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Biotechnology and the Legal Constitution of the Self: Managing Identity in Science, the Market, and Society

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Abstract
This article considers how certain ideas underlying the tort of appropriation may enable use more effectively to deal with the problems presented by a case such Moore v. Regents of the University of California which dealt with property rights of Moore's spleen cells. First, the author explores how the tort of appropriation of identity opens up new approaches to inform and perhaps supplement principles of property law as a guide to managing genetic information or other materials that seem intimately bound up with a particular human subject. Secondly, the author analyzes how the various opinions produced by the Supreme Court implicitly elaborate a powerful and problematic relation between the spheres of private life, science and the market, such that the science is granted special status and power relative to the other two – or rather, how the Supreme Court effectively exploits the social status of science to expand the reach of the market into the private sphere of control over the body. Finally, the author considers how the Appellate Court's discussion of appropriation of identity suggests possible new avenues to pursue regarding the legal recognition and management of both individual and group identity.

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Right of privacy, Biotechnology, Trover and conversion

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Biotechnology and the Legal Constitution of the Self: Managing Identity in Science, the Market, and Society

by
JONATHAN KAHN*

"somebody almost walked off wid alla my stuff
not my poems or a dance i gave up in the street
but somebody almost walked off wid alla my stuff
like a kleptomaniac workin hard & forgetting while stealing
this is mine/ this aint yr stuff/"
—Ntozake Shange.[1]

In 1990, the California Supreme Court decided that John Moore did not own his spleen, or more specifically, he had no property rights in the valuable pharmaceutical products that medical professionals had derived from Moore's spleen cells after they had been removed as part of his treatment for leukemia.[2] In doing so, the Supreme Court overturned that part of a lower court ruling finding that Moore had a cause of action under the tort of "appropriation of identity" based on the commodification of an aspect of his body, his DNA, that was so intimately bound up with his identity as to be analogous to his name or image.[3] Since the court's decision, this remarkable case has produced almost as much legal commentary[4] as it has profits for the

* J.D., Boalt Hall School of Law, 1988; Ph.D. (History), Cornell University, 1992. Visiting Associate Professor in Social Studies, Harvard University.

1. NTOZAKE SHANGE, FOR COLORED GIRLS WHO HAVE CONSIDERED SUICIDE WHEN THE RAINBOW IS ENUF 49 (1977).

2. *See* Moore v. Regents of the University of California, 793 P.2d 479 (Cal. 1990), *reh'g denied.*

3. *See id.* at 488-90.

4. A representative sample of some of the most useful writing includes the following: JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION

victorious defendants. Legal scholars, beginning with the writings of the court itself, evidence a great sense of unease in dealing with the unsettling and novel issues presented by Moore's case. The commentary has overwhelmingly focused on issues relating to property rights in the body and, to a lesser extent, informed consent. Some argue straightforwardly about the commercial interests involved. Others show more concern for the dignitary interests implicated by the sale of body parts. The commentators generally have found the various opinions (Supreme Court, Appellate Court; majority, dissents, concurrences) somehow wanting. (This, of course, is what legal commentators do.) But more is at stake here than basic reflection upon apparently flawed court opinions. As the law enters the arena of biotechnology (and other similar emerging technologies) where control of commercially valuable information increasingly implicates personal identity, existing principles of property law and informed consent are simply inadequate to the task of dealing with the resulting legal issues in a complete and satisfying manner.

I am therefore revisiting the case of *Moore v. Regents of the University of California* to explore and elaborate an approach that, I believe, points toward a more effective and just manner of ordering the legal management of identity in the realm of biotechnology—and perhaps beyond. The numerous articles, notes, and books on *Moore* have largely overlooked the issues raised by the Appellate Court's

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OF THE INFORMATION SOCIETY (1996) (especially chapter 9); JOHN FROW, TIME AND COMMODITY CULTURE 154-62 (1997); E. RICHARD GOLD, BODY PARTS: PROPERTY RIGHTS AND THE OWNERSHIP OF HUMAN BIOLOGICAL MATERIALS (1996) (especially Chapter 2); ALAN HYDE, BODIES OF LAW, chs. 3 & 5 (1997); Helen Bergman, Case Comment, Moore v. Regents of the University of California, 18 AM. J.L. & MED. 127 (1992); Michelle Bourianoff, Note, *Personalizing Personality: Toward a Property Right in Human Bodies*, 69 TEX. L. REV. 209 (1990); Mary Taylor Danforth, *Cells, Sales and Royalties: The Patient's Right to a Portion of the Profits*, 6 YALE L. & POL'Y REV. 179 (1988); Peter Halewood, *Law's Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331 (1996); J.E. Penner, *The "Bundle of Rights" Picture of Property*, 43 U.C.L.A. L. REV. 711 (1996); Laura Ivey, Note, Moore v. Regents of the University of California: *Insufficient Protection of Patients' Rights in the Biotechnological Market*, 25 GA. L. REV. 489 (1991); Jennifer Lavoie, Note, *Ownership of Human Tissue: Life after* Moore v. Regents of the University of California, 75 VA. L. REV. 1363 (1989); Stephen Mortinger, Comment, *Spleen For Sale:* Moore v. Regents of the University of California *and the Right to Sell Parts of Your Body*, 51 OHIO ST. L.J. 499 (1990); Note, Moore v. Regents of the University of California: *Expanded Disclosure, Limited Property Rights*, 86 NW. U. L. REV. 453 (1992). Among the few commentaries by a non-legal scholar is an intriguing essay by Paul Rabinow, *Severing the Ties: Fragmentation and Dignity in Late Modernity*, 9 KNOWLEDGE & SOC'Y 169 (1992). Jane Gaines also has a brief but illuminating discussion of the case in *New Direction: The Absurdity of Property in the Person*, 10 YALE J.L. & HUMAN. 537 (1998).

use of the privacy-based tort of appropriation of identity to resolve the case.[5] This is understandable, perhaps, given the Supreme Court's own brusque dismissal of the issue as largely irrelevant, not to mention the plaintiff's own omission of such a claim from his complaint. Nonetheless, I believe that a return to this tort in particular, and principles of privacy-based jurisprudence more broadly, may open up new and significant areas of analysis and understanding regarding the legal recognition and management of identity.

This article will pursue three such areas and consider how certain ideas underlying the tort of appropriation may enable us more effectively to deal with the problems presented by a case such as Moore's. First, I will explore how the tort of appropriation of identity opens up new approaches to inform and perhaps supplement principles of property law as a guide to managing genetic information or other materials that seem intimately bound up with a particular human subject. That is, intellectual property, which provided the foundation for legitimating the patents to products derived from Moore's cells, is a legal regime for the management of information. Appropriation of identity is also, at root, a privacy-based legal regime for the management of information—in this case, information regarded as intimately bound up with a subject's identity. I believe that the result in *Moore v. Regents* is ultimately is such an unsatisfying and provocative commentary because the regime of intellectual property law is inadequate to meet many of the challenges posed by emerging technologies. New principles may yet be elaborated, but in the meantime I believe the Appellate Court, by invoking the tort of appropriation, perhaps unwittingly hit upon a potentially rich source of existing law that may be used to inform and guide the legal management of certain critical types of information produced or manipulated by new technologies.

Second, I will analyze how the various opinions produced by the

5. In his discussion of the right of publicity and its relation to property rights in the body, E. Richard Gold alludes to "reintegrating the right of privacy" into publicity cases. But he reduces the right to privacy as protection for "hurt feelings, such as embarrassment and humiliation." In so doing, he both trivializes dignitary interests (as do many courts) and reduces them solely to a function of individual concern. *See* GOLD, *supra* note 4, at 103-06. As the history of the tort of appropriation shows, privacy rights originated in a concern to protect the integrity of the very identity of an individual, as well as of a particular type of community sufficient to recognize and respect such dignitary interests. *See generally*, Jonathan Kahn, *Enslaving the Image: The Origins of the Tort of Appropriation of Identity Reconsidered*, 2 LEGAL THEORY 301 (1996) [hereinafter "*Enslaving the Image*"].

Supreme Court (majority, concurrence, and dissent) implicitly elaborate a powerful and problematic relation between the spheres of private life, science and the market, such that the science is granted special status and power relative to the other two—or rather, how the Supreme Court effectively exploits the social status of science to expand the reach of the market into the private sphere of control over the body. This section will also consider how appealing to science to define the "identity" of Moore's cells, effectively displaces the ability of non-expert communities to define and assert local norms regarding the status of individual identity *vis a vis* the market.

Finally, I consider how the Appellate Court's discussion of appropriation of identity suggests possible new avenues to pursue regarding the legal recognition and management of both individual and group identity. Specifically, the court made the intriguing and potentially radical move of extending principles of appropriation to Moore's DNA as constitutive of his identity. A fuller analysis of Moore's case suggests that, just as DNA may be recognized under principles of appropriation as constitutive of one's identity, so too might the law accord a measure of recognition to other significant affiliations—such as race, class, gender, religion, or ethnicity—as fundamentally constitutive of one's individual identity. By focusing on identity-constitutive affiliations, the concept of appropriation may shift the legal debate from one over "group rights" to one of "rights through groups"—that is, to consider how legal treatment of groups through which individuals derive, construct, and/or maintain significant aspects of their identity implicates individual rights.

This approach to the legal status of group affiliation challenges traditional liberal understandings of the boundaries of the self. It may also present a powerful new alternative or supplement to existing equal protection doctrine. Given persistent injustices resulting from identity-based affiliations, scholars and practitioners concerned with the legal construction of identity typically look at how the law discriminates against groups based on race, gender, sexual orientation, ethnicity, or nationality. That is, they use principles of equal protection to analyze the law in relation to "racial" identity, "gender" identity, and so forth. They do not, however, generally consider how the law may construct or manage "identity" itself because the relational stance of equality does not require a definition of identity. Those concerned with equality focus on how the law treats people based on their identity, not on identity itself.[6] Of

6. Feminist legal analysis has provided very insightful critiques of the concept of equal protection under the law. *See, e.g.*, CATHERINE A. MACKINNON, FEMINISM

course, the law is always shaping identity in one way or another. But in the jurisprudence of appropriation we see the courts explicitly engaging with problems of recognizing and managing identity in a manner both highly revealing and suggestive of broader possibilities for dealing with group rights in contemporary society. Here my discussion itself will be more suggestive than conclusive as it raises an array of issues that are beyond the immediate scope of this article.

My overall approach is informed by the relatively straightforward observation that intellectual property and privacy are both regimes developed in large part for the legal management of information. The extensive commentary on Moore's case points up the fact that each alone seems inadequate to the task of managing new forms of information that are being generated or manipulated by emerging technologies. Together, however, they may provide a basis for a more satisfactory resolution to cases such as Moore's—cases that are likely to proliferate as our technologies continue to develop.

I. The Case: Moore v. Regents of the University of California

John Moore was, among other things, a medical patient whose spleen cells were taken from him and used to produce valuable pharmaceutical products without his knowledge or explicit consent.[7] Moore suffered from a condition known as hairy cell leukemia. In October 1976, he traveled from his home in Washington State to the Medical Center at the University of California, Los Angeles to seek treatment. At the Medical Center, Dr. David Golde confirmed the diagnosis and removed part of Moore's spleen as a necessary part of the treatment. Upon studying the spleen and other blood products and bodily fluids taken from Moore, his doctors became aware that Moore's cells had distinctive properties that were of potentially great commercial value as sources of pharmaceutical products. The doctors encouraged Moore to make regular visits back to the Medical Center for monitoring and continued treatment. During these visits, doctors extracted additional body fluids for research purposes. Moore gave consent to the extraction of these fluids, but he was never told anything about the ongoing work to develop commercially valuable products from his genetic material. By 1979, Dr. Golde, together with

UNMODIFIED 32-45 (1987); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175 (1982); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); and DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW (1989).

7. *See* Moore v. Regents of the University of California, 249 Cal. Rptr. 494, 498 (Ct. App. 1988), *review granted and superceded by* 763 P.2d 479 (Cal. 1990).

UCLA researcher Shirley Quan, had established a cell line from Moore's T-lymphocytes, a type of white blood cell that can produce materials having potential therapeutic value. Establishing a "cell line" is of great scientific and commercial value because it creates a culture capable of reproducing itself indefinitely. On January 30, 1981 the Regents of the University of California applied for a patent on the cell line. In his complaint, Moore admitted the difficulty of fixing an exact commercial value on the cell line, but noted that the biotechnology industry's predicted a potential market of more than $3 billion for such products.[8]

Moore cast his claim as a straightforward property-based right to share in the profits derived from the use of his cells. He did not explicitly argue that his body parts constituted a "name or likeness" *per se* that were appropriated in violation of his right to privacy. Rather, he alleged "conversion" of his personal property—his cells and other bodily materials taken for the research and production of commercially valuable pharmaceuticals. Nonetheless, in a striking opinion, the California Court of Appeals for the Second District, analogized Moore's situation to cases involving appropriation of identity, holding that, if the jurisprudence of appropriation protected the individual's interest in projections of identity in name or image, it also could and should be applied to protect constituent components of his identity—in this case, DNA.[9]

The California Supreme Court upheld that part of Moore's claim based on breach of fiduciary duty and informed consent, but it ultimately rejected the lower court's finding with respect to conversion and its attendant analogy to appropriation in a perfunctory manner that did not fully address the arguments and issues the lower court raised. The Appellate Court's opinion found support in strong dissenting opinions by Justices Mosk and Broussard (dissenting in part) and to a lesser degree in an interesting concurrence by Justice Arabian. In any event, the Appellate Court's reasoning is provocative and the logic of its argument potentially far reaching. Whether or not it is currently good law, the lower court's argument regarding the appropriation deserves fuller consideration than that given by the majority of the California Supreme Court. This appropriation analysis opens up new areas to explore as we begin to consider how the legal recognition of identity as elaborated in the jurisprudence of appropriation may potentially be extended into new areas of the law and social life.

8. *See* 793 P.2d at 480-82.
9. *See* 249 Cal. Rptr. at 507-08.

II. The Tort: Appropriation of Identity[10]

Since the turn of the last century, the American legal system has recognized a person's "identity" as something that could be stolen, or "appropriated" (not racial identity, or gender identity but simply identity).[11] Grounded in the common law right to privacy, the tort of "appropriation of identity" involves the use, without consent, of another's name or likeness for commercial gain.[12] The tort was first recognized by a state court in the case of *Pavesich v. New England Life Ins. Co.*, an early and influential privacy case wherein the Supreme Court of Georgia stated that "the publication of one's picture without his consent by another as an advertisement, for the mere purpose of increasing the profits and gains of the advertiser, is an invasion of [the right to privacy]."[13] In 1903, Paolo Pavesich had sued the New England Life Insurance Company over the unauthorized publication of his picture in an advertisement for life insurance together with a caption falsely attributing an endorsement of the product to him. In finding for Pavesich, the court singled out the commercial nature of the use as especially important. First, the court addressed free speech concerns by minimizing the expressive value of the advertisement, holding that such use contained "not the slightest semblance of an expression of an idea, thought, or an opinion, within the meaning of the constitutional provision which guarantees a person the right to publish his sentiments on any

10. Much of the discussion in the section draws on my article, *Enslaving the Image*, *supra* note 5.

11. In 1890, Samuel Warren and Louis Brandeis for the first time fully elaborated the principle of privacy as a right deserving of legal recognition and protection in a now legendary article published in the Harvard Law Review. Warren and Brandeis reviewed the diverse strands of legal, political and social commentary relating to issues of privacy and wove them together into a coherent argument for a legally distinct right to privacy grounded in a concern for "man's spiritual nature." Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) [hereinafter "*The Right to Privacy*"]. To Warren and Brandeis, privacy did not involve property so much as the "more general right to the immunity of the person—the right to one's personality." *Id.* at 205. Their project was largely to "disentangle privacy from property," Robert C. Post, *Rereading Warren and Brandeis: Privacy, Property, and Appropriation*, 41 CASE W. RES. L. REV. 648 (1991), and their great accomplishment was to articulate privacy as a free standing basic right. *See* David W. Leebron, *The Right to Privacy's Place in the Intellectual History of Tort Law*, 41 CASE W. RES. L. REV. 769, 779-80 (1991). For a thorough review of the right to privacy in the nineteenth century, see Note, *The Right to Privacy in Nineteenth Century America*, 94 HARV. L. REV. 1892 (1981).

12. William Prosser, *Privacy*, 48 CAL. L. REV. 389 (1960).

13. 50 S.E. 68, 81 (Ga. 1905).

subject."[14] Second, it asserted that the advertisement had harmed Pavesich by depriving him of control over his identity, in effect, "enslaving" him by forcing his image into the service of another against his will.[15]

The court in *Pavesich* carried the notion—that aspects of the self could become embodied in representations of the self—to its logical extreme in analogizing appropriation of identity to slavery. In powerful and evocative language, the court detailed the outrage:

> The knowledge that one's features and form are being used for such a purpose, and displayed in such places as advertisements are often liable to be found, brings not only the person of an extremely sensitive nature, but even the individual of ordinary sensibility, to a realization that his liberty has been taken away from him; and, as long as the advertiser uses him for these purposes, he cannot be otherwise than conscious of the fact that he is for the time being, under the control of another, that he is no longer free, and that he is in reality a slave, without hope of freedom, held to service by a merciless master; and if a man of true instincts, or even ordinary sensibilities, no one can be more conscious of his enthrallment than he is.[16]

In a remarkable semiotic turn, the court in *Pavesich* seems to have said that to enslave a representation of a person was to enslave the person himself. He who owns your sign, owns you.

The court thus recognized a special connection between a person and his image. Such a connection was essential to the idea that one could actually appropriate a person's "identity" through seizing his picture. The court assumed that Pavesich was literally invested in his name and likeness in a way that distinguished the tort of appropriation from the theft of a simple piece of property. The court, indeed, was little concerned with the material value of his image. Rather, it perceived that his image contained an intangible part of his self, of his spirit or identity; so much so, that the wrongful use of his image effectively enslaved a part of Pavesich.[17]

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14. *Id.* at 80.

15. *Id.*

16. *Id.*

17. As property, Pavesich's name and image were essentially intangible. The court's recognizing them as belonging to Pavesich reflects what Kenneth Vandevelde has identified as the "dephysicalization of property," a jurisprudential evolution that occurred in late nineteenth and early twentieth century American law. Vandevelde argues that a new "relational" conception of property as a "valuable interest" rather than as a physical thing emerged during this period. Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 328-330 (1980). This phenomenon perhaps also accounts for the irony of a Southern court, merely nine years after *Plessy v. Ferguson*, speaking so passionately about

That the law recognizes so amorphous a concept as "identity" is in itself remarkable. But even more remarkable is the degree to which scholars and practitioners of "identity politics" have overlooked its place in the history of the development of American law. Perhaps the relative obscurity of the tort of appropriation is due to its being eclipsed by its flashier cousin: the right of publicity. The right of publicity involves a person's (usually a celebrity's) right to control the marketing of her name or image. Publicity is a property right involving the individual's interest in the commercial value of her image. Damages in such cases compensate the plaintiff for economic loss.[18] The privacy-based tort of appropriation is quite different. It involves a personal right, concerning the individual's interest in maintaining the integrity of her identity. In appropriation cases, damages compensate the plaintiff for dignitary harm. They may also involve declarations that serve to vindicate or rehabilitate the integrity of the plaintiff's identity. In defining the right of publicity, the law deals with a person's image as a commodity. The identity of the subject matters only insofar as it may be translated into a quantifiable market value. But with the tort of appropriation, identity is valued precisely as a distinctive marker of the subject's unique individuality. Robert Post's work on the social foundations of the related tort of defamation is useful in further elaborating the distinction between dignitary and property interests. Post notes that "dignity is not the result of individual achievement and its value cannot be measured in the marketplace. It is, instead, 'essential' and intrinsic in 'every human being.'"[19] Post similarly noted that "honor cannot be converted into a continuous medium of exchange. It cannot be bought and sold...."[20] Thus, while damages may be sought in an appropriation case, the harm is measured not as a function of market value or unjust enrichment, but as a basis for vindicating and rehabilitating the subject's dignity. Indeed, the legal

the harms of "enslavement." 163 U.S. 537 (1896). Just as conceptions of property had developed from physical to relational, so too does the court's reasoning reflect a "dephysicalized" conception of slavery. One need not control the physical body of another to enslave them. Rather, one need only enslave an object, such as a name or image, bearing a special relation to that person.

18. *See* Melville Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROBS. 203 (1954); J. THOMAS MCCARTHY, THE RIGHTS OF PUBLICITY AND PRIVACY (1989).

19. Robert C. Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CAL. L. REV. 702, 712 (1986).

20. *Id.* at 712-13. For a fuller discussion of the relation between appropriation of identity and publicity rights, see generally Jonathan Kahn, *Bringing Dignity Back to Light: Publicity Rights and the Eclipse of the Tort of Appropriation of Identity*, 17 CARDOZO ARTS & ENT. L.J. 213 (1999).

domain of privacy provides such a useful complement to property law in examining cases such as Moore's precisely because it generally stands outside of, and often in opposition to, the domain of the market.

A. Identity Interests and Body Interests

At Moore's initial trial, the Superior Court dismissed the case, sustaining demurrers by the defendants. The Appellate Court reversed, holding that the plaintiff, Moore, had adequately stated a cause of action for conversion.[21] The defendants had asserted that the DNA from Moore's cells was "not a part of him over which he [had] the ultimate power of disposition during his life...."[22] The Appellate Court found this argument "untenable" and drew upon appropriation of identity cases to assert that DNA, as a constituent of individual identity, deserved the same legal recognition as names or images that were manifestations of identity. The court concluded that, "a patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress."[23]

Overall, the court evidenced a somewhat confused reading of appropriation. It asserted that appropriation cases establish a "proprietary interest" in one's persona, completely overlooking the dignitary aspects of the tort throughout its history. Yet, the court went on to characterize the harm to Moore as "a massive invasion of human privacy and dignity," implicitly recognizing that these values too lie at the heart of appropriation of identity. The confusion arose, perhaps, because the court wanted to consider the dignitary aspects of the harm to Moore, but Moore himself apparently was concerned primarily about money. He did not assert a dignitary harm nor was he seeking to redress any emotional injury. Rather, he alleged conversion: the wrongful exercise of dominion over his personal property by the defendants in a manner inconsistent with his title or rights therein.[24] That is, he wanted a piece of the action that had been generated from a piece of himself—the profits of the commercial biotechnology enterprise that had its source in what were, after all, originally his cells.

The Appellate Court, however, was very concerned with dignity.

21. *See* 249 Cal. Rptr. at 507-508.
22. *Id.*
23. *Id.* at 508.
24. *See id.* at 503.

The commercialization of human body parts unsettled the court and led it to examine deeper political and ethical issues implicated by Moore's claim.[25] The court began by considering the disturbing implications of treating the tissue of a living person as a form of tangible personal property. It began historically, noting that "the evolution of civilization from slavery to freedom, from regarding people as chattels to recognition of the individual dignity of each person, necessitates prudence in attributing the qualities of property to human tissue."[26] The parallels with early writings on the right to privacy are striking. Like Warren and Brandeis in their original 1890 article on the right to privacy, and like Roscoe Pound in his 1915 article on the "Interests of Personality," the *Moore* court began its analysis with a story of mankind's progress from savagery to civilization. For Warren and Brandeis the right to privacy grew out of civilization's growing awareness of and consideration for "man's spiritual nature, of his feelings and his intellect."[27] Pound saw the emergence of legal recognition of the "interests of personality" as resulting from "the progress of society" and "increasing civilization."[28] The *Moore* court's whiggish history of teleological evolution similarly marks the legal recognition of intangible interests in individual dignity as an incident of social progress. Its allusion to slavery, of course, evokes the language of *Pavesich* in expressing its concern that appropriation of one's image effectively turned him into a "slave, without hope of freedom, held to service by a merciless master."[29] Where the court in *Pavesich* was concerned about enslavement caused by new technologies of photo-reproduction and mass printing, the Appellate Court in *Moore* raised the specter of possible enslavement caused by new bio-technologies that "reproduced" aspects of Moore in new and different ways. In a world where human cloning is being discussed in terms of "when" and not "if," such issues must be of more than passing concern.

The court ultimately disposed of this problem by distinguishing between one person being the property of another and Moore's claim

25. Thus, even using a privacy-based analysis we can see how Moore's claim of conversion might fail because he did not allege any subjective sense of identity-based dignitary harm. Nonetheless, the jurisprudence of appropriation can and should be recognized and made available as a supplement to inform or guide principles of intellectual property as a basis for managing information, such as DNA codes, that may be intimately linked to a person's identity.

26. 249 Cal. Rptr. at 504.

27. Warren & Brandeis, *supra* note 11, at 193.

28. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 343 n.2 (1915).

29. 50 S.E. at 80.

to have property rights "in one's own body."[30] This sounds quite Lockean, but it also opens up the highly problematic possibility of allowing one to alienate freely one's body parts. On the principle of alienability, liberal theory generally draws the line at slavery. In a liberal polity, an individual is not permitted to sell herself into slavery. At one point, the court likens selling body parts to selling one's labor,[31] but it does not seem to consider fully some of the potential problems this raises.

For example, James Boyle, exploring the implications of genetic research both for property rights and for our conceptions of what constitutes a human being, considers the possibility of what he terms "transgenic slavery." Scientists create transgenic organisms by combining the genetic material from two different species. Already animals such as cows have been engineered to contain certain human genetic material. Boyle raises the possibility of a human-chimp hybrid, "Chimpy," able to perform important but potentially dangerous work, without the inconvenience to employers of such requirements as wages, unions or safe working conditions—i.e., the equivalent of slavery. While such an eventuality is admittedly unlikely, pursuing its implications may nonetheless lead to some useful insights. Indeed, Boyle notes that the U.S. "Patent Office has said that it will not grant patents on human beings because the Thirteenth Amendment prohibits the ownership of one human being by another." Pushing the scenario further, we must ask at what point would an organism such as "Chimpy" become a human being, with human rights? Boyle suggests that in the context of genetic engineering, the "social understanding of the Thirteenth Amendment might turn out to be a subset of the [First Commandment's] prohibition of idolatry and graven images—a prohibition on making beings in our own image."[32] To my ear, Boyle's concerns for transgenic slavery resonate not only with God's First Commandment to Moses, but also with the court's opinion in *Pavesich*. A genetic engineer might make a full-blown corporeal "image" of a human being in a lab; an advertiser might make a visual or aural image of a subject with a camera or tape recorder. The former, I would argue, is perceived by society as offensive because it demeans the dignity of human beings as a whole. The offense is caused primarily by the creation of such a being in the first place. The later possible enslavement of such being further degrades not only the subject but

30. 249 Cal. Rptr. at 504.
31. *See id.*
32. Boyle, *supra* note 4, at 150-51.

the society which would enslave it.

With regard to Moore's situation, we might consider that while a subject may not be directly selling himself into slavery through alienating his DNA, he might be contributing to the creation of a transgenic being that itself would later be enslaved. Moreover, one might argue that a being created from a subject's DNA, whether transgenic or through cloning, constitutes an "image" of that subject. Under the jurisprudence of appropriation, the creation and use of such an image could well constitute a deep harm to the dignity of the subject.

A clearer focus on privacy-based identity interests would allow us to move beyond the question of whether or to what extent certain or all body parts can be commodified. The Appellate Court's discussion of Moore's "proprietary interest" in his persona in tandem with its analogy to appropriation vitiated the force and clarity of a potentially innovative argument. The court's conflation or confounding of privacy and proprietary interests opened the door to the Supreme Court's easy dismissal of appropriation as an "inappropriate" source of law. If we disentangle the two interests, it may then be possible to use one to inform the other in a constructive and legitimate manner.

The first step is to recognize that appropriation of identity does not involve the use of one's body but rather of one's "name or image" in a manner that implicates one's identity. Moore's "property right" in his body is irrelevant to the tort. The Appellate Court essentially found that a body part may be so construed as to manifest an aspect of a person's identity. But it then made the mistake of characterizing the resulting interest as proprietary, even as it invoked claims of dignity. Appropriation does not harm the body *per se*, but rather one's identity. Neither does it harm one's property, but rather, one's dignity.

Alan Hyde's discussion of "narrated bodies" in his book, *Bodies of Law*, is suggestive of further distinctions along these lines. In analyzing the language from a well-known loss of consortium case involving a severe injury to the husband, Hyde notes that "the dominant literary trope" of the opinion is "narrative, typically chronological." The husband's body "is not a machine, or property, or commodity; it is not private, or sacred, or the 'physical and temporal expression of the unique human persona' [citing Mosk's dissent in Moore]." Such "narrated bodies," argues Hyde, seem more direct and natural: "we find them when empathy is sought." He continues by stating that, "the narrated body of [the husband] is a powerful alternative to the body figured as property, commodity, or

interest."[33]

Identity is similarly a narrative concept. Anthony Giddens, for example, provides a useful and succinct definition of what he terms "self identity" as "*the self as reflectively understood by the person in terms of his or her biography.* Identity here presumes continuity across time and space: but self-identity is such continuity as interpreted reflexively by the agent."[34] The tort of appropriation may thus similarly construct its subject narratively. Identities develop over time. We come to value them and understand potential harm to them largely through acts of empathy where we are asked to stand in the place of the injured party to understand the mortification she may have experienced at the "enslavement" of an aspect of her self. In a case such as Moore's, such a stance might complement property-based assessments of the commercial value of the information at stake. It would allow for the option of articulating a non-commercial basis for maintaining control over such information. Moreover, the tort of appropriation allows for the vindication, not only of individual rights, but of broader community values. The act of empathy demanded of the court or the jury allows it to assert and maintain a particular vision of their community as one that maintains social relations sufficient to support an individual's ability to protect her identity; that is, a community that values non-commercial, as well as commercial, aspects of the individual. Such a community allows for a legal distinction between the body and the self, recognizing that certain uses of the former may implicate the latter in a manner inconsistent with the character and values of the community.[35]

Second, it is necessary to isolate discussions of property-based publicity rights and focus directly on issues of individual control over the non-commercial identity interests implicated by the management of genetic information. In a sense, the Supreme Court does this by dismissing the Appellate Court's analogy to appropriation precisely because it is a privacy tort, and the Supreme Court was concerned only with the property interests involved (as, to be fair to the Supreme Court, was Moore himself).[36] Thus, we need to bring privacy back into the discussion, not necessarily to supplant property law but to supplement and inform our use of it. An explicit

33. Hyde, *supra* note 4, at 101-03.

34. ANTHONY GIDDENS, MODERNITY AND SELF-IDENTITY: SELF AND SOCIETY IN THE LATE MODERN AGE 53 (1991).

35. For more on the relation between the tort of appropriation and community values, see Kahn, *supra* note 5, at 318-24.

36. *See* 793 P.2d at 490.

engagement with the law of privacy and appropriation would allow courts to more coherently analyze the troubling issues of identity and dignity which heretofore have been dealt with unconvincingly by invoking property law and informed consent.[37]

Stanley Mosk's dissent from the Supreme Court's opinion begins to move in this direction. For instance, Mosk considers the social values implicated by Moore's claim when he asserts that,

> our society acknowledges a profound ethical imperative to respect the human body as the physical and temporal expression of the unique human persona. One manifestation of that respect is our prohibition against direct abuse of the body by torture or other forms of cruel or unusual punishment. Another is our prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person. The most abhorrent form of such exploitation, of course, was the institution of slavery.[38]

Here Mosk exhibits a concern for a very different type of uniqueness—that of the "human persona." Such uniqueness is not tangible or quantifiable but rests in a traditionally liberal conception of the value of each person as a distinct, rights-bearing individual whose dignity must be respected and protected by the law. Like the Appellate Court, Mosk's reference to slavery is evocative of the language of *Pavesich* and the idea that, to the extent that an image or name embodies an aspect of a person's identity, its appropriation constitutes an effective enslavement of that person. Here, it is the commercial exploitation of a constituent component of Moore's "unique human persona" that Mosk juxtaposes with slavery.

Mosk elaborates on the nature of the particular harm done to Moore's identity by quoting a law review article to make the point

37. Informed consent does implicate issues of dignity insofar as it is used to vindicate autonomy in the form of an individual's right to make informed decisions concerning the use of her body. *See, e.g.*, Recent Development, *Tort Law—Informed Consent*, 104 HARV. L. REV. 808 (1991). But it would, for example, likely fail to deal adequately with a situation such as Moore's (at least as it was initially) where the discovery of valuable research uses arise only after the initial medical procedure. Informed consent deals primarily with the dignity or autonomy of the speaker as implicated by the right to make informed choices about important health matters—important to be sure—but appropriation/privacy deals with a distinct dignitary interest relating directly to the control of information or material that is intimately connected with the subjects identity or sense of self. Moreover, informed consent applies only to situations where some sort of fiduciary relationship existed between the plaintiff and the defendant. It has no bearing on situations where genetic or other intimate information has been obtained outside such a relationship. Finally, the focus of informed consent is largely on the integrity of the doctor-patient relationship, whereas the focus of appropriation is on the integrity of the individual's identity.

38. 793 P.2d at 515.

that

> [research on human cells for economic gain] tends to treat the human body as a commodity.... The dignity and sanctity with which we regard the human whole, body as well as mind and soul, are absent when we allow researchers to further their own interests without the patient's participation by using the patient's cells as the basis for a marketable product.[39]

Commenting on Mosk's concern for the "human whole," Paul Rabinow notes that "the question remains a holistic one: body, mind, spirit and person are one; part is whole."[40] This conception challenges the Cartesian dualism articulated by the lower court. Indeed, from a holistic point of view, it is, perhaps, precisely the fragmentation of Moore's self, the severing of a constitutive part of his identity, that amounts to an affront to dignity. Drucilla Cornell has argued that denying the right to an abortion undermines the integrity of the female body by fragmenting its wholeness.[41] Mosk here exhibits a similar concern that commodifying the human body might similarly undermine the "dignity and sanctity of the human whole." The fact that the object at issue (the cell line created from Moore's excised cells) is actually beyond Moore's body does not lessen Mosk's concern that its commodification may degrade Moore's dignity and efface the distinctive individuality of his identity. Thus, as in the jurisprudence of appropriation, Mosk assumes a connection between the corporeal body and objects beyond its formal boundaries. That the cells were once part of Moore's body does not seem to distinguish this situation significantly from one involving a name or image because, as Mosk and the lower court take pains to point out, the cells are different from other objects that were once part of Moore's body, such as fecal material. The cells are not mere waste; rather, they are perceived to embody and constitute aspects of Moore's identity. The relationship between the object and the subject's identity then is what matters, not the simple relation to the subject's corporeal body.

B. Science Transcendent, The Market Supreme

In its opinion, the Appellate Court noted that "[u]ntil recently,

39. *Id.* at 516 (quoting Mary Taylor Danforth, *Cells, Sales, and Royalties: The Patient's Rights to a Portion of the Profits*, 6 YALE L. & POL'Y REV. 179, 190 (1988)).

40. Paul Rabinow, *Severing the Ties: Fragmentation and Dignity in Late Modernity*, 9 KNOWLEDGE & SOC'Y 169, 182 (1992).

41. Drucilla Cornell, *Bodily Integrity and the Right to Abortion*, *in* IDENTITIES, POLITICS, AND RIGHTS: THE ANTHROPOLOGY OF SCIENCE AND TECHNOLOGY 21, 36 (Austin Sarat & Thomas R. Kearns eds., 1995).

the physical human body, as distinguished from the mental and spiritual, was believed to have little value, other than as a source of labor. In recent history, we have seen the human body assume astonishing aspects of value."[42] The court thus framed its argument in terms of a straightforward Cartesian separation of the mind and body. This logic set up the court's later finding that Moore had a property right in his body parts, but it also contains the germ of the Supreme Court's later reversal with respect to the claim of conversion. The tort of appropriation of identity is based precisely on establishing a connection between the spiritual nature of an individual and a particular material (or corporeal) object. A claim of appropriation exists to the extent that the court finds aspects of the self to be invested in such an object. By presenting Moore's body as wholly separate from his spirit, the Appellate Court provided no grounds for a perspective that would view the use of his body as harmful to the integrity of his identity. Within the court's Cartesian framework, there was no injury to Moore's "self."

Indeed, this was, more or less, the tack taken by the Appellate dissent, which argued that the defendants had "transmuted" Moore's worthless spleen "from human waste into patentable blood cell lines."[43] The dissent went on to assert that, "although the raw material from plaintiff's body may have been unique, it evolved into something of great value only through the unusual scientific expertise of defendants, like unformed clay or stone transformed by the hands of a master sculptor into a valuable work of art."[44] The reference to clay immediately calls to mind Boyle's concerns about manufacturing transgenic beings in our image—as God formed Adam out of clay. Beyond this, Boyle also comments directly on Moore's case. He notes that the dissent's argument, ultimately taken up by the majority of the Supreme Court on appeal, is grounded in a conception of Moore's body as a source of raw materials that are transformed by scientists and doctors into something new and valuable. Analogizing the situation to intellectual property law, Boyle sees the opinion guided by a notion of "romantic authorship" which valorizes the creative expression of gifted individuals who give "new ideas to the society at large and [are] granted in return a limited right of private property in the artifact [they] have created."[45] The dissent can make this move without resistance because the majority has already

42. 249 Cal. Rptr. at 504.
43. *Id.* at 537.
44. *Id.*
45. BOYLE, *supra* note 4, at xii, 56-57, 104-08.

conceded a disjunction between Moore's DNA and his spirit.

The court's characterization of genetic material as "something far more profoundly the essence of one's human uniqueness than a name or a face,"[46] is also problematic. The idea that DNA is what makes a person unique supplants the more humanistic concern for man's spirit or dignity articulated in earlier appropriation cases with a highly scientized notion of individuality. That is, the Appellate Court here casts the damage to Moore's uniqueness not in terms of vernacular understandings of individuality but by reference to scientific evidence that establishes DNA as the basis of physical uniqueness. Yet, the court does ultimately conceive of the harm to Moore as a "massive invasion of human privacy and dignity."[47] This again reflects the court's confusion between the proprietary and dignitary aspects of identity that are implicated by Moore's claims.

In its discussion of his genetic uniqueness, the Appellate Court implied a direct connection between genes and identity. Its mention of fingerprints and blood type, not to mention personality traits, indicates a concern for those attributes that mark each individual as unique. But, of course, all humans have blood, and all have fingerprints. The fact that one has a fingerprint does not mark one as unique. It is the relationship between a particular individual and their distinctive genetic make-up that establishes uniqueness. That is, all human beings have DNA. Therefore, DNA marks one human as distinct from another only insofar as a relationship can be established between a specific individual and his particular genetic code.[48]

46. 249 Cal. Rptr. at 508.

47. *Id.*

48. As Paul Rabinow comments in his discussion of dignity in relation to the creation of an "immortal" cell line from Moore's tissue:

> Philosophically, the whole kind is preserved in the individual. The species and the individual coincided; the species immortal and the individual mortal.... *Dignitas* was at first an attribute of the King: the King is dead, long live the King. Then the term migrated to the medieval corporation. *Dignitas* became generalized and was given a precise legal status as a Phoenix-like attribute in which the corporation coincided with the individual precisely because it reproduced no more than one individuation at a time, the incumbent—the Corporate Sole. In this sense, Moore's body was inviolable and unique, even in its immortalized state, simultaneously the same and different. In fact, Mosk seems to hold precisely this view when he asserts that Moore's cells and his cell line are identical even though the cell line has a different number of chromosomes and exists only under laboratory conditions.

Rabinow, *supra* note 40, 182-83. Moore was the same as every other human being in that he had DNA, and yet different, in that he had a distinctive genetic code. Similarly, we may argue that all human beings are their possession of dignity, as an attribute inherent to our social definition of a person, and yet distinct insofar a key component of dignity is

Similarly, it is the relationship between an individual and a particular image that establishes whether her identity is bound up in the image. The court's opinion overlooks this relational aspect of identity, simply asserting the material basis of identity in DNA. The Appellate Court's failure to consider the relational aspect of identity and its confusion of the proprietary and personal aspects of the interest at stake left its opinion vulnerable to precisely the sort of reinterpretation of scientific evidence that formed a large part of the California Supreme Court's later reversal on this matter.

In dismissing Moore's claim of conversion, the California Supreme Court first rejected the lower court's analogy to the law of appropriation as "irrelevant to the issue of conversion" because the cases it cited did not expressly base their holdings on property law.[49] This is basically all the court had to say on the matter—appropriation dealt with privacy, not property; therefore, its principles were inapposite to Moore's specific case. Of course, since its inception, the tort of appropriation has been bound up with its companion, the right of publicity.[50] Individual cases inevitably seem to implicate both privacy and property rights. The problem here is that Moore himself invoked only his proprietary rights to his genetic material. The Appellate Court, perhaps, would have had a stronger argument if, instead of using analogy to import the principles of appropriation into Moore's claim of conversion, it had simply stated that the facts would give rise to an outright claim of appropriation based on the degree to which Moore's identity could be said to be bound up with his genetic material.

Justice Broussard, in his dissent with respect to the issue of conversion, criticized the majority's timidity, noting that if Moore could provide no judicial decision to support his claim, neither could the defendants provide any reported judicial decision to reject it. The case, he concludes, was simply one of "first impression."[51] Broussard's criticism brings to mind similar criticisms, made nearly ninety years before of New York's highest court for its decision in *Roberson v. Rochester Folding Box Co.*[52] In that 1902 case, the New York Court of Appeals refused to recognize the plaintiff's claim that her right to privacy had been infringed by the defendant's use of her

maintaining one's individual uniqueness. *See, e.g.*, Louis Henkin, *Human Dignity and Constitutional Rights*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 210 (Michael J. Meyer & W. A. Parent eds., 1992).

49. 793 P.2d at 490.

50. *See generally* Kahn, *supra* note 19.

51. *See* 793 P.2d at 502.

52. *See* 64 N.E. 442 (1902).

image together with the caption "flour of the family" to sell its flour products. As in *Moore*, this was essentially a case of first impression wherein the majority refused to find a right to privacy. Among the court's concerns was the fear that establishing a right to privacy would lead to a flood of litigation.[53] Popular outrage at the decision led New York in the following year to the passage of the first statute explicitly recognizing the right to privacy.[54] In his concurrence in *Moore*, Justice Arabian echoed the *Roberson* court when he expressed concern that recognizing Moore's claim for conversion might "expos[e] researchers to potentially limitless and uncharted tort liability."[55]

The Supreme Court, however, did not stop with its dismissal of the lower court's analogy to appropriation. It went on to assert that the lower court's use of the analogy to appropriation "seriously misconceives the nature of the genetic material and research involved in this case."[56] That is, the Supreme Court exploited the lower court's reliance on scientific evidence to recast the nature of the interest at stake. "The goal of the defendants' efforts," the Supreme Court stated,

> has been to manufacture lymphokines. Lymphokines, unlike a name or a face, have the same molecular structure ... in every human being and the same, important functions in every human being's immune system. Moreover, the particular genetic material which is responsible for the natural production of lymphokines, and which defendants use to manufacture lymphokines in the laboratory, is also the same in every person; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.[57]

James Boyle comments that "this passage is remarkable partly because it is nonsensical. It was precisely the unique properties of Moore's genetic 'programs' ... which made his tissue and bodily fluids such an important part of Dr. David Golde's profitable research."[58] True, the court's statement seems odd at best, but it was able to make such a statement, in part, because of the lower court's own confusion over the interest at stake. By characterizing Moore's

53. *See id.* at 443.

54. Laws of New York, 1903 N.Y. Laws 132. The constitutionality of the law was upheld by the Court of Appeals in Rhodes v. Sperry & Hutchinson Co, 85 N.E. 1097 (N.Y. 1908), *aff'd*, 220 U.S. 502 (1908).

55. 793 P.2d at 498.

56. *Id.* at 490.

57. *Id.* at 490.

58. BOYLE, *supra* note 4, at 104.

uniqueness primarily in terms of his physical attributes and genetic material, the lower court left the door open to the Supreme Court's reasoning.

Appropriation is based on a relation between self and image through which one's identity becomes invested in an object beyond the self. This relation is socially constructed and validated by community recognition. The Supreme Court did not have to deal with such intangibles because the lower court did not bring them to the center of its argument. Hence, it could reach its rather startling conclusion that there was nothing unique about Moore's genetic material because "science" established that lymphokines "have the same molecular structure in every human being."[59] Had the lower court based its argument more firmly on community standards that defined and protected an individual's dignity as a human being, the Supreme Court, perhaps, would have had a tougher time rejecting its holding. As it was, the Supreme Court comfortably asserted that it was not necessary "to force the round pegs of 'privacy' and 'dignity' into the square hole of 'property' in order to protect the patient, since the fiduciary duty and informed-consent theories protect these interests directly by requiring full disclosure."[60] Interestingly, the court did not say that there was no dignitary harm to Moore, merely that his property-based complaint did not encompass such harm.

Finally, the majority supported its argument by asserting, in effect, that Moore's cells, once severed from his body, were no longer a part of his self. "The patented cell line," it asserted, "is both factually and legally distinct... from Moore's body."[61] The court focuses on the intervening "human ingenuity" and "inventive effort" of the scientists in crafting a cells line as the basis for granting them a patent.[62] In an interesting footnote, however, the court also stated that "[t]he distinction between primary cells (cells taken directly from the body) and patented cell lines is not purely a legal one. Cells change while being developed into a cell line and continue to change over time [e.g., they may acquire an abnormal number of chromosomes]."[63] In addition to the intervening creative effort of scientists, which the opinion casts as transforming otherwise worthless raw materials into a valuable and original product, the court also apparently saw a temporal disjunction between Moore and the

59. 793 P.2d at 490.
60. *Id.* at 491.
61. *Id.* at 492.
62. *See id.* at 492-93.
63. *Id.* at 492 n.35.

patented cells line that somehow fractured the connection between his identity and his genetic material. The court's focus on the idea that cells change over time indicates its belief that time changes not only the material characteristics of a cell but also its "identity," that is, its connection to its original source in Moore. It also attempts to naturalize the difference; that is, to construct the disjunction between Moore and his cells as a pre-political function of the "objective" forces of nature.

One basic problem with this line of argument, of course, is that cells change within the human body as well and yet remain recognized by society as part of the person. Another problem is the court's insistence that the separation of an object from one's corporeal body somehow severs all ties to the subject's identity. This is where the jurisprudence of appropriation bears directly and immediately on the issues raised by Moore's case. Just as the law recognizes that a part of a person's identity may become bound up with an object or phrase that is external to their corporeal body, so too did the Appellate Court in *Moore* recognize that an individual's identity might be bound up with or affected by the use of genetic material which, though external to the body, was historically intimately bound up with the constitution of the subject's identity.

In an intriguing, if muddled, concurrence, Justice Arabian takes a very different tack from that of the majority. He argues that Moore's claim for conversion should be denied precisely because it offends human dignity to allow an individual to profit from the sale of body parts. Arabian is especially concerned about the potential entry of profit motives and market forces into this arena. He is deeply offended by Moore's claim, asserting that "[h]e entreats us to regard the human vessel—the single most venerated and protected subject in any civilized society—as equal with the basest commercial commodity. He urges us to commingle the sacred with the profane. He asks much."[64] Arabian, however, adopts a hands-off approach to the problem that ultimately results in protecting the defendants' use of Moore's tissue. He asks whether it would "advance or impede the human condition spiritually or scientifically, by delivering the majestic force of the law behind plaintiff's claim? I do not know the answers to these troubling questions—nor am I willing... to treat them simply as issues of 'tort' law, susceptible of *judicial* resolution."[65]

In his analysis of *Moore*, Alan Hyde comments on Arabian's "cloddish and awkward" invocation of the "sacred body," which

64. *Id.* at 497 (Arabian, J., concurring).
65. *Id.* at 498.

Hyde asserts is "the body that cannot be property,"[66] but rather is a "master symbol of what is *not* a subject of contract or barter." He rightly notes that if Arabian took his invocation of the sacred body seriously, he would find it to "prohibit ownership to Moore's cell line by the defendant researchers."[67] Hyde concludes that "[t]he *Moore* case well illustrates the impoverished nature of our legal discourse about the body.... Moore's spleen is and is not his property; calling it property makes Moore autonomous and degrades him."[68]

Hyde insightfully deconstructs the legal discourse surrounding the body here. One advantage of the tort of appropriation is that, by focusing on identity, it situates legal analysis in a different discursive realm. To be sure, social constructions of identity are no less problematic than those of the body. But they are not, as Hyde might say, as "naturalized"—that is, our social and historical understanding of identity itself is more open to contested or negotiated meanings. The body may or may not be "sacred," but such a designation is irrelevant to our understandings of identity. Hence, "identity" may be a sight for a less hierarchical and more fluid and humane conception of the legal management of genetic information.

Arabian's invocation of the sacred and the profane also recalls 19th century separate spheres ideologies that designated the private domestic world of the home as "sacred" space, where delicate and sensitive women engaged in edifying spiritual pursuits while men entered the rough and tumble of the profane public world of the market to earn a living and protect their dependent families.[69] Similarly, Arabian implicitly feminizes "the human vessel" as vulnerable to the ravages of the market. Market forces here become a form of "pollution" when they enter the sacred realm of spirit and dignity.[70] Ironically, his judicial restraint allows for the free commodification of Moore's body parts by the scientific and medical communities. Science, it would seem, does not "pollute" in the same way as do straightforward market forces. The apparently

66. Hyde, *supra* note 4, at 57.

67. *Id.* at 73.

68. *Id.*

69. For discussions of separates spheres ideology, see Frances Olsen, *The Family and the Market; A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983) and Okin, *infra* note 108. On the nineteenth century origins of the ideology of separate spheres in America, see generally NANCY COTT, THE BONDS OF WOMANHOOD (1977); ANN DOUGLAS, THE FEMINIZATION OF AMERICAN CULTURE (1977); and SHEILA ROTHMAN, WOMAN'S PROPER PLACE 13-62 (1978).

70. For more on the concept of cultural pollution, see MARY DOUGLAS, PURITY AND DANGER (1980).

"transcendent" values of scientific research somehow purify the otherwise profane commodification of body parts. Thus, like the male head of family, science and scientists seem capable of negotiating between the sacred and profane, mastering both. Arabian does not trust Moore with decision over whether to commodify his body parts, but he does trust the experts.[71] Arabian effectively deprives Moore of control over his sacred "human vessel" and hands it over to scientists and doctors to do with as they will. He thereby also deprives the community of the power to define and maintain a space beyond the reach of the market in which social relations recognize and validate a certain normative conception of individual dignity.

Arabian's abdication of judicial responsibility in the face of his admitted concern for "the effect on human dignity of a marketplace in human body parts"[72] points up the ongoing need to sort out the history of property and identity interests in the jurisprudence of appropriation. Moore himself was apparently primarily concerned with the property value of his tissues. But Arabian's denial of that interest does not begin to address his deeper concern to protect human dignity from the marketplace. Arabian, perhaps, is able to reach the odd result of sacrelizing the body while vindicating the defendants' property claim to it because he is concerned primarily with "the body" in the abstract as a sacred vessel. A focus on "identity" would force Arabian to consider the particular circumstances of a specific individual. If, instead of throwing up his hands in dismay, Arabian (and the majority) explicitly recognized that a dignitary interest was at stake, he could then make constructive use of the jurisprudence of appropriation to address the issue of whether the commodification of Moore's body parts without his consent harmed his dignity.

Commenting on the distinction between sale of such renewable body parts as blood plasma as opposed to one's DNA, Barry Hoffmaster notes that "[p]erhaps, then, it is not commercialization of the body per se that infringes dignity, but commercialization of parts, components, or aspects of the body that are constitutive or reflective

71. In his dissent with respect to the issue of conversion, Justice Broussard takes Justice Arabian to task for his inconsistency in objecting to the immorality of selling body parts while embracing a majority decision that permits the defendants "who allegedly obtained the cells from plaintiff by improper means, to retain and exploit the full economic value of their ill-gotten gains free of their ordinary common law liability for conversion." 793 P.2d at 506 (Broussard, J., concurring and dissenting).

72. *Id.* at 498 (Arabian, J., concurring).

of our uniqueness as human beings."[73] A comparable distinction may be found in the law of appropriation where the mere use of a person's image is not actionable per se. Rather, the image must be recognizable as portraying a particular individual. That is, it must be seen to contain or embody some aspect of that individual's unique identity. Similarly, aspects of the body that are considered as distinctively constitutive of a particular individual might be seen as embodying some aspect of that individual's unique identity; hence, the Appellate Court's concern to refute the dissent's argument that Moore's spleen was "human waste" by asserting the "dignity of the human cell."[74] Thus, in cases such as Moore's, concerns for commodification of the body may be refracted through the additional lens of concerns for commodification of the individual. That is, we may better understand how and when the law should permit or forbid the sale of body parts as property if we consider how and to what extent the individual's identity would be implicated by the transaction. "Experts" cannot make this decision for us. It can only be made by judges, juries, or legislatures who choose to interpret the transaction in light of local understandings of its significance. In this context, relations between the body and the self are constructed not by science but by social and historical processes.

In a forceful dissent, Justice Mosk focused on the difference between not-for-profit scientific use versus commercial for-profit use of Moore's genetic material. Mosk's market-based distinction strongly echoes the distinction in the jurisprudence of appropriation between newsworthy and commercial uses of a person's image. The former is not seen to debase individuality, whereas the latter, by rendering the subject into a fungible commodity, harms the individual by effacing or partializing distinctive aspects of his unique identity.[75] Mosk based his argument on a section of the California Health and Safety Code that permits only "scientific use" of excised body parts.[76] "It would stretch the English language beyond recognition," he asserts, "to say that commercial exploitation of the kind and degree alleged here is also a usual and ordinary meaning of the phrase 'scientific use.'"[77] Mosk notes that the majority dismissed his objections by arguing that the phrase "scientific use" includes for-

73. Barry Hoffmaster, *Between the Sacred and the Profane: Bodies, Property, and Patents in the* Moore *Case*, 7 INTELL. PROP. L.J. 115, 133 (1992).

74. 249 Cal. Rptr. at 505-07.

75. *See* Kahn, *supra* note 5, at 318-24.

76. *See* 793 P.2d at 508 (Mosk, J., dissenting).

77. *Id.* at 508.

profit as well as not-for-profit scientific uses.[78] Mosk, however, rejoined by stating that, "the distinction I draw is not between nonprofit scientific use and scientific use that happens to lead to a marketable by-product; it is between a truly *scientific* use and the blatant *commercial* exploitation of Moore's tissue that the present complaint alleges." Under that complaint, Mosk asserted, the defendant doctors were not only scientists but also "full-fledged entrepreneurs."[79]

Mosk, then, was not bothered by the fact that scientific use of human tissue may eventually lead to profit. Rather, he was concerned with "commercial exploitation." The analogy to newsworthy (as opposed to commercial) uses of a person's identity grows strong here. Thus, for example, the mere fact that one sells a newspaper for a profit does not necessarily mean that the use of an individual's name or image therein constitutes a commercial exploitation of her identity. But where, as in Clint Eastwood's suit against the National Enquirer, the form of publication in a newspaper merely masks a more direct and immediate commercial exploitation of the subject's identity, a cause of action for appropriation may exist.[80]

Mosk also configured the boundaries between public and private differently from the majority. The majority saw science as capable of negotiating between the market and the private sphere of individual autonomy without ill-effects. Mosk, however, casts science outside of and perhaps even in opposition to the market. There is a distinct sense that Mosk sees as profane commercial motives as "polluting" the more sacred ideals of "pure" science. Even if it does not wholly belong to the private sphere, science, for Mosk, nonetheless does not exist in the market. Perhaps Mosk was imputing to science a quasi-public status, like government: an enterprise to be disinterestedly pursued for the common good. In any event, Mosk clearly was trying to establish a boundary between science and commerce, much as the jurisprudence on privacy does between news and commerce.

Yet Mosk has difficulty getting away from a property-based conception of Moore's rights. At one point, he suggests that Moore be considered a "joint inventor" of the cell line with an equal claim to benefit from its commercial exploitation.[81] Although a reasonable argument (which partially addresses James Boyle's concerns that the

78. *See id.* at 492 n.34, 508.
79. *Id.* at 509 (Mosk, J., dissenting).
80. Eastwood v. Superior Ct., 198 Cal. Rptr. 342 (Ct. App. 1983).
81. *See* 793 P.2d at 513.

majority opinion effectively reduces Moore to a mere source of raw materials), it nevertheless fails to take account of the dignitary harm alluded to by the lower court in its analogy to the appropriation cases. Mosk even went so far as to endorse Justice Broussard's assertion that "'the question of uniqueness has no proper bearing on plaintiff's basic right to maintain a conversion action; ordinary property, as well as unique property is, of course, protected against conversion.'"[82] It is important to note, however, that Mosk and Broussard here were referring to the uniqueness of Moore's cells as defined by science. They were not addressing directly the issue of the impact of their appropriation upon the uniqueness of Moore's identity as defined by the community or polity.

A more explicit articulation and direct use of privacy jurisprudence in this area might provide an alternative set of regulative principles to clarify and strengthen arguments regarding the proper management of genetic information. Specifically, the tort of appropriation recognizes a special harm in the commodification of identity. In its turn-of-the-century origins, the tort meant to reaffirm a set of values regulating social relations beyond the reach of the market. Subjecting a person's identity to market forces threatened to render it a mere fungible commodity, or at any rate commensurable with other objects in a cash nexus. Such subjection, particularly without consent, could efface or otherwise degrade the integrity of the person's distinct individuality. It affronted both the dignity of the individual and the integrity of the community seeking to enable a set of normative values that validated dignitary interests.[83]

C. The Self Beyond the Body: From Individual to Group Identity

Returning to the Appellate Court's decision, we find the tort of appropriation is at the heart of its finding regarding Moore's claim of conversion. Among the most suggestive appropriation cases alluded to by the Appellate Court are those involving Bette Midler and Lothar Motschenbacher. In the 1980s, Bette Midler, a popular singer with a highly distinctive vocal style, had been approached by an advertising agency to perform a song to run with a television commercial for Ford Motor Company. Midler refused, saying she did not do commercials. The agency thereupon hired one of Midler's former backup singers whom they told to sound as much like Midler as possible. After the commercial ran, a number of people did indeed

82. *Id.* at 522 (Mosk, J., dissenting) (quoting Broussard, J., concurring and dissenting, *ante*, at 503).

83. *See* Kahn, *supra* note 5, at 318-24.

believe the voice to be Midler's. Midler then brought suit in California seeking an injunction and damages.[84]

The Ninth Circuit Court of Appeals found that Midler stated a valid cause of action based on the common law tort of appropriation. Drawing a direct analogy to the appropriation of an individual's visual image, the court argued that, "[a] voice is as distinctive and personal as a face.... The singer manifests herself in the song. To impersonate her voice is to pirate her identity."[85] The court focuses on the way and degree to which an individual becomes bound up with a representation of herself. Midler was harmed by the sound-alike to the degree that she had "manifested" herself in the song. In using the metaphor of piracy, the court evokes images of plunder and looting that echo *Pavesich*'s allusions to enslavement.

The *Midler* court here takes a step beyond traditional appropriation law in recognizing that one's identity may become bound up with something other than one's name or visual image. In basing the cause of action on this relationship, the court uses the law to recognize and construct a conception of identity as both worthy of legal protection and as capable of being projected beyond the boundary of the corporeal body or its visual representation into such intangible and "unfixed" a thing as the sound of one's voice.

Beyond the use of names and images which directly invoke a person's identity, courts have also found that the commercial exploitation of certain objects or phrases that are closely identified in the public mind with a particular individual may amount to an actual appropriation of identity. In the 1974 case of *Motschenbacher v. R.J. Reynolds Tobacco Co.*, the Ninth Circuit Court of Appeals found that the use in an advertisement of a famous driver's distinctive race car may give rise to a cause of action for appropriation of identity.[86] The court noted that the plaintiff Motschenbacher had "consistently 'individualized' his cars [with special markings] to set them apart." The advertisement showed the car on a racetrack in the foreground in front of other race cars. Motschenbacher was in the car but his features were not recognizable. The advertisement showed a word balloon coming from the plaintiff's car which said "Did you know that Winston tastes good, like a cigarette should?" The plaintiff established that many people immediately recognized his car. A lower court dismissed the claim on the grounds that the plaintiff

84. *See* Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988).
85. *Id.* at 463.
86. *See* 498 F.2d 821, 821 (9th Cir. 1974).

himself was not identifiable in the advertisement.[87]

The Circuit Court reversed, holding that even though the plaintiff himself was not recognizable, the portrayal of his distinctive car clearly implied that it had a driver who was in fact the plaintiff. By implying Motschenbacher's presence through his car, the defendant may have appropriated his identity.[88] That is, an object, in this case a car, had become so identified with a particular individual that its use served to invoke his identity just as the use of a recognizable image of his face would.

Unlike the cases involving imitation or look-alikes, Motschenbacher's car did not "look like" him. There was no question of the car itself being mistaken for Motschenbacher. Rather, the court moved beyond first hand representation of the individual to consider the ways in which distinctive objects may embody a person's identity. The question of recognition was thereby shifted from the individual to the object. Motschenbacher need not be recognizable if his car is. The car becomes a surrogate for its owner.

The court here extended legal recognition of identity beyond its manifestation in direct representations of the individual to objects which "stand for" or symbolize the individual.[89] To a certain degree this is simply the logical extension of legal recognition of the identity interest in a name which is a similarly abstract symbol of an individual. Names, however, have a long history being accepted as legal symbols of an individual.[90] As a practical matter, therefore, the court's action opens up significant new territory by moving beyond

87. *Id.*

88. *See id.* at 824-25. In contrast, in the 1954 case of *Branson v. Fawcett Publication*, 124 F. Supp. 429 (E.D. Ill. 1954), the court found no invasion of privacy where a picture of a racing car accident published in a magazine to illustrate a fictional story that made no reference to the plaintiff. Even though some of the plaintiff's friends recognized the car as his, the court noted that "no identifying marks or numbers on the car appear. It is just another speed automobile," and concluded by stating that, "[w]hen considered by itself [the picture] in no way relates to or identifies any particular driver." *Id.* at 432. The court construed the image itself to be fungible, "just another speed automobile;" its generic quality apparently precluded it from embodying any particular identity characteristics. In the court's eyes, the lack of identifying marks meant, in effect, that the plaintiff was not "present" in the picture and hence could not be harmed by its use. *See id.* The mere association of this picture with the plaintiff by a few of his friends was not sufficient to place him in the picture. Perhaps had a larger social circle recognized the image the court would have found appropriation, as a court later did in *Motschenbacher*.

89. For a discussion of symbolic representation and the phenomenon of one thing "standing for" another, see HANNAH PITKIN, THE CONCEPT OF REPRESENTATION 60-91 (1967).

90. See ANTHONY COHEN, SELF CONSCIOUSNESS: AN ALTERNATIVE ANTHROPOLOGY OF IDENTITY 72 (1994).

the long-accepted categories of name and image to find that almost any object may potentially gain legal recognition as an embodiment of an individual's identity.

The Appellate Court in *Moore* made a potentially radical finding by using the analogy to cases such as *Midler* and *Motschenbacher* to grant legal recognition to DNA as a constitutive aspect of Moore's self. In the traditional jurisprudence of appropriation, one's name and image are protected insofar as they manifest aspects of one's identity—that is, insofar as they act as projections or manifestations of one's self beyond the body. In *Moore*, however, the court asserted that an individual should have a legal claim to his genetic material because,

> [p]laintiff's cells and genes are a part of his person. Putting aside the effect of environment, "[a]n individual's genotype contains all of the genetic instructions essential for human development, growth, and reproduction.... [paragraph sign] All human traits, including weight, strength, height, sex, skin color, hair texture, fingerprint pattern, blood type, intelligence and aspects of personality (for example, temperament), are ultimately determined by the information encoded in the DNA." (Gordon Edlin, *Genetic Principles—Human and Social Consequences* (1984) pp. 406-407.) If the courts have found a sufficient proprietary interest in one's persona, how could one not have a right in one's own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face?[91]

This passage is both extraordinary in the possibilities it raises for the legal recognition of identity and all too typical in its blurring of the dignitary and proprietary interests implicated by the appropriation of a person's identity. Nonetheless, it clearly finds that Moore's DNA deserves legal consideration under the domain of appropriation law because it somehow constitutes his "human uniqueness."[92]

Granting legal recognition to the constitutive elements of identity is a logical corollary of recognizing its outward manifestations in names or images. Indeed, projections of one's identity serve in turn to reconstitute and maintain it as it grows and evolves. The jurisprudence of appropriation does not construct identity as a static, fixed object but rather as an organic, complex and evolving manifestation of the self that changes over time and across context.[93]

91. 249 Cal. Rptr. at 508.

92. *Id.*

93. A nice example of this may be seen in the case of *Allen v. National Video, Inc.*, 610 F. Supp. 612 (S.D.N.Y. 1985). In 1985, Woody Allen, the well-known comedian, actor,

Protecting projections of identity, therefore, also involves protecting the ongoing constitution of the self. The Appellate Court in *Moore* simply made this relationship more explicit. By focusing on DNA, the court emphasized the value of relations and objects that constitute

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and movie director, brought suit under New York's privacy statute and the Lanham Act to enjoin the dissemination of an advertisement for a video store that showed a celebrity look-alike portraying Allen. The court ultimately resolved the claim by finding that the advertisement violated the Lanham Act by using a representation which might confuse or mislead consumers. Nonetheless, it also considered at length Allen's privacy-based appropriation claim and reflected upon its legal implications.

The court began with a discussion of whether the advertisement qualified as a "recognizable likeness" of the plaintiff. *Id.* at 623. It found the status of a look-alike to be far more problematic in this regard than a mere photograph or artistic representation. The issue for the court was not whether the look-alike would "remind" people of Allen but whether "most persons who could identify an actual photograph of the plaintiff would be likely to think that this was actually his picture." *Id.* at 624. In this case, however, the look-alike portrayed an earlier "version" of Allen, a past identity which was no longer consonant with his present self. As the court put it,

> the hair style and expression [of the look-alike], while characteristic of the endearing "schlemiel" embodied by plaintiff in his earlier comic works, are out of step with plaintiff's post-"Annie Hall" appearance and the serious image and somber mien that he has projected in recent years.

Id. at 624. The court found this relevant primarily as it bore on whether an observer would think the image actually was Allen. If so, a claim of appropriation might be warranted. The court found that the advertisement did make a reference to Allen but it would hesitate "to conclude that the photograph is, as a matter of law, plaintiff's portrait or picture." *Id.*

Consider first, that if the court were concerned only with the property-based aspects of the celebrity image, then all representations of Allen, regardless of the stage of his life portrayed, would presumably be his property. But because the court was concerned with the privacy-based dignitary aspects of appropriation of identity it had to consider whether this particular image was invested with aspects of Allen's current identity. That is, the court was concerned with which of Allen's personae had been appropriated. If the "schlemiel" persona of the past were sufficiently divorced in the public mind from Allen's current more serious persona then there would be no appropriation.

In the law of appropriation, therefore, identity is not fixed and bounded. It shifts and evolves according to time and context. The use of the "schlemiel" persona before Allen had appeared in "Annie Hall" might constitute an appropriation, whereas the use of the exact same image some years later might not. The court recognized that Allen's identity had developed over time. He was literally (and legally) not the same person he once was. To the extent that he retained aspects of the identity embodied by the "schlemiel" image he might be able to bring a claim of appropriation. But the court indicated that his newer identity was currently more salient. It established this in large part by reference to the public perception and understanding of Allen as having left the "schlemiel" behind to become a more serious film maker. Allen's present persona, therefore, would not likely be harmed by the advertisement. The advertisement's image of a past self might enslave a past identity but the identity of Allen as constituted in the current plaintiff before the court was not captured by the look-alike. Hence the court's hesitation to find an appropriation of Allen's identity. *See id.* at 624.

the self. The issue for the court, then, was what sort of legal interest Moore had in a constitutive aspect of his self (in this case, genetic material) after (or when) that aspect came to exist beyond the boundaries of his corporeal body. It resolved the question by asserting that Moore had a privacy-based dignitary interest in maintaining control over what happened to his tissues.[94]

The potentially powerful implications of this holding become evident when we return to an offhand phrase at the beginning of the passage quoted at length above: "Putting aside the effect of environment." The court may put environment aside, but it does not dismiss it. Rather, it implies that environmental factors may constitute identity just as DNA does. I would like to consider what might happen if we bring environment back "inside" the discussion.

If, as the court asserts, the law should recognize a legal interest in genetic materials insofar as they constitute the "essence of one's human uniqueness," then should it not also recognize environmental factors—history, culture, and society—through which the substance of individual identity is constituted and maintained? The implications of such legal recognition are both promising and problematic: promising because they open up new approaches to the legal status of group rights and to redressing harms caused by stigmatizing individuals based on affiliations that constitute aspects of their identity; problematic because such affiliations are potentially boundless and require some substantive standards of recognition in order to offer manageable and legally coherent guidelines to be applied.

In her work on "Property and Personhood," Margaret Radin asserts that "to achieve proper self-development—to be a *person*—an individual needs some control over resources in the external environment."[95] She goes on to make a critical distinction between fungible and non-fungible types of property, control of the latter being critical to "proper self-development."[96] All objects, Radin argues, contain both fungible and non-fungible attributes. They may, in fact, be considered as existing along a continuum between complete fungibility and non-fungibility—a continuum Radin characterizes as involving "property and personhood."[97] Non-fungible attributes are those grounded in the personhood or identity of the owner. That is, they are a source of value distinctive to the owner and derived from identity-based associations rather than from

94. *See Moore*, 249 Cal. Rptr. at 508.
95. Margret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 957 (1982).
96. *See id.* at 959-60.
97. *Id.*

material use or exchange value. "Most people," Radin notes, "possess certain objects they feel are almost a part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world."[98] Objects possessing mostly fungible attributes, in contrast, do not become bound up with the self but rather are "perfectly replaceable with other goods of equal market value."[99] Radin illustrates her point with the example of a wedding ring: if stolen from a jeweler it can be replaced with insurance proceeds, but if stolen from its "loving wearer" perhaps no amount of money can restore the status quo.[100]

Looking to Radin's notion of a continuum of "property for personhood" we may argue that the greater the degree to which a person is invested in or bound up with an historical, social, or cultural association the more the law should recognize a legal interest in protecting the integrity of that relationship. That is, just as DNA may be seen to constitute an important aspect of our tangible physical identity, so too may affiliations of family, race, gender, ethnicity, religion and so forth be recognized as constituting important aspects of our intangible social, cultural, and historical identity. Each may deserve a measure of legal recognition as "profoundly the essence of one's human uniqueness."

The nature and degree of legal recognition may vary according the nature and degree of the affiliation at stake. At one end of the continuum, it may entail simple procedural recognition of a right to participate in notice and comment hearings, as with local decisions affecting the zoning of a long-standing ethnic neighborhood that may play a role in constituting its inhabitants identities. At the other end, it may involve invoking the full force of the law to dismantle a political and legal regime that demeans and undermines the integrity of individual's identity based on her affiliation with a particular group with which they are intimately bound up—as for example, the Jim Crow South.

A focus on identity-constitutive relationships shifts the question of the legal status of groups from one of "group rights" to one of "individual rights *through* groups." That is, under this approach groups become legally relevant to the extent that individuals obtain, maintain, and retain significant constitutive aspects of their identity through their affiliation with a particular group. Indeed, courts

98. *Id.* at 959.
99. *Id.* at 960
100. *Id.*

already recognize a legal value for identity-constitutive relationships that may be understood as establishing "rights through groups"—but they do so implicitly or indirectly. Thus, we may recharacterize an array of established rights as being secured largely through group affiliation. At the most basic level, an individual obtains certain rights through affiliation with the group "persons." That we generally do not conceive of "persons" as an identity-constitutive group is merely testament to the degree to which we view this classification as so "natural" or "given" as to render it unproblematic and hence largely unmarked. Yet, it was precisely the problem of defining the boundaries of what constituted a "person" that lay at the heart of Justice Blackmun's rather tortured resolution of legal status of the fetus in *Roe v. Wade*.[101] Less controversially, the law constructs persons when it grants corporate charters or recognizes *de facto* corporations. Going back at least to the 1886 case of *Santa Clara County v. Southern Pacific Railroad*,[102] we see that significant rights have been accorded to corporations largely by reason of their judicially defined affiliation with the group "persons."[103]

A somewhat more circumscribed group is legally defined by the term "citizens." The contours and boundaries of this group, like that of the group "persons," are far more problematic than appear on first impression. As Judith Shklar notes of the American context, "[w]hat renders any group or individual unfit for citizenship is economic dependence, race, and gender, which are all socially created or hereditary conditions."[104] Thus, for example, the infamous case of *Dred Scott v. Sandford*[105] turned largely on the question of whether African Americans, slave or free, could belong to the group "citizens" of the United States.[106] The Court denied such an affiliation based primarily on its understanding of historical and social constructions of the *identity* of African Americans as being "unfit" for taking on the attributes such an affiliation would confer.[107] (Indeed, one might also argue that the Court's analysis of the status of African Americans also excluded them from full membership in the group "persons.") The legally-sanctioned oppression of women similarly bespeaks a systematic limitation or restriction of state recognition of women's claim to take on the full attributes of "citizen." Most glaringly, the

101. 410 U.S. 113 (1973).
102. 118 U.S. 394 (1886).
103. *See id.*
104. JUDITH SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 8 (1991)
105. 60 U.S. (19 How.) 393 (1857).
106. *See id.*
107. *See id.* at 407.

denial of suffrage withheld from women the right or power to conceive of themselves as full citizens—it denied them a full civic identity. Additionally, the legal concept of coverture subsumed a woman's civic identity under that of her husband's—again, as with African Americans, even to the point of excluding her from full membership in the larger group of "persons."[108] The history of immigration and naturalization is also replete with examples of tortured legal constructions of who may and who may not qualify as a "citizen" of the United States.[109]

Similar arguments may be made with respect to categories such as race. Race, too, is not a "natural" category, and its legal significance in particular is socially and historically constructed.[110]

The legal boundaries of particular racial groups are continually shifting in practice, whether through individual acts such as "passing," or through contemporary political debates and struggles over census categories, including the new "multi-racial" group. In the realm of equal protection, *Brown v. Board of Education*,[111] with its focus on racial stigma, may be viewed as deeply concerned with dismantling a regime of state-sanctioned denigration of the identity of a group of individuals based on their affiliation with a particular race. Invoking the words of the *Moore* court, we might say that racial segregation implicated something "profoundly the essence of one's human uniqueness" and hence constituted "a massive invasion of privacy and dignity."[112] In this context, "uniqueness" would be conceived of not as some essential timeless core of individuality (certainly not in any "genetic" sense), but as a socially and historically recognized characteristic through which many individuals constituted deeply significant aspects of their identity. In this regard, concepts from the jurisprudence of appropriation may be used to elaborate the work of scholars such as Charles Lawrence, who analyze *Brown* as a case about regulating hate speech, that is, about the message segregation sends that stigmatizes blacks.[113]

108. *See, e.g.*, JOAN HOFF, LAW, GENDER, AND INJUSTICE, *passim* (1991); SUSAN MOLLER OKIN, JUSTICE, GENDER, AND THE FAMILY 26-33 (1989).

109. *See e.g.*, IAN HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

110. *See, e.g., id.*; MICHAEL OMI & HOWARD WINANT, RACIAL FORMATION IN THE UNITED STATES: FROM THE 1960S TO THE 1990S (1994).

111. 347 U.S. 483 (1954).

112. *Moore*, 249 Cal. Rptr. at 508.

113. Charles R. Lawrence, III, *If He Hollers Let Him Go: Regulating Hate Speech on Campus*, 1990 DUKE L.J. 431; *see also* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. REV. 133

Moving to a still more circumscribed level of legally recognized identity-constitutive groups we may consider how the United States Supreme Court has recognized, through substantive due process analysis, the legal value of the integrity of the group "family," in large measure because of its role in raising children—or, one might say, forging their identities.[114] Thus, Justice Powell, in his plurality opinion in *Moore v. City of East Cleveland*, spoke of how the Court's "decisions establish that the Constitution protects the sanctity of the family, precisely because the institution of the family is deeply rooted in this Nation's history and traditions. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural."[115] Powell goes on to elaborate a definition of "family" that, while rooted in biology, is also profoundly social and historical: "Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition."[116]

This is not to say that all groups, being "socially constructed" are of equal political or legal significance as constitutive of individual identity. In his majority opinion in *Roberts v. United States Jaycees*,[117] Justice Brennan provides a good starting point for sorting through and evaluating the importance of diverse group affiliations. In this case, the Court found that the application of state law to compel the Jaycees to accept women as regular members did not violate their First Amendment right of association. Brennan found that the basis of associational rights lay in a group's relation to sustaining and developing the identity of individual members:

> Without precisely identifying every consideration that may underlie this type of constitutional protection, we have noted that certain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.... Moreover, the constitutional shelter afforded such relationships reflects the realization that individuals draw much of their emotional enrichment from close ties with others. Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to

(1982); Mari Matsuda, *Public Response to Racist Speech*, 87 MICH. L. REV. 2320 (1989).

114. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390 (1923); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Moore v. City of East Cleveland, 431 U.S. 494 (1977).

115. *Moore v. East Cleveland*, 431 U.S. at 504.

116. *Id.*

117. 468 U.S. 609 (1984).

define one's identity that is central to the concept of liberty.[118]

Following Brennan's recognition of that certain group affiliations are more central to identity than others, we may conceive of varying degrees of legal recognition of and solicitude for such affiliations. The more central to individual identity, as recognized through social and historical practice, the greater the legal consideration of identity-constitutive affiliations. We may conceive of this scheme as being ordered along "spheres of identity" (to paraphrase Michael Walzer).[119] We are, all of us, enmeshed in multiple webs of associations through which we constitute our sense of self. Some of those associations are more important than others. Groups such as "person," "citizen," "African American," "family," or "woman" each have distinctive traditions of legal recognition. Other groups, such as those based on class or sexual orientation, have much more limited but evolving histories of legal consideration. Still others—clubs such as the Jaycees, for example—have received very limited legal recognition based on the perception that they do not play a significant role in maintaining an individual's ability to "define one's identity."

The case of *Moore* and its attention to the tort of appropriation of identity provides a basis for making legal recognition of identity-constitutive relationships more explicit and more directly accountable as the open manifestation of conscious substantive commitments to particular group affiliations that are recognized as playing a significant role in constituting and maintaining individual identity. This approach might establish a sort of continuum of legal recognition based on the intensity or centrality of the relevant affiliation.

In Thurgood Marshall's opinions we see an existing approach to equal protection that might provide a model for such an identity-based continuum of legal recognition. Thus, for example, in his dissent in *San Antonio Independent School District v. Rodriguez*,[120] Marshall writes that,

> [a] principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of

118. *Id.* at 618-619 (citations omitted).
119. MICHAEL WALZER, SPHERES OF JUSTICE (1983).
120. 411 U.S. 1 (1973).

> reasoned approach to equal protection analysis for which I previously argued—that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."[121]

Marshall's "spectrum" takes into consideration the types of variable social, historical, and political circumstances that lower courts have applied for nearly a century in privacy cases involving the construction and maintenance of individual identity. This is especially so in his reference to the "recognized invidiousness of the basis upon which the particular classification is drawn." The concept of "recognized invidiousness" brings us back to historically and socially established considerations of stigma and identity. Marshall, however, was unable to move the court away from a rigid "two tiered" approach to scrutiny under equal protection. Perhaps, this was due in part to the fact that the discourse of equality is not easily susceptible to a "sliding scale."[122] Something either is or is not equal to something else. The principles of privacy-based consideration for the interests of identity as articulated in the jurisprudence of appropriation may, however, be used to inform or supplement Marshall's approach to elaborate a more coherent and forceful approach to the legal management of state action that implicates the interests and rights of groups.

Appropriation presents an established legal tradition that allows us to specify and articulate more clearly the nature of the legal interests and harm involved when identity-constitutive relations are implicated by a case. Stigma, as Erving Goffman so influentially stated, involves the "management of spoiled identity."[123] To engage issues of stigma in the legal arena, therefore, we must first elaborate what the law considers to be "identity." The jurisprudence of appropriation provides perhaps the most explicit site for the exploration of this issue. It is hardly the only place where law recognizes and manages identity; but being so explicit, it is an excellent starting point. We can see, however, that this approach to the harm of racial stigma is not grounded in the equal protection analysis of the Fourteenth Amendment but in the jurisprudence of

121. *Id.* at 98-99 (quoting Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (dissenting opinion)).

122. For a discussion, and endorsement of Marshall's approach, see Ronald Dworkin, *Is Affirmative Action Doomed?,* N.Y. REV. BOOKS, Nov. 5, 1998, at 57.

123. ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY (1963).

privacy and the appropriation of identity. Harm, in that sense, is not identified by comparing the treatment of some particular group to a particular other group (most typically the unstated norm of the adult, straight, white, native-born, protestant male).[124] Rather, it involves a commitment to certain substantive norms regarding the proper recognition and treatment of particular groups and their members in society. In cases involving state action, this would effectively involve using substantive due process analysis as an alternative or complement to equal protection. Such a substantive approach forces hard choices and may become the site of fierce contestations, but it may be applied to a potentially wide variety of groups and affiliations.

These consideration all go to the question, "which group affiliations matter and who says so?" There is no easy answer, but this does not mean that the principle of recognizing the legal significance of identity-constitutive affiliations is wholly unworkable. We may continue to engage the issue by paraphrasing Marshall—by considering "the character of the [group] in question, the relative importance to individuals of [their affiliation with the group] . . . and the asserted state interests in support of the classification [affecting the group]."[125] Marshall's formulation may then be further fleshed out by looking back to appropriation cases ranging from Pavesich's to those of Midler and Motschenbacher. In these cases we see the courts willing to engage in an ongoing process of assessing and evaluating the relationship between individuals and a wide variety of names and images that are said to somehow contain a part of themselves. The courts have had no bright line rules to guide them in these cases, but they have managed all the same to deal with this intangible thing they call "identity." Just as all groups do not play an equally significant role in constituting individuals' identities, the mere claim by an individual to be "bound up" with a particular name or image does not guarantee legal recognition under the tort of appropriation. Nonetheless, the subjective viewpoint and narrative experience of the individual is respected and essential to these cases. The courts have also evaluated claims of appropriation in their local social and historical context. An image is not found to "embody" aspects of the plaintiff's identity unless there is some broader social recognition of the validity to the plaintiff's claim. Identity is not constructed solely by the individual but through interaction with history and society. Similarly, manifestations of individual identity also require a broader consideration of historical and social recognition that a particular

124. *See, e.g.*, MACKINNON, FEMINISM UNMODIFIED 32-45 (1987).
125. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 98-99.

name or image might indeed manifest aspects of the individual's identity.

We may argue that similar considerations could and should apply when examining a claimed relationship between an individual and an identity-constitutive affiliation. Scholars such as Owen Fiss, Kenneth Karst and Aviram Soifer have already developed eloquent and forceful arguments for granting legal recognition to socially, culturally and historically significant groups.[126] Their work, however, tends to focus on the First Amendment right of association and the Equal Protection Clause of the Fourteenth Amendment. This focus, of course, is logical, and quite suggestive. I would argue that such analyses might be fruitfully elaborated and extended by incorporating the principles and practices articulated by the courts through the now well-established jurisprudence of appropriation of identity.

If we take the jurisprudence of appropriation seriously as an articulation of certain legally cognizable identity-based dignitary interests that may be manifest in various representations of the self, then we must reconceive the nature and status of the liberal rights-bearing individual within existing legal doctrine. The law of appropriation demonstrates that there is a long established but largely overlooked tradition in American jurisprudence that blurs and enlarges the boundaries of the self beyond the "natural" body (itself a social construct) to images and symbols that come to embody aspects of the self through social practices of identification, recognition, and acceptance.

From Paolo Pavesich's case in 1905, to recent cases such as Midler's and Motschenbacher's, we see American courts continuously and explicitly grappling with the legal status of identity. In the course of their opinions, the courts have recognized that a rights-bearing individual can be harmed by the commercial use of names or images (or nicknames, sounds, phrases and objects) that somehow capture a part of his identity. From the trope of enslavement in *Pavesich* to that of piracy in *Midler*, the courts have conceived of such uses as directly implicating the self. That is, these cases legally recognize and construct individual identity as something that can become manifest outside the body. The self remains connected to identity and may

126. *See, e.g.*, Owen Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976); Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 U.C.L.A. L. REV. 263 (1995); KENNETH L. KARST, LAW'S PROMISE, LAW'S EXPRESSION: VISIONS OF POWER IN THE POLITICS OF RACE, GENDER, AND RELIGION (1995); AVIRAM SOIFER, LAW AND THE COMPANY WE KEEP (1995).

therefore be harmed directly by the commercial appropriation of images and objects that "embody" aspects of one's identity.

What then are some implications of this overlooked but vigorous area of the law? If the law recognizes a connection between the self and manifestations of one's identity beyond the corporeal body, what other identity-based interests might it also legitimately recognize under the same or similar legal principles? In the realm of state action, one logical and significant starting point is the law of affirmative action. The recent and growing backlash against affirmative action programs is grounded in large part in a rhetoric of equality. Differential consideration of the needs and background of women and minorities, for whatever reasons, is cast as contrary to the basic idea of treating all people "equally."[127] Hence, we have now the long-standing use of the term "reverse-discrimination"—a term that only has force in the discursive realm of equal protection analysis.

Applying an identity-based approach to the problem of affirmative action, the issue is not whether individuals are being treated the same or different by virtue of their membership in a particular group, or whether, more specifically, the use of a particular racial classification is legitimate. Rather, the issue becomes how and to what extent such classifications implicate the identity of people inside or outside the group. We would then ask, does a particular affirmative action stigmatize or otherwise threaten to undermine the integrity of the identity of, say black women, or for that matter, the excluded white men? To evaluate the legitimacy of such a program we do not turn to social science experts to provide statistical profiles of relevant labor pools but to the substantive commitments of our polity to respect the dignity of its citizens. Such a stance reflects the aspiration toward what Avishai Margalit has termed "The Decent Society."[128] A decent society, writes Margalit, "is one that fights conditions which constitute a justification for its dependents to consider themselves humiliated. A society is decent if its institutions do not act in ways that give people under their authority sound reasons to consider themselves humiliated."[129]

More generally, where state action is involved, a concern for the power of official sanction would lead to a broader conception of the

127. Perhaps most notorious in this regard was the wording of California's recently adopted Proposition 209, codified as Cal. Const. Art. 1, § 31, which provides that no state institution may "discriminate against, *or grant preferential treatment to*, any individual or group on the basis of race, sex, color, ethnicity or national origin in the operation of public employment, public education, or public contracting." (Emphasis added.)

128. AVISHAI MARGALIT, THE DECENT SOCIETY 10-11 (1996).

129. *Id.*

words or actions that might threaten or otherwise compromise the integrity of a group's identity. When a state official pronounces that a particular group is somehow defective or otherwise inferior, it carries much more power than when a private individual does so. State pronouncements implicate fundamental issues of inclusion and exclusion in the polity that are central to the maintenance of a decent society and hence merit closer scrutiny.

In the arena of private law, a focus on identity might be especially useful in sorting out such claims as those of certain American Indian groups who have found the appropriation of certain powerful names and images to be deeply offensive to tribal integrity. Naming practices are particularly salient here; whether in the continued use by professional sports organizations of such appellations as "Washington Redskins," or in the recent case of the descendants of the Sioux Tasunke Witko, known in English as Crazy Horse, who sued Hornell Brewing Company to enjoin it from using Crazy Horse's name to market liquor—a particular scourge in Indian people.[130] The law of appropriation gets beyond the issue of who has a right to "control" these names or images. It asks, rather, what is the effect of their use upon the identity of the relevant group and its members?

When non-state actors are involved we must be especially concerned that tort actions not be permitted to undermine the vitality of the First Amendment protections for free speech. The jurisprudence of appropriation also provides guidance here. Specifically, since the case of Paolo Pavesich, the tort of appropriation has been especially concerned to protect an individual's identity from forced commodification in the market.[131] Later cases, such as *Flores v. Mosler Safe Co.*,[132] speak of the "right of an individual to be immune from commercial exploitation."[133] Still more recently, the 1984 case of *Onassis v. Christian Dior-New York, Inc*,[134] articulates the legal principle under New York law that "all persons ... are to be secured against rapacious commercial exploitation

130. *See, e.g.*, Joseph William Singer, *Publicity Rights and the Conflict of Laws: Tribal Court Jurisdiction in the Crazy Horse Case*, 41 S.D. L. REV. 1 (1996); Nell Jessup Newton, *Memory and Misrepresentation: Representing Crazy Horse*, 27 CONN. L. REV. 1003 (1995).

131. *See* Kahn, *supra* note 5, at 318-24.

132. 164 N.E. 853 (N.Y. 1959).

133. *Id.* at 855. This case involved the interpretation of a New York statute establishing a right to privacy, passed in the aftermath of the *Roberson* case in 1903. Although statutory, the right is modeled on the common law of privacy.

134. 472 N.Y.S.2d 254 (Sup. Ct. 1984).

.... [This law] is intended to protect the essence of the person, his or her *identity* or *persona* from being unwillingly or unknowingly misappropriated for the profit of another."[135] Newsworthy or artistic uses of names or images, or even casual gossip, by definition do not introduce identity into the realm of the market and hence do not produce the special harms caused by commodification.

Similarly, in daily conversation, a person may invoke another's name or image without undermining the integrity of their identity. Thus, a personal epithet or even a political tract that criticizes a particular group may be insulting but not threaten identity. When, however, a person introduces another's name or image into the market—for example, to help sell a product or even as a product itself—then the larger power of the market is brought to bear upon the affected individual. The resulting commodification of identity may be seen to seriously threaten the integrity of individual identity, precisely because the nature of the market is to render objects fungible or commensurable with other objects (most notably money) and thereby deny or efface their distinctive individuality. If we are truly concerned with protecting individual identity from being effaced, fragmented, or otherwise degraded then the principles of the jurisprudence of appropriation may perhaps be fruitfully applied not only to cases such as Moore's, but also to a myriad of other cases involving identity-constitutive relationships. In the area of private law, the substantive privacy-based principles of appropriation may be used to reconceive such difficult questions as assessing the harms of hate speech or other actions that aim to degrade a person based on their affiliation with a group that plays a significant role in constituting their identity. In public law, the jurisprudence of appropriation may shed new light on aspects of equal protection law that are based in stigma. Using such principles we might argue that classifications based on race, gender or ethnicity are impermissible where they are used to debase individual identity by degrading groups that play a significant role in constituting individual identity. Such an approach avoids the dilemma faced by advocates of affirmative action who have to base differential treatment on the principles of "equal protection." Under the rules of appropriation, people do not necessarily need to be treated "equally," they need to be treated "decently." Under these principles, affirmative action would cause no harm to excluded groups (such as white men) so long as the classification was not meant and did not function to stigmatize them.

We may fear, like the majority in *Roberson* or the majority in

135. *Id.* at 260 (also interpreting the New York State privacy statute).

Moore, that this would lead to a flood of new litigation. But we may also hope, in the tradition of Warren and Brandeis, that this would lead to new and creative ways to recognize and protect the dignity of individuals in a liberal polity as it develops to meet the challenges of an increasingly complex and interrelated world.