

Property in the Body

We live in an era when all bodies are potentially ‘feminised’ by being rendered ‘open access’ for biomedical research and clinical practice. Adopting a theoretically sophisticated and practical approach, *Property in the Body: Feminist Perspectives* rejects the notion that the sale of bodily tissue enhances the freedom of the individual through an increase in moral agency. Combining feminist theory and bioethics, it also addresses the omissions inherent in policy analysis and academic debate. For example, while women’s tissue is particularly central to new biotechnologies, the requirement for female labour is largely ignored in subsequent evaluation. In its fully revised second edition, this book also considers how policies and developments vary between countries and within specific areas of biomedicine itself. Most importantly, it analyses the new and emerging technologies of this field while returning to the core questions and fears which are inextricably linked to the commercialisation of the body.

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This series of books was founded by Cambridge University Press with Alexander McCall Smith as its first editor in 2003. It focuses on the law's complex and troubled relationship with medicine across both the developed and the developing world. Since the early 1990s, we have seen in many countries increasing resort to the courts by dissatisfied patients and a growing use of the courts to attempt to resolve intractable ethical dilemmas. At the same time, legislatures across the world have struggled to address the questions posed by both the successes and the failures of modern medicine, while international organisations such as the WHO and UNESCO now regularly address issues of medical law.

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

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Property in the Body: Feminist Perspectives

Second Edition

Donna Dickenson

Birkbeck College, University of London



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Preface to the Second Edition

In the preface to the first edition of this book, I wrote:

From its earlier low obscurity, property in the body has risen to such heights of interest that the reader could be excused for asking, ‘What more could I possibly want to know about this topic?’ Luckily, or unluckily, there is still a great deal to bring to light and a particular kind of illumination required.

Luckily or unluckily indeed, commodification of the body still requires the particular kind of light that a feminist approach can shed. There are unexpected developments to bring to light in this second edition, while some of the previous phenomena that concerned me have, if anything, intensified – particularly egg sale and the private banking of umbilical cord blood. The first edition has had a very welcome amount of influence in the academic world, and to some extent in the world of activism, of which I also count myself a member. Yet commodification of women’s reproductive tissue is still gaining ground, strengthened by powerful economic and political forces.

Doom and gloom are not, however, universal. In the area of commercial surrogacy, much stricter regulatory measures are being enacted by governments in some of the countries most affected by international ‘reproductive tourism’, notably Thailand, Nepal, Mexico and India. As I write, these states and others have either banned or are about to ban the international surrogacy trade. That measure is particularly surprising in the case of India: earlier versions of its long-debated reproductive medicine bill had actually proposed a regime that weakened the rights of the surrogate mother and favoured international child buyers.

Surrogacy affords an example of another phenomenon analysed in the first edition and still all too relevant to the second edition: the way in which ‘the lady vanishes’.¹ While women’s tissue is particularly central to the aspects of new biotechnologies in which commodification of the

¹ Donna L. Dickenson, ‘The lady vanishes: what’s missing from the stem cell debate’ (2006) 3 *Journal of Bioethical Inquiry* 43–54.

body is gaining ground, the requirement for women’s labour in those technologies is widely ignored in policy analysis and academic debate. I first identified the phenomenon of the vanishing lady some ten years ago, in relation to the absence of reporting on the use of human eggs in stem cell technologies. Even though the technologies in which women’s crucial contribution is ignored have altered in the ensuing decade, the lady is still missing. As David Albert Jones wrote in 2015 about the under-reported need for human ova in so-called mitochondrial transfer, ‘the contemporary situation is just as it was in 2006, when Donna Dickenson remarked that “the women from whom the ova are taken have virtually disappeared from view”, or in 2008 when Francoise Baylis observed that “their eggs are regarded as mere receptacles and their reproductive labour is taken for granted.”’²

But although I have retained core concepts such as ‘the lady vanishes’ from the first edition, this second edition contains a very substantial amount of new material and analysis: almost half of the text, in fact. The order of the chapters has changed along with their content. Chapter 1, which retains its deliberately controversial title ‘Do We All Have Feminised Bodies Now?’, also keeps its jurisprudential core centring on the bundle concept of property, which has proved more apposite than ever over the past decade. However, case law has moved on to recognise some forms of property in excised tissue, sparking debate about whether a property model is intrinsically misguided or whether it can actually help to protect vulnerable patients. There have also been influential new academic analyses of women’s clinical labour, biocapital and the global bioeconomy; these too are introduced in this first chapter and developed at greater length later in the book.

Chapter 2, now called ‘Commodification, Contract and Labour’, retains much of the political theory and history from its predecessor but also contains my interpretation of women’s labour in egg extraction as grounding a property right, previously located in Chapter 3. It seemed right in this second edition to concentrate all the political theory and jurisprudence in the first two chapters, unifying the theoretical analysis more tightly before moving on to practical examples in the succeeding chapters. In addition, there is a new argument rebutting the recent criticism that the term *commodification* is vague, overused or both. That anyone could think that commodification of the body is ‘old hat’ might be a testimonial of sorts to the influence of this book’s first edition and of

² David Albert Jones, ‘The other woman: evaluating the language of “three parent” embryos’ (2015) 10(4) *Clinical Ethics* 97–106, citing Francoise Baylis, ‘Animal eggs for stem cell research: a path not worth taking’ (2008) 8 *American Journal of Bioethics* 18–32.

related analyses offered by many other scholars, but if it is a compliment, I would prefer to refuse it.

The third chapter is now titled ‘The Lady Vanishes: Eggs for Reproduction and Research’. In the first edition, Chapter 3 considered egg sale mainly in the context of stem cell research, which was the dominant topic in the biotechnology literature at the time. Since then, there has been a huge expansion in the egg trade for IVF, at both domestic and international levels, but there has also been a resurgence in the use of ova for research: in particular, research into three-parent IVF – so-(incorrectly)-called mitochondrial transfer. The fertility industry and research are conventionally considered separately, but human eggs are treated as capital in both, a key point also made in an important book published in 2014 by Melinda Cooper and Catherine Waldby on women’s ‘regenerative labour’.³ My previous analysis in terms of women’s alienation from their own reproductive labour remains relevant to these developments, but new work such as Cooper and Waldby’s gives rise to challenges that I need to consider. I have also developed a more nuanced analysis of exploitation, one of those challenges, and that is presented here.

Chapter 4, ‘Surrogacy: Can Babies Be Property?’, is entirely new. Except for a short discussion in the original third chapter, where surrogacy was discussed as a form of the ‘lady vanishes’ phenomenon, I did not concentrate on surrogacy in the first edition because, strictly analysed, it does not concern property in the body. Although the terms *buying* and *renting* a womb are widely used, they are simply incorrect: the woman’s uterus is not excised and sold, and ‘renting a womb’ trivialises pregnancy while entirely omitting the major matter of childbirth. What is bought in a surrogacy transaction is in fact the baby, an obvious conclusion which somehow has become almost as uncommon as claiming that the emperor is wearing no clothes. Since it seems to be necessary nonetheless, I substantiate that conclusion in this chapter.

Commercial surrogacy has expanded since the first edition of this book, although as I have mentioned, important restrictions are being enacted by some of the countries most heavily involved in the global trade. Yet although it is certainly a commercial industry, surrogacy is often presented as a private act of love: the altruistic language of gift is heavily used, just as it is in egg sale. This assumption of altruism in women undermines the contractual nature of the transaction; does it challenge my argument in the first edition that contract can emancipate women? Surrogacy might also throw into question my Lockean argument

³ Melinda Cooper and Catherine Waldby, *Clinical Labor: Tissue Donors and Research Subjects in the Global Bioeconomy* (Durham, NC: Duke University Press, 2014).

that women should own the products of their reproductive labour. For all these reasons, I have decided to make surrogacy the focus of a separate chapter in the second edition: even though it does not involve property in the body, it tests many of the book's key concepts, such as contract, gift and exploitation.

The title of Chapter 5 remains unaltered: 'Umbilical Cord Blood Banks: Seizing Surplus Value'. At the time the first edition came out, private umbilical cord blood banking was not as widely analysed or practised as it has now become: my analysis has turned out to be prescient. But there has been one very important change: the development of an international trade in cord blood units held by public banks has undermined the distinction I originally drew between profit-making and altruistic banks. The surplus value derived from cord blood donation is still being taken from women who donate altruistically, but it is going to plug gaps in austerity-threatened public banks' budgets and not just to create profits for private corporations. France, which occupied an entire chapter in the previous edition, is instead considered in a sub-section of this chapter. Despite its frequently reiterated principle of non-commodification of bodily tissue, France has now embraced this global trade on behalf of its public banks, encouraging more women to donate units which may change hands on the global market for some €25,000.

The remaining chapters expand outward from property in the body as mainly affecting women to ways in which all bodies, whether biologically female or not, are affected and feminised by commodification. A feminist approach can show how it has mainly been in relation to biotechnologies affecting both sexes that resistance to commodification has succeeded – whereas in egg provision, commercial surrogacy and umbilical cord blood banking, commodification has proved harder to combat. However, that does not necessarily mean that resistance to commodification has always succeeded where both sexes are involved, as the instance of biobanking and 'Big Data' will demonstrate.

Chapter 6 is now titled 'Biobanks and Databases: Our Bodies, but Not Ourselves'. Biomaterials and biodata donated by individuals of both sexes to biobanks are effectively still regarded as free materials, while Big Data has become a major commercial venture for consumer genetics firms, pharmaceutical companies and universities. This phenomenon, too, can be seen as part of the feminisation of all bodies. However, the rights of research participants have been somewhat enhanced by further applications of the charitable trust model for biobanks. There has also been growing concern that personal rights models, particularly open or blanket consent, are insufficient to protect donors who are concerned with 'downstream' management of their contributions. These concerns

came to a head with the recent UK ‘care.data’ scheme, which I analyse in a separate section.

Chapter 7, now placed in a different order from the first edition but still called ‘The Gender Politics of Genetic Patenting’, has been likewise revised to incorporate new case law and further theoretical analysis. The *Myriad Genetics* case, finally decided in 2013, has overturned major patents on genes implicated in some breast and ovarian cancers, but the impact of the holding is not limited to those genes. The rainbow coalition bringing the action comprised doctors, researchers, professional organisations, civil liberties groups and religious bodies in addition to women patients. The *Myriad* decision also chimes with the concept of the human genome as common property, leading naturally into the concerns of the final chapter.

Chapter 8, now called ‘Reclaiming the Biomedical Commons’, has been almost entirely rewritten. It retains the first edition’s material on conceptions of the common good in cases of resistance to commercialisation of their genetic heritage by indigenous peoples such as the Tongans, with updated examples to include more recent cases, such as that of the Havasupai. In the past decade, however, I have expanded my concerns about the common good to include the contrast between individualised personalised medicine and public health,⁴ as well as working on the concept of the genetic commons and its unexpected counterpart: what I have elsewhere called the ‘corporate commons’.⁵ Commercial interests have already realised the potential for developing a very profitable resource created by many persons’ mutual labour but owned privately. Although the traditional agricultural commons was also typically the property of a private landowner, those who put labour into it enjoyed rights of access and usufruct. We could use the bundle concept of property to guarantee similar rights to research participants and tissue donors, I suggest in an argument which brings the book back round full circle to the concept of the property bundle elucidated in the first chapter.

All the people whom I thanked in the first edition of this book still deserve my gratitude, but their ranks have swollen. So I want to say a further thank-you to Rene Almeling, Bristol Advanced Studies Institute, Nik Brown, Roger Brownsword, Daniel Callahan, Alana Cattapan, Julian Cockbain, Marcy Darnovsky, Dorian Deshauer, Karen Devine, Andrea

⁴ Donna Dickenson, *Me Medicine vs. We Medicine: Reclaiming Biotechnology for the Common Good* (New York: Columbia University Press, 2013).

⁵ Donna Dickenson, ‘Alternatives to a corporate commons: biobanking, genetics and property in the body,’ in Imogen Goold, Kate Greasley, Jonathan Herring and Loane Skene (eds), *Persons, Parts and Property: How Should We Regulate Human Tissue in the 21st Century?* (Oxford: Hart, 2014), pp. 177–96.

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Doucet, Marie Gaille, Imogen Goold, Kate Greasley, Jonathan Herring, Ruth Horn, David Hutchon, David Albert Jones, Kenton Kroker, Martin Lupton, Laura Machin, Danae McLeod, Gisli Palsson, Anelka Phillips, Sigrid Sterckx, Britta van Beers, David Winickoff and Ernie Wise. The commons of collaborative academic exchange is alive and flourishing.

Preface to the First Edition

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

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

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

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

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

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

The section on indigenous peoples in Chapter 8 could never have been written without the remarkable opportunity graciously afforded me by Nga Pae o te Maramatanga, the New Zealand National Institute for Research Excellence in Maori Development and Advancement. Their conference on ‘Research Ethics, Tikanga Maori/Indigenous and Protocols for Working with Communities’, held in Wellington in June 2004, was not just a scholarly gathering but also a collaborative venture

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

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

I owe a very great deal to Dr Susan Bewley, chair of the Royal College of Obstetricians and Gynaecologists Ethics Committee, without whose assistance I would never have had access to the clinical evidence base about cord blood. I respect a great many clinicians for their commitment

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to serious ethical debate, but perhaps Susan most of all. My thanks should also go to the librarians at the Royal College, to my colleagues on the Ethics Committee and to my former student Saskia Tromp for first alerting me to the issue of cord blood during our supervisions.

I am also very grateful to Onesimus Kipchuma, associate editor of the *University of Nairobi Law Journal*, for providing me with a copy of the journal containing an article on ‘The Tragic African Commons’ by Professor H. W. O. Okoth-Ogendo, which I found invaluable in writing Chapter 8. Among many other colleagues whose comments have helped me to refine my ideas, I would particularly like to thank Catherine Waldby, Lori Andrews, Susan Dodds, Françoise Baylis, Carolyn McLeod, Catriona MacKenzie, Jane Kaye, Mary Mahowald, Carole Pateman, Alan Ryan, Jennifer Hornsby, Diana Coole, Susan James, Ingrid Schneider and Sarah Sexton.

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