempted to adapt, but the result is that the law is at a stage where different body parts are treated in widely varying ways.

For example, many body parts are now commonly treated as commodities appropriate for sale, with very little legal involvement.[128] Blood, semen, hair, teeth, sweat, and urine are the simplest of these,[129] but even pieces of skin and muscle from living persons have been sold without raising any controversy.[130] Pituitary glands are even sold for use in research and medications.[131] Sale of these body parts is discrete but common-place, appears to be legal, and has apparently been accepted by society.

The Uniform Anatomical Gift Act ("UAGA"),[132] which has been enacted, in some form, by all fifty states,[133] authorizes the donation of body parts for transplant or medical research.[134] The statutory recognition of body part gifts is a further example of how society currently treats body parts like property, because the concept of donation is related to property.[135] In common usage, the giving of a gift is typically envisaged as the giving of some sort of "thing" which is considered property.[136] Such gifts of body parts are highly accepted in current society,[137] and are considered desperately needed.[138] As a result, the law and society have allowed this interest

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128. *See* Anita M. Hodgson, *The Warranty of Sperm: A Modest Proposal to Increase the Accountability of Sperm Banks and Physicians in the Performance of Artificial Insemination Procedures*, 26 IND. L. REV. 363, 373 (1993) (listing blood and semen as generally "acceptable for sale"). Sperm donors average fifty dollars per donation. *Id.* at 374, n.75, 375.

129. *See* SCOTT, *supra* note 8, at 180-81, 190-91.

130. *See* SCOTT, *supra* note 8, at 190. The author, while attending a university with an attached research hospital, can recall posters offering seventy-five dollars for small circles of living skin to be used in medical research.

131. *See id.* Many states authorize removal of the pituitary during autopsy. *Id.* at 93.

132. UAGA, *supra* note 116.

133. *See* Note, *supra* note 116, at 1188; UAGA, *supra* note 116, at 19, 63.

134. *See* UAGA, *supra* note 116, at §§ 2-4, 6(a).

135. As a specific statute, this, of course, does not necessarily change the common law.

136. Gift is defined as a "voluntary transfer of property to another made gratuitously and without consideration." BLACK'S LAW DICTIONARY 688 (6th ed. 1990).

137. Seventy percent of Americans polled indicated a willingness to donate organs after their death. Rorie Sherman, *Bioethics Debate*, NAT'L L.J., May 13, 1991, at 1, 30.

138. *See* Silver, *supra* note 4, at 682-88 (describing the shortage of organs for transplant

which looks like a property interest.

On the other hand, Congress has passed the National Organ Transplantation Act ("NOTA"),[139] which prohibits the sale of organs for transplant.[140] However, the Act does address the disposition of body parts other than organs,[141] nor does it deal with dispositions of organs for purposes other than transplants.[142] Thus, to some small degree, the law has retreated from a property right in human body parts, perhaps indicating that one existed in practice, if not at law.[143] However, because it is so limited in scope, the Act continues to leave many issues concerning the ownership of body parts unresolved.

Some states have also stepped in and passed laws prohibiting trade in human organs. Most of these state statutes are similar to NOTA in that they are limited in scope to the transfer of organs for transplantation.[144] However, at least three states ban the sale of human body parts altogether,[145] and a few states have unique variations on these themes.[146] So, even where there has been state action, in most cases the law leaves much unresolved.

Against this mix of rules and regulations, the world is in a state

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due to inadequate anatomical gift-giving).

139. Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified as amended at 42 U.S.C. §§ 201, 273, 274e) (Supp. 1994).

140. *See* 42 U.S.C.S. § 274e (Supp. 1994).

141. Organ is defined broadly but not exhaustively to include the "kidney, liver, heart, lung, pancreas, bone marrow, cornea, eye, bone, and skin or any subpart thereof." *Id.* at § 274e(c)(1).

142. The relevant portion reads "[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration *for use in human transplantation* if the transfer affects interstate commerce." *Id.* at § 274e(a) (emphasis added).

143. *See infra* notes 153-58 and accompanying text.

144. At least seven states prohibit the sale of organs for the purpose of transplantation. *See* CONN. GEN. STAT. ANN. § 19a-280a (West Supp. 1994) (misdemeanor); LA. REV. STAT. ANN. § 101.1 (West Supp. 1994) (felony); NEV. REV. STAT. ANN. § 201.460 (Michie 1992) (misdemeanor); N.Y. PUB. HEALTH LAW § 4307 (McKinney 1985) (misdemeanor); S.D. CODIFIED LAWS §§ 34-26-42 thru 34-26-45 (1994) (felony); W. VA. CODE § 16-19-7a (1991) (misdemeanor); WIS. STAT. ANN. § 146.345 (West 1989) (felony). An eighth state seems to follow this lead, but the operative difference is that it prohibits the sale of transplantable organs. *See* KY. REV. STAT. ANN. § 311.171 (Michie/Bobbs-Merrill Supp. 1992).

145. *See* FLA. STAT. ANN. § 873.01 (West Supp. 1994) (felony); TEX. PENAL CODE ANN. § 48.02 (West 1994) (misdemeanor); VA. CODE ANN. § 32.1-289 (Michie 1992) (felony).

146. *See* GA. CODE ANN. § 16-12-160 (1992) (making a felony the sale of human body parts except as allowed, and allowing sale of blood, hair and fluids as well as the sale of any body parts for purposes of "health science education"); MONT. CODE ANN. § 72-17-302 (1993) (making a felony the prior sale for transplant or therapy if removal is to occur after death).

of continuous technological advancement affecting those uses to which people might put human body parts. As one commentator has observed, "society and the legal system will have to grapple anew with questions such as whether property rights can exist in a human body."[147] Congress reports that, even back in 1987, the government spent over two billion dollars funding biotechnological research.[148] This includes genetic engineering, cell culture technology, and hybridoma technology, all of which may use human tissues.[149] Also, with the advent of organ transplantation research, there has been an increasing demand for transplantable tissues.[150] Ever since the first successful organ transplant, the variety of body parts desired has continued to increase.[151] Even the genome itself is experimented with in research and therapy of various kinds.[152] The list of various examples could go on indefinitely. In short, society is in a state of rapid technological advancement, much of it involving human body parts. Because of this inexorable advancement, cases like *Hecht* and *Moore*, which require society to deal with issues that it might not wish to, will likely increase. The legal system must be prepared to meet the challenge.

Additionally, an international market in human body parts exists and is very widespread.[153] China uses the organs of condemned prisoners for transplants,[154] many of which go to foreigners willing and able to pay.[155] The poor in many countries sell off organs to people with money, including foreigners.[156] Indeed, in the Indian slum of Villivakkam, nicknamed Kidney-vakkam, more than twenty percent of

147. Jaffe, *supra* note 115, at 528.

148. OTA: U.S. Investment, *supra* note 6, at 4, table 1-1.

149. OTA: Ownership of Human Tissues, *supra* note 11, at 5.

150. OTA: Ownership of Human Tissues, *supra* note 11, at 75; *see* Silver, *supra* note 4, at 682-88.

151. *See* SCOTT, *supra* note 8, at 29-57; Silver, *supra* note 4, at 682-84. One of the more recent controversial uses of tissue has been fetal tissue research for therapy for Alzheimer patients. *See, e.g.*, Hodgson, *supra* note 128, at 377.

152. *See e.g.*, Jaroff, *supra* note 5, at 56; Svitil, *supra* note 5, at 91.

153. *See supra* note 10.

154. Teresa Poole, *China's Executioners Work Overtime*, INDEPENDENT, Oct. 30, 1994, at 16. *See generally* Jonathan Mirsky, *Peking Accused of Using Organs From Executed Prisoners*, TIMES, Aug. 29, 1994, at 7.

155. *See* Poole, *supra* note 154, at 16; *Probing the Body Trade*, SOUTH CHINA MORNING POST, Oct. 30, 1994, at 7.

156. *See* Bennett, *supra* note 10, at 2; McGirk, *supra* note 10, at 8 (the sale of kidneys by India's poor); *Poverty Stricken*, *supra* note 10, at 7 (offers of kidney sales by Iraqis); Riga, *supra* note 10, at A3 (Canada); Wallace, *supra* note 10, at A1.

the residents have sold a kidney.[157] Finally, and perhaps the most frightening, there are even allegations of the theft of organs from the living.[158] Arguments indicating that the body is not property because it is of no worth are clearly repudiated. It has become frighteningly clear that the body has a value to those beyond its occupant.

Indeed, despite common usage and the common law no-property rule, the current legal status of many human body parts remains in doubt. Once again, the law is lagging behind medical technology, though perhaps it is seeking to abandon the no-property rule by inaction. What society is left with in the meanwhile is a system in which body parts have an ever-increasing value but an uncertain legal status. The law is a patch work and continues to be influenced by an ancient declaration without much of a basis. If there once was such a basis, it was in the context of the time, and times indeed have changed.

III. A RECOMMENDATION

As the California Court of Appeals in Mr. Moore's case observed, "[f]or better or worse, we have irretrievably entered an age that requires examination of our understanding of the legal rights and relationships in the human body."[159] Due to technological advances involving the use, possession, and control of human body parts, and in light of the recent cases, the courts should begin to recognize that human body parts are property. Certainly, at first blush, this approach will seem distasteful to many. It conjures up negative images: healthy people selling off their kidneys for money,[160] people selling off the bodies of family members despite last wishes, the disturbance of graves,[161] and perhaps the "bioemporium," where brain dead people are kept on life support indefinitely to provide a ready supply of human body parts.[162] However, the appeal of these concerns is more

157. *See* McGirk, *supra* note 10, at 8.

158. *See, e.g.*, O'Shaughnessy, *supra* note 10, at 27 (disappearing Russian orphans); Wallace, *supra* note 10, at A1 (kidnappings for kidneys in India).

159. Moore v. Regents of the Univ. of Cal. 249 Cal. Reptr. 494, 504 (Ct. App. 1988), *modified* 793 P.2d 479 (Cal. 1990).

160. *See supra* notes 156-57 and accompanying text. A recent poll asked the question of whether or not the sale of organs like a second kidney should be legal. Sixty-three percent of those polled rejected the idea, though the younger group polled was not nearly so condemning of the idea. *See* Sherman, *supra* note 137, at 1.

161. *See infra* notes 241-49 and accompanying text.

162. The idea of the bioemporium is one of the images presented by Russell Scott in his book which discusses the procurement of organs for transplant and property rights in the human body. *See* SCOTT, *supra* note 8, at 164-65, 168.

emotional than substantive in conjunction with the mere recognition of a property right, and such concerns may be satisfactorily assuaged by the benefits of recognizing a comprehensive property right. In fact, most such criticisms put the emphasis in the wrong place. Instead, the emphasis should be on the fact that it is important to recognize a property right because of the protective value, and the comprehensive, relatively unified approach property law affords. Due to these factors, and in response to current problems, a recognition of property rights is desirable in the modern world.

This part will consider two major themes that run through advocating for the recognition of a property right in human body parts. The first is a notion of fairness and justice founded upon the concept that, of all the things that belong to a person, the body is the foremost. The second theme is that of the protection of a person's interest in his or her own body. In a society where body parts are acquiring an ever-increasing value, a need for protection exists which the law of property can provide. Indeed, the value of this protection may outweigh some of the possible drawbacks of the body as property, as well as clear up remaining fears. An additional, minor theme is also present. This theme is a concern for predictability and uniformity, facets which are not present in the current treatment of body parts, but which would come with the recognition of a property right. Other criticisms of and problems with a property based approach will then be discussed. Finally, the all encompassing theme of changed circumstances will be addressed, in which it is submitted that the views of society and rise of the value of body parts has increased such that the no-property rule and the subsequent rules which still reflect it are obsolete.

A. Fundamental Fairness

The first theme behind advocating broad property rights is based upon a concept that nothing is more one's own than one's own body.[163] The California Court of Appeals recognized this principle in Mr. Moore's situation, as well as the irony in the claim that Mr. Moore could not own his cells, but that the doctor could, and be able to patent the products as well.[164] Such a claim seems neither fair

163. *See* Grandolfo, *supra* note 80, at 957.

164. *See* Moore v. Regents of the Univ. of Cal. 249 Cal. Reptr. 494, 506-07 (Ct. App. 1988), *modified* 793 P.2d 479 (Cal. 1990).

nor just, and the majority of Americans seem to agree.[165] At some level, it makes perfect sense to call one's body one's property,[166] and on this ground alone commentators have suggested that the law make this recognition.[167] If this is indeed the general view in society, logic and justice seem to argue for recognition of a property right.

The somewhat competing principle to the idea that one must own one's body is that the human body and its constituent parts are special, and deserve consideration apart from the rules of property.[168] The concern is that a property based approach would demean the dignity of both the body and the person.[169] "Putting a price on the priceless, even a high price, actually cheapens it. So we don't approve of selling our body parts; and the body isn't quite property."[170] For those who believe that the body is worthy of a great deal of respect, this concern is hard to overcome.[171] However, the act of declaring the body property, with other reasonable restraints,[172]

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165. Fifty-two percent of those polled, including sixty-two percent of younger people, felt that, in a case like *Moore*, the patient should participate in the profits. *See* Sherman, *supra* note 137, at 1.

166. As one court observed "[i]t is not unknown for a person to assert a continuing right of ownership, dominion, or control, for good reason or for no reason, over such things as excrement, fluid waste, secretions, hair, . . . blood, and organs . . . whether their separation from the body is intentional, [or] accidental." Venner v. State, 354 A.2d 483, 498 (Md. Ct. Spec. App. 1974), *aff'd*, 367 A.2d 949 (Md. 1977), *cert. denied*, 431 U.S. 932 (1977).

167. *See* Lori B. Andrews, *My Body, My Property*, HASTINGS CENTER REP., at 28, 37. Oct. 1986 ("It is time to start acknowledging that people's body parts are their personal property.").

168. Much of this view can perhaps be traced to the religious import of the body at common law. *See In re* Estate of Johnson, 7 N.Y.S.2d 81 (Sur. Ct. 1938). In this decision, Surrogate Delehanty lays out a short but insightful history of views on the subject of the corpse as property under common law. In reference to Coke's no-property rule, the court wrote

> [t]here is thus expressed by Coke a conception of the human body which was most congenial to the human mind in the 17th century. The body was the temple of the Holy Ghost from which at his death a man was temporarily to be separated. That this sacred object should be property was unthinkable to Lord Coke and his contemporaries . . . . A man had a right to the decent interment of his own body in expectation of the day of resurrection.

Id. at 84.

169. OTA: Ownership of Human Tissues, *supra* note 11, at 135 (presenting an argument against commercialization).

170. OTA: Ownership of Human Tissues, *supra* note 11, at 127 (quoting the commentator Thomas H. Murray).

171. For those who do not attach any special moral significance in the corporeal body, such as those of certain religious and philosophical backgrounds, this is unlikely to be a major concern. *See* OTA: Ownership of Human Tissues, *supra* note 11, at 131-34.

172. Reasonable restraints might include limits or bans on sales, bars to attachment of

should not dissuade the person who believes the body is special from accepting a property designation in light of the many accepted uses for body parts. Viewed reasonably, the recognition of the body as property should be far less of an affront to those concerned about the inherent dignity and worth of the body than these current uses of body parts.[173]

It is fairly apparent that most modern Americans do not view the body as it was viewed in Lord Coke's era.[174] The vast majority of Americans accept the idea of the use of body parts in medicine and research, to the extent that they are willing to donate their own organs.[175] Even in Mr. Moore's situation, public opinion indicates that payment for his contribution to the research would be acceptable,[176] which implies that the use of body parts is well accepted. Concern for the body has clearly moved away from the view of the body as an inviolate "temple of the Holy Ghost from which at his death a man was temporarily to be separated."[177] It is more likely that the emphasis of respect for the body now comes out of a respect for the person whom it still represents, or respect for personhood in general.[178] Therefore, in response to recent technologies, society is willing to allow the body to be used in various ways that would have once been unacceptable under an older conception of the body. If society can countenance these uses under the present rationale of respect, then there is little logical reason society should oppose the recognition of a property interest, so long as it does not lead to a degradation of the person or personhood in general. Nothing inexorably flows from the recognition of the body as property that would do so. Rather, it is the uses to which society allows that property to be put which holds this danger, and that is a severable, distinct issue. Also,

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the body for debt, and restrictions on the disposition of the body when others come into ownership, which are all amenable to a property approach and exist under present property law.

173. For example, society allows organ transplants, tissue transplants, sales and donations of semen and blood, the sale of hair, research using human tissue and human DNA, the freezing of reproductive materials and embryos, autopsies despite religious beliefs, and even the regular harvesting of corneal and pituitary tissue. *See* OTA: Ownership of Human Tissues, *supra* note 11, at 130. The ethics of allowing these practices are invariably intertwined with the ethics of how society allows the materials to be obtained.

174. *See supra* note 168 and accompanying text.

175. *See* Sherman, *supra* note 137, at 1.

176. *Id.*

177. *In re* Estate of Johnson, 7 N.Y.S.2d 81, 84 (Sur. Ct. 1938).

178. *See* Michelle B. Bray, Note, *Personalizing Personalty: Toward A Property Right In Human Bodies*, 69 TEX. L. REV. 209, 214 (1990).

as will be demonstrated, the control and protection offered by property law can actually help prevent the degradation of personhood by assuring greater autonomy.

B. Protection

In light of the legal protection which property law has to offer in helping one maintain control over one's own body parts, which will protect the dignity of the human body as an extension of a person to whom it belongs or belonged, any lingering doubts over degradation should disappear. A property right in the body should be recognized because it would serve as an important protection in a world where commercial interests in human body parts already exist. Biotechnology and medicine will continue to advance, and as a result, so will the uses for and the commercial value of human body parts. Protection is needed against some of the injustices that might occur as a result of this growth. Lawsuits similar to those in *Hecht* and *Moore* have been instituted in recent years, but have not received a great deal of attention because they have been settled out of court.[179] It is likely that there will be more and more such cases. While very valid concerns have been raised over the dignity of the human body, the recognition of the body as property would not demean the human body or the person to whom it belongs. Rather, it would serve to protect dignity by giving the "owner" an enforceable stake.

For example, a state's recognition of a property right would provide extra protection at the constitutional level. In *Arnaud v. Odom*,[180] a doctor was sued in federal court by the parents of infants upon whose corpses he performed unauthorized experiments.[181] The threshold question was whether or not the parents had a constitutionally protected interest in the bodies. The court found that they had such an interest, given that constitutionally protected property interests are created by state law, and the state recognized a quasi-property interest.[182] This would seem not to argue for a property interest par-

179. *See* OTA: Ownership of Human Tissues, *supra* note 11, at 25-26 (delineating three other cases apart from Moore brought by the time of the report's publication).

180. 870 F.2d 304 (5th Cir. 1989), *cert. denied*, 493 U.S. 855 (1989).

181. *Id.* at 305-06. These "grisly" experiments consisted of "taking the corpse of the infant to the rear of the laboratory and, holding the corpse by the feet, dropping the corpse head-first from a predetermined height of one meter onto a surface of virtually smooth concrete." *Id.* at 306.

182. *See id.* at 307-09. The case, however, was nonetheless dismissed on the grounds

ticularly, however, one must keep in mind that there are states that do enforce the rights of a family to a corpse but do not call the interest a quasi-property interest. This becomes so close a question that one might be willing to dismiss it as a matter of semantics. However, these semantics can make all the difference in terms of constitutional protection.

Brotherton v. Cleveland[183] is a perfect example of this. This was a suit against a coroner for removing corneas for transplant despite the wishes of the decedent and the family, an act contrary to state law.[184] The theory of the suit was analogous to that presented in *Odom*.[185] Ohio law apparently recognized and protected the same interests as were protected by the state in *Odom*, but it protected them under an emotional distress tort theory.[186] Because the quasi-property approach was expressly denied, despite the fact that the same interests were in fact being protected, the court dismissed the suit on the grounds that there was no constitutionally protected property interest.[187] A clearer break with the common law rule, and the subsequent rules it influenced, would prevent cases such as this from nearly slipping through the cracks, and would thus offer greater and more reliable protection.

Similar slippage can be seen in *Deeg v. City of Detroit*,[188] where the issue was whether or not an action for mutilation of a corpse survived the death of the holder of the action, which in turn depended upon whether or not the action was for interference with a property right or a personal right.[189] The court found that there was no property right, although again the court recognized that there are rights which will be protected, and cites cases which approve of a view similar to a quasi-property right.[190] Consequently the suit was dismissed, and one may infer that the wrong done to the corpse po-

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that the interest was adequately protected by state law and procedure. *See id.* at 309, 311.

183. 733 F. Supp. 56 (S.D. Ohio 1989), *rev'd*, 923 F.2d 477 (6th Cir. 1991).

184. *Id.* at 57.

185. *Id.* at 58.

186. *See id.* at 58. For a similar approach, see Davis v. United States, 602 F. Supp. 355 (D. Md. 1985) (D.C. law).

187. *See Brotherton*, 733 F. Supp. at 58-59, 60. Fortunately, the circuit court majority disagreed and followed a path similar to that followed in *Odom*, despite the fact that "Ohio law has made it very clear that there is no property in a dead person's body." Brotherton v. Cleveland, 923 F.2d 477, 483 (6th Cir. 1991) (Joiner, J., dissenting).

188. 76 N.W.2d 16 (Mich. 1956).

189. *Id.* at 19-20.

190. *Id.*

tentially went unaddressed. Were a property right recognized,[191] this would not happen, as the action would have survived and the wrongdoer would have paid had the suit been meritorious.

In the context of modern organ transplantation, recognizing that the body is property would also provide an important level of protection for individual autonomy. Although NOTA has cut off the problem of commerce in organs for transplant, advances in transplantation still present problems. A profound shortage exists in transplantable organs which results in what is considered a vast number of unnecessary deaths.[192] In light of this, most commentators agree that some change must be made in the present system of organ procurement.[193] The system proposed by Dukeminier and Sanders is that of presumed consent; organs will be taken at death unless some type of objection has been previously raised.[194] Given that seventy percent of Americans claim they are willing to donate their organs,[195] and that there are simple escape mechanisms, this approach would not be a threat to individual autonomy.

However, more extreme approaches also exist which could be adopted that would threaten individual autonomy. An example of this is the proposal that organs be taken at death despite any objections, save valid religious reasons.[196] It has been argued that such an approach would withstand Fifth Amendment challenges because the body is not property.[197] A change in the law to recognize that the body is property would help to curtail such efforts when they conflict with individual autonomy. Of course, the government could then resort to eminent domain actions in order to recover organs.[198] How-

191. Arguably, a squarely recognized quasi-property right as was recognized in *Arnaud*, may have also been sufficient, but there would still be unsettling room for it to be held an insufficient property interest under the statute in question, since it is based on the same rights as were admitted to exist in *Deeg*.

192. *See* Jesse Dukeminier, Jr. & David Sanders, *Organ Transplantation: A Proposal for Routine Salvaging of Cadaver Organs*, 279 NEW ENG. J. MED. 413, 413 (1968); Dukeminier, *supra* note 10, at 813-14; Silver, *supra* note 4, at 682-88.

193. *See, e.g.*, Dukeminier & Sanders, *supra* note 192; Silver, *supra* note 4. For a brief but witty criticism of such proposals, which was directed at Dukeminier & Sanders in particular, see Jonathan Swift, *Anthropophagy: Swift Reprisal*, 279 NEW ENG. J. MED. 890 (1968) (pseudonym).

194. *See* Dukeminier & Sanders, *supra* note 192, at 418-19.

195. *See* Sherman, *supra* note 137, at 30.

196. *See* Silver, *supra* note 4, at 694-95, 723-28.

197. *See id.* at 712-15.

198. For a discussion on the takings of organs and the related constitutional issues, see Jaffe, *supra* note 115.

ever, given the fact that organs are presently transplantable only when quite fresh, and that a legal action would take some substantial amount of time, this seems an unlikely threat. Even if technology or the law advanced to a degree to make this feasible, a property rule would still make the "donor" better off because, under present law, there is little preventing this from happening now. With a property rule, if organs are taken, the Constitution will assure that "at least they've been paid for."[199] Money may be little comfort, but at least it is something. Also, the process afforded to the family would likely be somewhat comforting.[200]

C. *The Need and Desire for Uniformity*

A further advantage in recognizing that the human body is property is that property law would provide a great deal of uniformity, which is sorely needed. It is true that different body parts are treated in different ways, often with the rules arising on an ad hoc basis.[201] Yet, parts are not really all that different in and of themselves, and all seem to otherwise have the indicia of personal property once removed or rendered lifeless. As indicated above, a confusing mass of limited and contradictory rules and practices remains the norm. This uncertainty in the law is undesirable because it does not give people assurances that they can protect their interests in their own body parts. Indeed, with reference to a testator's control over the disposition of his body, one commentator has observed that the deceased "now has something more than a hope, but far less than an assurance, that his or her wishes will be carried out at death."[202]

For example, William Kane relied on what he must have thought was common sense in willing his sperm, and fortunately the court backed him so far as the devise is concerned. However, it seems fair to infer that, had Kane known that his desires were open to litigation, he would have been distressed at the possibility that his directions as to the disposal of his semen might not be heeded. When body parts are in question, such issues of control naturally become quite personal and quite sensitive. The thought of having no real control could very

199. Jaffe, *supra* note 115, at 571.

200. And there is of course the chance that the taking will be found to be unwarranted, perhaps out of sympathy for a particularly distressed family.

201. *See* discussion *supra* part II.

202. JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 265 (4th ed. 1990).

well be somewhat distressing to anyone.[203]

Nor is such uncertainty desirable in the field of biotechnology, upon which society relies for continual medical miracles. In its report, the Office of Technology Assessment wrote that the biggest threat to continuing developments in biotechnology is the uncertainty over how body parts will be treated,[204] and that "resolving the current uncertainty may be more important to the future of biotechnology than solving it in any particular way."[205] A property approach would provide a well developed system of law already in existence, a system into which body parts seem to generally fit by both their physical and now their commercial nature. Admittedly, small changes may be needed over time for reasons of public policy, but this is not unusual in the processes of the law. A property approach would nonetheless provide a good, more certain starting point; a set of relatively consistent rules which could then be drawn upon, analogized, and applied to a given situation, which would benefit society overall.

D. Other Concerns

There are also other concerns with the body as property which need to be properly addressed. To begin, one of the chief criticisms against the recognition of property rights in human body parts is that it would result in commercialization.[206] However, society and the law already allow a great deal of trade in human body parts.[207] For example, one poll has indicated that most people would not have had a problem with Mr. Moore selling his excised spleen to the researchers.[208] Indeed, the overwhelming concern, as reflected in NOTA and state law,[209] seems to be that a market will grow in transplantable organs, whether they come from the living or the dead.[210] The pros and cons of a market in transplantable organs have been widely de-

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203. As aptly put by one judge, "[m]ost people look forward to the proper disposition of their remains, and it is natural that they should feel an anxiety on the subject." Pierce v. Swan Point Cemetery, 10 R.I. 227, 239 (1872).

204. OTA: Ownership of Human Tissues, *supra* note 11, at 4, 27.

205. *Id.* at 4.

206. *See* Sherman, *supra* note 137, at 31 (the public, 2-to-1, rejects the idea of a market in transplantable organs).

207. *See supra* note 173 and accompanying text.

208. Fifty-two percent of Americans polled indicated that they felt Moore should be paid for the contribution made by his spleen. *See* Sherman, *supra* note 137, at 31.

209. *See supra* notes 139-46 and accompanying text.

210. *See* Sherman, *supra* note 137, at 1.

bated[211] and are beyond the scope of this Note. It suffices to say that commercial endeavors need not flow from the recognition of property rights if it is undesirable. Recognizing a property right does not mean that the law cannot regulate the subject of that right. For example, an object may be property, and yet there may be a regulation on the disposition and sale of that property.[212] Indeed, sale may be prohibited altogether,[213] yet the object nonetheless remains property. Congress, as well as several states, has already outlawed the sale of organs for transplant,[214] property or not. As a result, if courts presently were to recognize that people's body parts are their personal property, there would still be no legal market in organs for transplant. As for illicit activities, whether there is a black market or not[215] will not be affected by the legal recognition or denial of property rights. This potential horror of society's collective conscience is already prevented to the extent possible under the law, and therefore no longer exists as a reason for denying the recognition of property rights.

Most other ethical concerns also have to do with the commercialization of the sale of human body parts.[216] Similarly, since most of the concern over commercialization is focused on the sale of tissue for transplant, many of the worst excesses are already eliminated by NOTA. Related to this, a concern exists over the diminishment of social equality between the rich and the poor. This diminishment would be caused by the rich, who would exert economic pressure on the poor to obtain needed organs. It would result in the poor being the sources of organs and tissues for the rich,[217] while remaining unable to enter the market themselves because they have been priced out. Presently this does not occur because of the ban on organ sales. However, despite the ban, many body parts can still be sold for many reasons. Yet it is unlikely that the rich as a group would be particularly interested in these purchases. Labs may still wish to buy these body parts, such as Mr. Moore's spleen and Mr. Kane's sperm, but

211. *See, e.g.*, Dukeminier, *supra* note 10; Note, *supra* note 116.

212. *See* Andrus v. Allard, 444 U.S. 51, 65 (1979) (holding that a ban on the sale of eagle feathers did not constitute a taking under the Constitution, which shows that there can be property without a right to sell).

213. *See id.* at 67.

214. *See supra* notes 139-46 and accompanying text.

215. Black market activities already exist. *See* SCOTT, *supra* note 8, at 181; *supra* notes 153-58 and accompanying text.

216. *See* OTA: Ownership of Human Tissues, *supra* note 11, at 134-35.

217. This is what occurs in India. *See* McGirk, *supra* note 10, at 8; Wallace, *supra* note 10, at A1.

the economic pressure is much less,[218] as is the harm, since the poor are therefore highly unlikely to be enticed into selling off parts that might prove harmful to them. The sale of blood, fluids and tissues, the typical body parts likely to be involved, while possibly objectionable to some, is unlikely to breed any great excesses and outrageous situations,[219] and have so far been accepted by society.[220] Nothing prevents such transactions now, so why not consider the objects of these transactions property, or preferably, outlaw them as illegal dealings in property?

The major policy concern expressed by the California Supreme Court in *Moore* against the recognition of body parts as property, was that the recognition of a property right in Moore's spleen cells would discourage scientists from conducting socially valuable research.[221] The court indicated that recognition of a property right would interfere with the free trade of information essential to useful scientific progress.[222] Commentators have demonstrated that this is a doubtful proposition at best,[223] and even Justice Mosk's dissent presented compelling information indicating that this is not a likely potential problem.[224] Due to growth and advancement in the biotechnology industry and the rising number of patents in this field, secrecy is fast becoming the norm.[225] Biotechnology is a business, and it is big business.[226] It should not be surprising that billion dollar secrets are well protected, and thus free exchange of information is already internally impeded. But, unlike the body parts of Mr. Kane and Mr. Moore with respect to their original owners, these secrets get the full protection of the law of personal and intellectual property, even when derived from human body parts.

In response to the *Moore* case, one commentator proposed a special property right which could have been used to protect Mr.

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218. After all, the lab is being motivated by profit margin, which provides some control, rather than a desire to live at all costs.

219. Indeed, the sale of these things has gone on to some extent for some time. *See, e.g.*, Hodgson, *supra* note 128, at 373.

220. *See supra* note 173 and accompanying text.

221. *See* Moore v. Regents of the Univ. of Cal., 249 Cal. Reptr. 494, 494-97 (Ct. App. 1988), *modified*, 793 P.2d 479 (Cal. 1990).

222. *See id.* at 494-95. Significantly, it would result in a need for extensive record keeping.

223. *See generally* Dickens, *supra* note 45.

224. *See Moore*, 793 P.2d at 509, 513-14 (Mosk, J., dissenting).

225. *See id.*

226. *See generally* OTA: U.S. Investment, *supra* note 6.

Moore's interest, called the right of commerciality.[227] While this right is a helpful suggestion, one which is certainly better than the present anarchy, it is also a good example why many such solutions are inferior to the full property approach. The right of commerciality is similar to the right individuals have in their own identity, a right already recognized in California, as well as other states.[228] The right of commerciality would, if adopted, give patients like Mr. Moore a right to share in the commercial value of their own cells, but would not give a possessory interest in the body parts themselves. And, since it is profit based, this right excludes non-profit researchers from liability.[229] In essence, this right protects a person's identity as expressed in his body parts just as the right of publicity protects a celebrity's identity expressed in his likeness.[230]

For example, in Mr. Moore's situation, he would have a right to share in the profits gained from the use of his cells. However, he presumably still could not maintain a claim of conversion, since he never has any right to possession. His doctor at the university would be liable to him under the right because the research was for profit,[231] and Mr. Moore would share in the profits, which is consistent with public opinion.[232]

The right of commerciality is in general a good idea, and deals with problems of commodification and of imposing liability upon non-profit researchers conducting socially desirable medical research.[233] Also, it provides a degree of fairness in that a person can profit from his or her own body parts to the same extent as researchers do. However, it is too limited a right, being very much tailored to deal with the narrow situation presented in *Moore*. For example, it protects neither a person's interest in the disposition of his own body parts nor that dignity of the body that comes with a person's right of control over his or her own body. This makes it inadequate and inferior to a true property right.

For example, the right of commerciality would clearly not have protected William Kane's interest in his semen. He deposited his

227. *See* Hardiman, *supra* note 15.

228. *See id.* at 259.

229. *See id.* at 262.

230. *Id.* at 260-63.

231. *See supra* note 66 and accompanying text.

232. *See* Sherman, *supra* note 137, at 31 (majority believe Moore should be allowed to profit).

233. Hardiman, *supra* note 15, at 261-62.

semen for a specified purpose, and his concern was that it be used as he directed. Indeed, assuming he was sane, Mr. Kane was relying on the law to enforce his wishes after his death just as it would do for other items of which he cared to specifically dispose. His children were attempting to prevent what he wished. They were not seeking to use the semen or exploit it in any way themselves, nor was there a direct profit in store for them. Rather, they were trying to block the use of the semen altogether. With this absence of commercial exploitation, the right of commerciality could do nothing to enforce Mr. Kane's interests.

On the other hand, if the court had gone a step further and recognized a more comprehensive property right than it did, and allowed Ms. Hecht to seek enforcement through the law of gifts of personal property, Ms. Hecht would have had one more avenue to seek enforcement of Kane's wishes, an avenue upon which Kane may have also been relying.[234] Also, it seems incongruous to argue that giving a gift of semen is more degrading of the human body or human reproduction than leaving it by will.[235]

The shortcoming of the right of commerciality in that it is too constrictive and would not cover many of the situations likely to arise in today's world can plainly be seen. As a result of this limited scope, the right of commerciality would be of little help in achieving a desired level of uniformity, and of no help in achieving protection of one's body. It would become yet another fragmented piece of law on the topic of body parts.

The right of commerciality also has another problem which makes it inferior to a comprehensive property right. The right of commerciality makes provisions exempting non-profit researchers from liability, which is admittedly a laudable goal. As a result, only those who profit from a person's body parts would be liable to pay from their profits.[236] However, just like a property approach, this would require all those involved, both the for-profit and non-profit research-

234. All of this assumes that Kane was of sound mind, which he may not have been, considering his behavior. *See supra* notes 19-24 and accompanying text. However, the general common law rules can deal with unsound minds in the realm of gifts as it can in the law of wills. *See* DUKEMINIER & JOHANSON, *supra* note 202, at 143-64, 311-16 (undue influence and gifts).

235. Besides, it is permissible for sperm to be regularly donated through sperm banks, which is quite clearly a gift, as well as permissible for people to sell sperm to sperm banks. *See generally* Hodgson, *supra* note 128.

236. *See* Hardiman, *supra* note 15, at 240-41.

ers, to keep records on all the tissues they have at hand.[237] The simple reason for this need is that a tissue sample could be transferred after its initial donation, for example, between a non-profit university researcher and another for-profit researcher in the same institution.[238] The main criticism of this scheme is that there would be little incentive for non-profit researchers, who would never be liable, to keep accurate records. This therefore raises the possibility that patients entitled to compensation under this limited right would not get what they deserve, nor would patients have control over what is being done with their body parts. These shortcomings interfere with the dignity of the human body, arguably the most important aspect to the entire body as property issue.

A further possible criticism of recognizing a property right is the possibility of unacceptable abuse by a person selling off his or her "loved ones" to make a fast dollar. While this is not an unrealistic concern in general, as previously mentioned, it is not a concern which necessarily flows from a property right. First of all, NOTA has already removed the greater part of the economic incentive by prohibiting the sale of organs for transplant.[239] The possibility would still remain that the body could be parcelled up and sold for research or other uses, however. The first point to make is that in most states, there is nothing stopping this from happening now, even absent a property approach, unless somebody with a legally protected interest in the body chooses to object. However, if a decedent had an enforceable property right in his own body, this excess could also be avoided if he or she wanted to avoid it by providing that the body be treated in a specified manner acceptable to that person. Under this approach, a decedent would continue to have an enforceable say in what becomes of his body at death, and perhaps more flexibility in how he provides for it. True, if he did not act, the family could still decide to sell off his body to science. But, as things currently stand under the UAGA, they could quite clearly give it away anyway if the decedent has raised no objection.[240] Thus, the recognition of a property right would not result in possibilities not already present in the

237. The California Supreme Court did not want to subject researchers to such cumbersome record keeping. *See* Moore v. Regents of the Univ. of Cal. 249 Cal. Reptr. 494, 496-97 (Ct. App. 1988), *modified*, 793 P.2d 479 (Cal. 1990).

238. In the case of Mr. Moore, the research being done was at a state university, which was the ultimate assignee of the patent. See *id.* at 480-82.

239. *See supra* notes 139-46 and accompanying text.

240. *See* UAGA, *supra* note 116, § 3.

current system, nor would it prohibit states from regulating these possibilities as they see fit.

Some outrages, however, may occur under a property scheme if it is not properly administered. This argues only for flexibility, which property law is capable of, rather than the maintenance of the current system with all of its faults. In this regard, the property action of replevin[241] must be discussed. It has been held that replevin cannot be maintained for a body since it is not property.[242] The right to possession of the body has to be enforced under other theories. However, in *Guthrie v. Weaver*, an action of replevin resulted in an outrageous situation. In this case, a man brought suit for a coffin and its contents (his wife) against his father-in-law, and had the sheriff deliver him summary possession.[243] Thoroughly disapproving of this, the court held that "replevin cannot be maintained for a corpse under the pretext of recovering a coffin."[244] Under a property approach, this is certainly a potential problem. However, the problem is with the summary nature of the remedy as applied to the facts, since cases asserting preeminent rights to possession for burial or to determine the place of burial necessarily involve the same issues as replevin but do not allow summary possession. Since a small problem such as this could be fixed easily by court decree or legislative pronouncement, and given the great benefits of a property right already discussed, this should not stand in the way of that recognition. Property rights should be adopted because they make a good basis and starting point; it is not claimed that adjustments would not be necessary or desirable.[245]

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241. Replevin is a common law personal property action in which the person entitled to goods can sue one wrongfully in possession for return of the property. It may also refer to a provisional remedy allowing a plaintiff to seize the goods before judgement. *See* BLACK'S LAW DICTIONARY 1299 (6th ed. 1990).

242. *See, e.g.*, Keyes v. Konkel, 78 N.W. 649 (Mich. 1899); Guthrie v. Weaver, 1 Mo. 136 (1877).

243. *Guthrie*, 1 Mo. at 136-37.

244. *Id.* at 143.

> If proceedings of this sort are to meet with judicial sanction, and replevin can be maintained virtually for a corpse, the most sacred feelings are in constant danger of intolerable outrage at the hands of any inhuman wretch who has the audacity to make the attempt. The sanctities of the tomb are hopelessly at the mercy of any one who will swear that he is entitled to the possession of a shroud, and the grave must be opened first, and the question of property determined after the sacrilege is complete.

Id. at 142.

245. It should be noted that, at common law, a species of replevin action could be

E. A Note on Changed Circumstances

If there is one theme that pervades everything contained in this Note up to this point, it is that since Coke first enunciated the no-property rule, everything on which that rule was based has fundamentally changed. The position that Americans have a profoundly different view of the significance of the body has already been set out fully above. It is clear that this position represents a fundamental change.

Also documented in this Note and in many of the sources upon which it is based, is that the commercial value of the human body has clearly increased since Lord Coke's time. In recent years this increase has been dramatic. With the rise of the current legal situation, and with enforceable rights or the quasi-property approach, the denial of a property right is often seen in conjunction with the fact that at best the corpse is of nominal commercial value.[246] Thus the present system is unprepared to deal effectively with questions that concern items of commercial value,[247] causing the line to become blurred or nonexistent between what is acceptable and what is not. Perhaps absent a property right, the law of corpses, which has become the law of body parts, will evolve to meet these new condi-

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brought for a person unlawfully detained, an action later superseded by habeas corpus. *See* BLACK'S LAW DICTIONARY 1299-1300 (6th ed. 1990). This indicates the adaptability of the common law process into new situations.

246. "A corpse has no value." Griffith v. Charlotte, 23 S.C. 25, 31 (1884) (circuit court opinion). In comparing the view of the body in Lord Coke's time with today, one judge commented,

> [t]here is thus expressed by Coke a conception of the human body which was most congenial to the human mind in the 17th century. . . . The body in a commercial sense was devoid of market value. A son could not then have hypothecated the body of his father to secure money borrowed by the former as he might have done in ancient Egypt nor could execution be sued out by a creditor against the dead body of his debtor. A man had a right to the decent interment of his own body in expectation of the day of resurrection.

In re Estate of Johnson, 7 N.Y.S.2d 81, 84 (1938); *see also* Larson v. Chase, 50 N.W.2d 238, 239 (Minn. 1891) ("[W]hile it may be true still that a dead body is not property in the common commercial sense of that term."); Law of Burial, 4 Bradf. 503, 529 app. (N.Y. Sur. Ct. 1856) ("[N]o evidence appears to exist, in modern jurisprudence, of a legal right to convert a dead body to any purpose of pecuniary profit.").

247. It is interesting to note that, at common law, things of a base nature, no matter how highly valued by the owner, could not be the subject of larceny, nor could things such as papers, which have no worth in themselves. *See* HAWKINS, *supra* note 89, at *93. This may support the existence of some relationship between the body being of little acceptable commercial value and the no-property rule.

tions.[248] However, it does not seem as if it is about to do so.[249] The truth is that the common usage of body parts has come to be more like the use of property and much less like the burial of the corpse. Thus, given the changed circumstances, the courts should recognize a right of property in human body parts.

IV. CONCLUSION

Hecht v. Superior Court itself is a small but significant case which reflects body as property issues which are brought about by the progress of medicine and biotechnology in today's society. *Hecht* clearly does not go all the way in recognizing a full property right in the human body, but it does take one more significant step toward this laudable end, and away from ancient rules long unsuited and now obsolete. For reasons of fairness, protection, uniformity, and changed circumstances, this end should be the goal of the courts in response to the new and increasing value of human body parts, which is arising from advances in science and technology. If society is willing to allow scientists and researchers to make these advances, the law must deal in a meaningful and coherent way with the conflicts which are certain to ensue. Ideally, the law will provide guidance in step with these advances. However, it has not adequately done so. The recognition of a property right in one's own body is the most preferable way for the law to deal with these growing problems. Perhaps, by its very nature, the law must always be "in the rear and limping a little"[250] but there is no excuse for not burying the decayed corpses in the law that have long ceased to move at all.

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248. When forced to act the courts do often make the "right" decision in the face of new technologies, as in *McFall v. Shimp*, 127 PITT. LEGAL J. 14 (Allegheny County Ct. 1978). Here, the court refused to grant a mandatory injunction that the defendant donate bone marrow to save the plaintiffs' life. "To do so would defeat the sanctity of the individual." *Id.* at 14-15.

249. It is interesting to consider that the quotes prefacing this Note echo similar concerns, but are written more than a century apart. *See supra* notes 1-2 and accompanying text. Also interesting to note is the solution to the problem of grave robbing which was on the rise at the time Carey wrote his article. *See supra* note 2, at 252-53. He recommends cremation because "[t]he body is reduced to the smallest possible compass, and the ashes are valuable to the friends and relations alone." Carey, *supra* note 2, at 269.

250. COWEN, *supra* note 12, at 5.