

2 Property, Objectification and Commodification

This chapter's job is to suggest some preliminary insights from the objectification and commodification of women's bodies, in such a way as to help us to better understand whether all bodies are being made into objects and commodities by the new biotechnologies. I have argued that there is a parallel between the historical ways in which women's bodies have been made objects and the 'new enclosures' in bioethics and biotechnology. A comprehensive history or typology of women's objectification and commodification is impossible in a single chapter; nor do I view the task before me as exclusively historical. Rather, the concepts that will help us to analyse and combat objectification and commodification of the body in both sexes come not only from practice, but also from theory. By viewing the 'new enclosures' through the prism of women's social entitlements and feminist theory, we will gain important insights into the interrelationship between personal and property rights, the extent to which agency can survive objectification of the body, the limitations of informed consent and the nature of self-ownership. These all have ramifications for property in human tissue and the human genome, and later chapters will draw on them. Very few commentators on bioethics or biolaw have traced the historical roots of modern attitudes about biotechnology and property in the body to canonical political theorists and the historical circumstances in which they wrote. That, I hope, is a novel achievement of this chapter.

In attempting this task, I shall develop further the original theory of property set forth in my earlier book, *Property, Women and Politics*. The model I proposed there relied on critical insights from canonical political theory, feminist theory, law and historical practice. My goal was to transcend the passive view of women and their bodies as merely objects, while still accepting, with Simone de Beauvoir, that 'what marks the specificity of woman's situation is that while she, like any other human being, is an autonomous freedom, she discovers and chooses herself in a world where men force her to assume herself as the Other; they claim to fix her as

an object'.¹ But although the many ways in which women's bodies had been made objects were originally an important target for feminism, I felt that it was imperative to move beyond the conventional feminist view that women were *merely* objects. As I wrote:

Why should feminists be content to accept that women can have no other relation to property than as its *objects*? In political theory and jurisprudence, property is generally linked to being a *subject* . . . Both nineteenth-century and second-wave feminists made good polemical use of the notion of women as objects, and it was strategically important that they did. But ultimately, I think, viewing women's relationship to property purely in the passive leads down a political and theoretical cul-de-sac.²

Although the distinction between subjects and objects of property-holding was crucial to that book and to this one, much feminist theory has been sceptical about the straightforwardness of the subject-object distinction. That makes a useful reminder at the start of my task. As Catharine MacKinnon writes, 'Having been objectified as sexual beings while stigmatized as ruled by subjective passions, women reject the distinction between knowing subject and known object.'³ Another task of this chapter, then, is to explore the subtleties of the subject-object distinction: that will help us, in later chapters, to move beyond the simplistic treatment of human bodies, both male and female, as simply the 'known objects' of the 'knowing subjects' behind commodification of human tissue and the human genome.

If the subject-object distinction is complex, however, it is also self-reinforcing. In political theory, law and historical practice, there is a dialectical relationship between women's propertylessness and their lack of full subject status. It is a truism, but an instructive one, to note that women now and in the past typically hold and held less property than men, and that in many instances they have been more like the objects of property-holding. What is less often noted is the relationship between that fact and women's agency. As I remarked in *Property, Women and Politics*,

¹ Simone de Beauvoir, *Le deuxième sexe* (Paris: Gallimard, 1986), cited in Michèle le Dœuff, *Hipparchia's Choice An Essay Concerning Women, Philosophy, etc.* (Trista Selous (tr.), Oxford, Blackwell, 1991), pp. 55–56.

² *Property, Women and Politics*, p. 2, original emphasis.

³ Catharine A. MacKinnon, *Toward a Feminist Theory of the State* (Cambridge, MA, Harvard University Press, 1989), p. 120. For feminist critiques of agency and embodiment, see, among others, Christine Battersby, *The Phenomenal Woman: Feminist Metaphysics and the Patterns of Identity* (Cambridge, Polity Press, 1997); Rosi Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (New York, Columbia University Press, 1994); and Iris Marion Young, *On Female Body Experience: 'Throwing like a Girl' and Other Essays* (Oxford, Oxford University Press, 2005).

'It is because they [women] are propertyless that they are not construed as political subjects; it is because they are not accorded the status of subject that they hold little or no property'.⁴

This insight affords an instructive parallel with the 'new enclosures'. In chapter 1, I rejected the conventional position in medical ethics and medical law which holds that informed consent is sufficient to guarantee full agency and autonomy to those who 'donate' tissue or DNA samples. There I argued for property rights *as well as* personal rights. Without some form of property rights in the material taken from our bodies, our personal rights are inevitably less than complete. It is because we are propertyless in our own bodies, according to legal doctrines such as abandonment or *res nullius*, that we are vulnerable, as something akin to objects, to the 'new enclosures'. Personal rights such as informed consent are necessary but not sufficient, on their own, to put that right.

We have one advantage, however: whereas in feminist theory, and in political theory more generally, property has often been a largely neglected concept,⁵ in bioethics and biolaw there is an enormous and continually expanding literature on the subject. Furthermore, in the notion of property as a bundle of rights, as explained in chapter 1, we possess a well-enunciated, flexible and sophisticated concept that can help us to identify the most pressing and also the most practical objectives concerning property rights in the body.

Before beginning in earnest, I need to make my use of objectification and commodification clearer. I shall use 'objectification' in a broad rather than an excessively literal sense, although not as comprehensively as does Martha Nussbaum, who presents objectification as a plurality of denials imposed on human subjects: denials of their agency, autonomy, uniqueness and dignity.⁶ Similarly, Nancy Scheper-Hughes argues for an enlarged conception of commodification to include 'all capitalized economic relations between humans in which human bodies are the token

⁴ *Property, Women and Politics*, p. 6.

⁵ Carol M. Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Boulder, Westview Press, 1994), pp. 1–2. Rose rightly points out that this theoretical neglect sits oddly with the political resurgence of neo-liberal models of politics. A notable exception is the influential model of property offered by Stephen R. Munzer in his many works, including *A Theory of Property* (Cambridge, Cambridge University Press, 1990), especially ch. 3, 'Persons and their bodies', pp. 37–58; 'An uneasy case against property rights in human body parts' (1994) 11(2) *Social Philosophy and Policy* 259–86; 'The special case of property rights in umbilical cord blood for transplantation' (1999) 51 *Rutgers Law Review* 493–568; and his edited collection, *New Essays in the Legal and Political Theory of Property* (Cambridge, Cambridge University Press, 2002), which includes his chapter, 'Property as social relations' (pp. 36–75).

⁶ Martha Nussbaum, 'Objectification' (1995) 24(4) *Philosophy and Public Affairs* 249–91.

of economic exchanges that are often masked as something else – love, pleasure, altruism, kindness'.⁷ Both definitions are too broad for my purposes, but they do draw our attention to unexpected forms of objectification and commodification.

Objects and commodities are not the same, and neither are objectification and commodification, although they are linked. Physical objects of property-holding may or may not have fungible value like commodities: although personal memorabilia are objects which can be owned, their value is generally seen as merely sentimental.⁸ (Margaret Radin, however, points out that the Chicago school of economics assigned monetary prices to anything or any person that people value, with authors such as Becker and Posner applying an economic analysis to children, marriage and family life,⁹ thus obliterating the conventional distinction between objectification and commodification.)

My understanding of *commodities* is consistent with Marx's position that commodities should be seen as possessing *both use and exchange* value.¹⁰ *Objectification*, by contrast, only entails the attribution of *use value*, the process by which something external to ourselves is made to satisfy human needs and wants. Only objects separate from the self can be alienated and objectified in this fashion.¹¹ I noted in chapter 1 that modern biotechnology muddies the clear distinction between things external to our bodily selves and those intrinsic to us, so that mechanical ventilators or pace-makers are incorporated from outside into our bodies, and parts of our bodies such as tissue samples or DNA swabs may be disaggregated and separated from us. The notion of 'external' is problematised and problematic in modern bioethics and biolaw, and with that come difficulties that Marx did not have to confront about what is alienable and what is inalienable from the subject.

Although some analysts contend that Marx viewed commodification as wrong in itself, favouring universal non-commodification, others assert

⁷ Nancy Scheper-Hughes, 'Bodies for sale – whole or in parts' (2002) 7 *Body and Society* 1–8, 2.

⁸ My thanks to Carolyn McLeod for this example and for her helpful comments on an early draft of this chapter. See also her article 'Means and partial means: the full range of the objectification of women' (2003) 28 *Canadian Journal of Philosophy* 219–44.

⁹ Gary S. Becker, *A Treatise on the Family* (enlarged edition, 1991) and Richard A. Posner, *Economic Analysis of Law* (4th edn, 1992), cited in Margaret J. Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things* (Cambridge, MA, Harvard University Press, 1996), p. xii.

¹⁰ Karl Marx, *Capital* (Samuel Moore and Edward Aveling (tr.), Frederick Engels (ed.), Moscow, Progress, 1954, original edn, 1867), p. 48.

¹¹ Radin, in *Contested Commodities* (p. 34), traces the origin of this firm distinction to Kant and Hegel, but clearly it continued to influence Marx.

that neither objectification nor commodification is intrinsically malign in Marx or anywhere else.¹² What is wrong is the objectification or commodification of that which should be treated as having value in itself, irrespective of what use might be made of it. As Carolyn McLeod and Francoise Baylis note:

the act of commodification can be morally permissible or impermissible depending upon: i) whether the thing commodified has intrinsic value that is incompatible with it being either fully or even partially commodified; ii) whether moral constraints exist on the alienability of the thing from persons; or iii) whether the consequences of making the thing alienable and of commodifying it are favorable.¹³

To avoid the abuses of full-blown consequentialism, I would prefer to replace the final 'or' by 'and'. Even where the consequences of making a thing alienable and commodifying it are favourable, a Kantian perspective would require us to avoid *commodification* of that which has most intrinsic value in itself: the human subject as a member of the Kingdom of Ends. I have already noted in chapter 1, however, that Kant recognises the right to use the body in such a way as to preserve one's life, for example by amputating a diseased limb. Clearly, commodification is not involved in that example, although it might be argued that the limb is objectified both by being made something external, and by being used to satisfy the most basic of human needs, staying alive. Nevertheless, Kant is willing to tolerate this extent of objectification.

Blood is likewise objectified in any system of donation, as soon as it leaves the body and becomes something which can be tested, measured or transferred; but in a system of free donation it is not monetarily commodified (although as we saw in the previous chapter, it is still an object of exchange insofar as gift may be expected to occasion counter-gift).¹⁴ Nor is the individual donating the blood necessarily objectified by the mere fact of giving blood. We shall see in chapter 7 that the French system of gratuitous blood donation rests on the notions of common ownership of the *patrimoine* and social solidarity, so that the blood donor demonstrates agency and citizenship by her action: the attributes of a subject rather than an object. Much the same can be said of the portrait of the UK system as delineated by Titmuss, although very little of that altruistic system

¹² Carolyn McLeod and Francoise Baylis, 'Feminists on the inalienability of human embryos' (2006) 21 *Hypatia* 1–14.

¹³ *Ibid.*

¹⁴ John Frow, 'Gift and commodity' in his *Time and Commodity Culture: Essays in Cultural Theory and Postmodernity* (Oxford, Clarendon Press, 1997).

now remains, except for the fact that donors are not paid.¹⁵ Something is going on in a true gift relationship, at the communal level, which resembles the Kantian exemption for individuals: it is morally permissible, and indeed good, to objectify part of one's body in order to satisfy other individuals' needs to stay alive. If done freely, this is the laudable action of a subject, although enforced 'donation' would clearly reduce the 'donor' to the status of an object. (The difficult case is someone who sells her blood simply to keep body and soul together: in one sense, that is to reduce oneself to the level of an object, but insofar as ought implies can, it might even be thought permissible to sell one's blood to stay alive, if there is no other choice.)

Since objectification is a more extensive category than commodification, the range of ways in which people can be treated as objects is also greater than the variety of modes in which they can be regarded as commodified, despite the inventiveness of modern biotechnology and late capitalism in finding ever-new ways to commodify things and people alike. Many of the historical forms of women's objectification do not demonstrate commodification as such. This is one of the first lessons that feminist thought and theory can suggest for a nuanced analysis of objectification and commodification in modern bioethics. Not all forms of objectification in modern biotechnology commodify individuals or their body parts, although they may still be ethically debatable. Essentially, such practices will be wrong if they objectify that which should be treated as having value in itself, regardless of its use potential: if they reduce subjects to objects in some essential sense. What that sense is remains to be seen in the concrete contexts which I shall examine in later chapters.

The second useful aspect of a historical survey is to suggest how objectification and commodification differ for men and women. Although it is broadly true that the extent of objectification is normally greater for women, there may also be a degree of objectification for men in the historical systems examined in this chapter. Generally, however, we will find that women are more heavily objectified. If extrapolated to present-day biotechnology, this difference undermines any simplistic claim that men and women are alike subject to objectification and commodification in the new biotechnologies. I do not claim that they are *equally* vulnerable, or that the new forms of objectification and commodification are always

¹⁵ Richard Titmuss, *The Gift Relationship: From Human Blood to Social Policy* (Ann Oakley and J. Ashton (eds.), 2nd edn, London, LSE Books, 1997). Catherine Waldby and Robert Mitchell, *Tissue Economies: Blood, Organs and Cell Lines in Late Capitalism* (Durham, NC, Duke University Press, 2006), ch. 1, delineate how far from the gift ideal the UK 'blood economy' has travelled.

the same for both men and women. In chapters 3 and 4, I demonstrate ways in which female tissue has greater 'biovalue' than male tissue, with the result that female bodies are more likely to be the objects of commodification. But it is also true, and importantly true, that some aspects of objectification which were previously limited to women's historical experience are now being extended to biologically male bodies as well: that is the meaning of 'feminisation' as I use it.

The objectification of women's bodies: lessons from classical Athens

From the Athenian *polis*, we have inherited, along with essentials of our democratic system and democratic theory, a particularly objectified history of women's relationship to property. Although it is a misconception to think of Athenian women as effectively slaves, their property entitlements were considerably fewer than those of other Greek women, such as those in Sparta or Crete, and also fewer than those of Egyptian women of the same epoch.¹⁶ I noted in *Property, Women and Politics* that during the period when liberal democratic theory was developing, England and colonial America likewise operated particularly oppressive systems of property entitlements for women. It is certainly unfortunate that those political theories and particular legal systems which we consider our historical forebears had particularly punitive property regimes for women.

Not only did women lack entitlements to property in the systems that have most influenced our own democracy: in important aspects they were treated as the objects of property, even if not fully commodified in a monetary sense. The first important insight imparted by a look at women's history is that the law's insistence on drawing a thick black line between persons and objects is untenable. Even when they were not slaves, women's status has frequently hovered between subject and object. It is too easy for the law in a modern society to say that the firm distinction between persons and things remains intact, once slavery no longer exists. Women's history suggests that half of humanity has found and still finds it difficult to attain full subjectivity, even when 'free'.

For example, an Athenian woman was subject to right (7) in Honofé's classification, the right to transmit or alienate property to others by bequest or gift: she could be given in marriage by her father as her lord, and then, if widowed, bequeathed to her husband's brother. Aristotle's

¹⁶ For further detail, see *Property, Women and Politics*, p. 51 *et seq.*

will¹⁷ provides for the gift of his daughter (who is conspicuously anonymous, unlike the males party to the will) to Nicanor, or, if Nicanor dies first, to Theophrastus, if he will have her. Theophrastus, as a full human subject, is allowed to say no, but she is not, although she is not a slave. She may not choose her own husband; nor may she choose whether to marry at all.

An Athenian woman was not party to her own marriage contract: that was a transaction between her father as her present *kyrios* (lord) and her husband-to-be as her future one. Although modern commentators have sometimes been shocked by the lack of freedom of choice in Plato's proposals for eugenically dictated marriages in *The Republic*, this is to ignore the fact that no Athenian woman had a free choice of whom to marry, or indeed whether to marry.¹⁸ What we see in the outrage of such commentators is a similar phenomenon to the feminisation of the body by biotechnology in late capitalism: the assault on freedom is only noticed when it begins to apply to men.

Property in classical Athens, although not in Sparta or other city-states, belonged primarily (although not exclusively) to the household rather than to the individual, and to the *kyrios* as head of the household. The husband's only legal obligation to the wife was to maintain her so long as he kept her dowry, although that could be confiscated to meet his debts. In that case she might seek a divorce, but a childless divorced woman in Athens had no claim to maintenance in any household. Effectively she had no property entitlements whatsoever. A married Athenian woman did not even have title to her clothes, and certainly could not own land, the more secure and prestigious form of property (although there are records of women owning land in Sparta, Delphi, Gortyn, Thessaly and Megara). Full legal persons can possess proprietary rights in things, but the Athenian woman was neither a full legal person nor a thing.

As in the Athenian legal system, so in classical Athenian political theory women's property entitlements were limited, and their status ambivalently posed between subjects and objects of property-holding. Plato, despite his well-known proposals for a certain degree of equality between male and female guardians in the *Republic*, actually refers quite blatantly to women as private property: in the same work, Socrates discusses the 'right acquisition and use of children and women' and 'the law concerning

¹⁷ From Diogenes Laertius, *Lives of the Eminent Philosophers*, V, 11–16, reproduced in Mary F. Lefkowitz and Maureen Fant (eds.), *Women in Greece and Rome* (Sarasota, FL, Samuel Stevens, 1977), pp. 19–21.

¹⁸ This point is made by Susan Moller Okin, *Women in Western Political Thought* (London, Virago, 1980), p. 34.

the possession and rearing of the women and children'.¹⁹ Similarly, in the *Laws* he typifies the state second only to the Republic in ideal qualities as one in which 'women and children and houses remain private, and all these things are established as the private property of individuals'.²⁰ Although Plato does not mean commodified private property, women were certainly objectified in his system.

The prevalent Athenian property model appears to influence the way in which women's activity in sustaining the household is not recognised by Aristotle, even though he claims that the point of property and of all economic activity is precisely to maintain the household or *oikos*. Although Aristotle denies that women are slaves or objects of property – 'nature has distinguished between the female and the slave'²¹ – neither does he recognise them as full subjects. In Aristotle, women's economic activity is reduced to safeguarding the household property which men have created; their labour adds no value, since 'the art of household management is not identical with the art of getting wealth, for the one uses the material which the other provides'.²² In reality, of course, the Athenian woman's labours in spinning, weaving, food processing and animal husbandry all created a product and added value to what was by nature mere substance. We shall see in chapters 3 and 4 that an attitude not so very different from Aristotle's has prevailed in the stem cell technologies and in the banking of umbilical cord blood, where women's labour is not recognised as adding value to 'natural' resources.

In Aristotle, it is women's intermediate nature between full subject and something more akin to an object, although not a chattel slave, that makes their labour of lesser value. 'A husband and father . . . rules over wife and children, both free, but the rule differs',²³ for rule over sons is temporary, but wives can never attain the status of self-ruled or rulers. Yet, conversely, it is also the gendered nature of property acquisition which justifies men's rule over women in the family, and, more particularly, the way in which women's labour is not perceived to add wealth to the *oikos*. As the Danish political scientist Mogens Hansen writes, however, 'it was the work of the women even more than that of the slaves that provided the male citizens of Athens with their opportunity to run the political

¹⁹ Plato, *Republic* (Paul Shorey (tr.)) in *The Collected Dialogues of Plato including the Letters* (Edith Hamilton and Huntington Cairns (eds.)), New York, Pantheon Books, (1961), 451c and 453d.

²⁰ Plato, *Laws* (Paul Shorey (tr.)) in *The Collected Dialogues of Plato including the Letters* (Edith Hamilton and Huntington Cairns (eds.)), New York, Pantheon Books, (1961), 807b.

²¹ Aristotle, *Politics* (Benjamin Jowett (tr.)) in *The Basic Works of Aristotle* (Richard McKeon (ed.)), New York, Random House, (1941), 1252b1.

²² Aristotle, *Politics*, 1236a10. ²³ Aristotle, *Politics*, 1259a39.

institutions'.²⁴ Notwithstanding the fact that Athenian women brought dowries into their marriages, Aristotle considers wives to be 'bought' – although more indirectly than slaves – through sharing in the husband's supposedly greater economic contribution to the household, and in the children, who in this view are created predominantly by the male's active, energising, soul-creating power.²⁵ Thus, an element of commodification does enter in, albeit indirectly.

Here, in Aristotle's blindness to the value of women's reproductive labour, construed as not only as birth and child-rearing but also as reproducing the next generation through labour in the household, we see the beginnings of a phenomenon that can be traced through the history of Western political theory and law and into modern biotechnology, as I will demonstrate in later chapters. Without women's reproductive labour in producing ova for the stem cell technologies and cord blood for private profit-making banks, these technologies would not exist. Yet women's role in modern biotechnology is viewed in the same way Aristotle saw it 2,500 years ago: as a mere receptacle or conduit for the energising, value-creating male principle. This claim will be developed at further length in chapters 3 and 4; all I do here is to trace its historical provenance.

Women's propertylessness in their own tissue and reproductive labour is one lesson from Athens; another relates to the connection between holding property and having political rights, particularly having the right to govern others. Although this link is more clearly established in liberal political theory, which I shall consider in the [next section](#) of this chapter, it is also present in the Athenian model. As I wrote in *Property, Women and Politics*, 'It was property in the private household which gave the master a place in the outside world . . . the flow is from economic agency to political personhood.'²⁶ In classical Athens, citizenship was defined in terms of the means of life, such as a farm. Women were excluded from political life because they did not own the means of independent living, or the property in their own bodies. 'Without autonomy over their own bodies and actions, they could not be given the right of political control over those who did own themselves, freeborn men.'²⁷ Only those who unequivocally 'own' themselves have wider political and legal rights: they are 'the lords and owners of their faces', as Shakespeare put it.

If we do not unequivocally own our own bodies, does that imperil our personal rights such as informed consent? If this proposition were true,

²⁴ Mogens Herman Hansen, *The Athenian Democracy in the Age of Demosthenes: Structures, Principles and Ideology* (Oxford: Blackwell, 1991), p. 318.

²⁵ Aristotle, *The Generation of Animals* (William Ogle (tr.)) in *The Basic Works of Aristotle* (Richard McKeon (ed.)), New York, Random House, 1941), 731b30.

²⁶ *Property, Women and Politics*, p. 60. ²⁷ *Ibid.*

it would lend even greater urgency to the need to develop a bundle of property rights in our bodies; rather than co-existing on equal terms with personal rights, property rights would then underpin them, in such a way that personal rights would be derivative and secondary. The gist of this argument would be something like this: if we do not have a property in our own bodies, we cannot have such a thing as personal rights. Thus, the choice sketched in chapter 1 between the personal and the property rights model would be a false dichotomy. Without the property rights model, the personal rights framework would collapse. The trust placed in personal rights such as informed consent by consultative commissions, professional bodies and law-makers dealing with property in the body would then be doubly misguided. Not only would such institutions be at fault for failing to recognise the need for property rights as an *adjunct* to personal rights, they would have wrongly assumed that personal rights can stand on their own, without a *foundation* in property rights.

Liberal political theory: property in the body and property in the person

We have seen that Aristotle distinguishes between women and slaves, yet denies women the full privileges associated in modern times with 'self-ownership'. It may well appear contradictory that a person who is not a chattel slave, and whose body is therefore not simply the object of property, should not own herself or her own actions, including those that produce use value. In liberal theory, self-ownership is logically prior to other rights: hence the argument, stated briefly above, that if we do not have a property in our own bodies, we cannot have any other entitlements. But is self-ownership literally a form of property entitlement? And must it necessarily be true that if I am not a slave, I must own myself? James W. Harris has identified the illicit jump from the first proposition to the second as the crucial mistake made by liberal theory, and carried over from it into Marxist thought. Even if I am not a slave, that does not mean that I own my body. No one then owns my body, not even I myself, and self-ownership then becomes a nonsensical concept.²⁸

If self-ownership is supposed to be similar to property rights, then it consists in a set of relations of exclusion or control concerning a particular object or objects. Are these merely negative rights of non-interference? – like protection against theft, for example.²⁹ Or does self-ownership imply

²⁸ James W. Harris, *Property and Justice* (Oxford, Oxford University Press, 1996), p. 189.

²⁹ Penner, for example, construes a property entitlement as being like a gate rather than a wall: the owner has the right to decide who will be admitted and not excluded. (James Penner, *The Idea of Property in Law* (Oxford, Clarendon Press, 1997), p. 87).

all the rights in the property bundle? – full powers to determine all uses of the ‘object’. And what would that ‘object’ be? Is it ownership of the physical body? We have already seen in chapter 1, and at the start of this chapter, that there is something strange about this idea, not least because it objectifies the body. Objects of property, typically, ‘are only contingently ours . . . [and] might just as well be someone else’s’.³⁰ How can this possibly be true of my own body?

If we are our bodies, if we are embodied subjects, then it is nonsensical to assert that we *own* our bodies; we simply *are* our bodies. As Kant says, ‘Man cannot dispose over himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for insofar as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property he would be a thing over which he could have ownership.’³¹ This is a strong strain not only in Kant but also in feminist theory, which has generally distrusted what it sees as ‘masculine’ mind-body dualism, whether Cartesian or religious in origin. Feminists have alleged that wherever there is a rigid division between body and subject, or soul, or intellect, or reason, the body has tended to be identified with women and given an inferior status, as being merely animal or natural.³² Thus, feminism is generally sympathetic to the identification of body and subject, rather than to the self-ownership model in which the subject is seen as some disembodied force possessing the body – indeed, objectifying and alienating it.³³

All these considerations might appear at first to rule out any contribution from liberal or neo-liberal thought to the debate on the ‘new enclosures’. The strongest voices arguing for commodification of human tissue have typically been neo-liberal;³⁴ if their argument is rooted in a fallacy about the right to sell one’s body because one owns it, what use is liberal

³⁰ Penner, *Idea of Property*, p. 112.

³¹ Kant, *Lectures on Ethics* (Indianapolis, Bobbs-Merrill, 1963), p. 4, cited in G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge, Cambridge University Press, 1995), p. 211, and in chapter 1. For critiques and counter-critiques of the Kantian position, see Nicole Gerrand, ‘The misuse of Kant in the debate about a market in human body parts’ (1999) 16(1) *Journal of Applied Philosophy* 59–67, and Jean-Christophe Merle, ‘A Kantian argument for a duty to donate one’s own organs: a reply to Nicole Gerrand’ (2000) 17(1) *Journal of Applied Philosophy* 93–101.

³² Moira Gatens, *Feminism and Philosophy: Perspectives on Difference and Equality* (Cambridge, Polity Press, 1991).

³³ See e.g., Jackie Leach Scully, ‘Normative ethics and non-normative embodiment’, paper presented at the Feminist Approaches to Bioethics conference, Sydney, November 2004.

³⁴ David Resnik, ‘The commercialization of human stem cells: ethical and policy issues’ (2002) 10 *Health Care Analysis* 127–54 and ‘Regulating the market for human eggs’ (2001) 15(1) *Bioethics* 1–26; Richard Arneson, ‘Commodification and commercial surrogacy’ (1992) 21(2) *Philosophy and Public Affairs* 132–64.

thought? However, the claim that we *cannot* own our bodies is actually more consistent with Locke's position, and neo-liberals who claim a Lockean basis for the argument that we own our bodies unreservedly are misinterpreting proper Lockean liberalism rather badly. Self-ownership in the sense of ownership of the physical body is not the crux of his argument: rather, the claim that I own my actions, and therefore the resources or wealth produced by my actions. It is not necessary to assert that I own my physical body in order to stake a claim in the results produced by my agency.

Chapters 3 and 4 will argue that in the case of women's reproductive labour and work in producing tissue such as enucleated ova for non-reproductive purposes, effort, intentionality and agency ground individual property in that tissue, on a Lockean basis. In the instances of genetic patenting and biobanks, discussed in chapters 5 and 6, there is less extensive labour, intentionality and agency involved, but still enough so that a Lockean labour-desert argument can justify a communal property for donors, to be administered by a form of charitable trust on their behalf. Lockean liberalism does have an important contribution to make to the philosophical and legal resources we need to defend ourselves from the 'new enclosures', particularly for protecting women.

The right to property in Locke's *Second Treatise on Civil Government* is founded, famously, on the 'mixing of labour' with resources: when we do so, we acquire property rights in the results. (I realise this is a vastly oversimplified account, but here I do not wish to focus on the structure of the argument for acquisition in itself: for more detail see *Property, Women and Politics*, ch. 3.) Our right to the resultant wealth depends in turn on our prior rights in our own selves. The question I want to examine here is the nature of those selves and rights.

This issue is important in the context of objectification and commodification because many people seem to assume that if we do not own our bodies straightforwardly (and we do not in law) then we do not own our selves, and are less than full subjects. Again, this is also to assume a bright line between persons and things, which we have already seen to be an inaccurate assumption regarding women's status. The present discussion concerns another component of that misleading dichotomy: between full subjects, who own their bodies straightforwardly, and things, which are the objects of ownership. But it is not necessary to believe that full subjects own their bodies like things in order to believe that they have certain rights, selected from the 'bundle', in relation to their bodies.

Now although the conventional belief that we do own our bodies implicitly rests on Lockean foundations, in fact Locke never says that we have

a property in our physical *bodies*: rather that we have a property in our *persons*. He is careful to distinguish between persons and bodies, and between the labour of our bodies and our bodies themselves, when he says that ‘Every man has a property in his own person; this nobody has any right to but himself. The labour of his body and the work of his hands we may say are properly his.’³⁵ We have a title to that with which we have ‘mixed our labour’ because our labour is the expression of our agency and status as persons, not because the raw materials have touched our bodies. The connection is not literally between our bodies and the hoe, flute or pen, but between our skills and the fruit, music or poem that flow from the labour for which we use those tools. Jeremy Waldron makes this distinction very ably: ‘Humans, then, do not have creators’ rights over their bodies. But they can be regarded in this strong sense as the creators of their own actions (and *a fortiori* of their work and labour).’³⁶

Further – and this is crucial for property in tissue, body parts or DNA – we do not have a property in that which we have *not* laboured to create. We do not own our bodies merely because ‘we’ (whoever that disembodied ‘we’ may be) inhabit them. In Locke’s view, we do not own our bodies at all: God does, because He alone created them. The final proof that rights in what one has created flow from subjecthood or agency rather than from possession of a physical body must be God’s own disembodiment.

Absent or present Locke’s belief in God, the conclusion remains the same: we have not laboured to create our own bodies. Those who argue, on a purportedly Lockean basis, that we do have complete and full-blooded ownership rights in our bodies actually ignore this distinction in Locke between property in the moral person, which I equate with self-ownership, and property in the physical body. The liberal basis of a right to property is thus intimately linked to self-ownership; it derives from the connection between our value-creating labour and our agency, although not from our ownership of our physical bodies.³⁷ That labour is an expression of our agency and not of our bodies as such; it derives its values from that agency, but it is done through the medium of our bodies. This interpretation is consistent with the view of the subject as embodied, and with the desire to avoid the objectification or commodification

³⁵ John Locke, *The Second Treatise on Civil Government* (1689), cited in G. A. Cohen, *Self-Ownership, Freedom and Equality* (Cambridge, Cambridge University Press, 1995), p. 209. See also my further elaboration of the claim that Locke distinguishes between property in the person and property in goods: *Property, Women and Politics*, p. 78.

³⁶ Jeremy Waldron, *The Right to Private Property* (Oxford, Clarendon Press, 1988), p. 179.

³⁷ John Christman, in *The Myth of Property: Toward an Egalitarian Theory of Ownership* (Oxford, Oxford University Press, 1994), argues that Locke would not actually have subscribed to the notion of self-ownership, because we do not own our bodies. However, he does not distinguish between property in the body *per se* and property in labour.

of the body, which opens up as a possibility once we admit the notion that bodies can be owned by subjects.

Returning to the question posed in chapter 1, concerning why the ‘new enclosures’ cause us so much distress, we now need to consider whether we could conceivably retain our self-ownership, even if we do not have a property in our own bodies as such. Conversely, what distresses us about the supposed loss of property in our physical tissue, body parts or DNA may be simply an erroneous impression that we have thereby lost our agency, our subjecthood: that we have become the objects of property-holding. We have already seen that under both civil and common law, property in the body is at best a weak concept, or even an oxymoron. Yet both systems, using different vocabularies, make a great deal out of self-ownership, in the guise of individual freedoms in the common law system and of human dignity in the civil system.

Can we then be said to own ourselves in another sense? – in terms of owning our moral persons rather than our physical bodies. This Lockean interpretation is surprisingly similar to that made by Paul Ricœur between the two senses in which something can be said to belong to me.³⁸ In the first sense, I own a physical object like a book, car or house; in the second, closer to that of owning the moral person, ‘what belongs to me is more appropriately understood through the notion of constitution, as constitutive of who I am’.³⁹ Ricœur asserts that we should understand our bodies as belonging to us in this second sense. ‘They are “ours” because they are expressive of our agency . . . Our bodies belong to us in the sense that we are embodied in them, we express our agency and intentions through them, and we experience the world from the perspective of our particular embodied points of view.’⁴⁰ Although Ricœur and commentators on him generally restrict the sphere of property or ownership to the first set of relationships, which would exclude the self from the realm of property, I do not see why this has to be so. An embodied self, in my view, can still be conceived of in terms of some of the property relationships in Honofé’s formulation, and indeed Catriona MacKenzie, in commenting on Ricœur, does something like this when she argues that the rights to bodily non-interference and bodily self-determination should be grounded in Ricœur’s constitutive sense of belonging.⁴¹

³⁸ Paul Ricœur, *Oneself as Another* (Kathleen Blamey (tr.), University of Chicago Press, 1992), especially the Fifth Study, ‘Personal identity and narrative identity,’ cited in Catriona MacKenzie, ‘Conceptions of the body and conceptions of autonomy in bioethics,’ paper presented at the Seventh World International Association of Bioethics conference, Sydney, November 2004, p. 8.

³⁹ *Ibid.* ⁴⁰ *Ibid.* ⁴¹ *Ibid.*

If redefined as a question about who has the right to control ‘ourselves and our powers’,⁴² then self-ownership appears to be less about the physical body as the object of relations of exclusion and control. Property is about the relations among persons in regard to objects; this alternative formulation conceives of ‘ourselves and our powers’ as such an object, but not necessarily as a physical object. There is no reason why property has to be about tangible objects, of course; copyright and patent are forms of property relations, intellectual property, concerning intangible things. Indeed, one could go further: defined as control over ‘ourselves and our powers’, self-ownership does not even require the potentially self-contradictory notion of a self that is being owned by a self. The self need not be a tangible or even an intangible thing, in this formulation, any more than personal reputation, public persona or good name, which are actionable goods in intellectual property law. The right to sell the use of one’s name or image has evolved into a full property right in US courts, although on close examination it is far from clear exactly what is being protected in such cases.⁴³ This insight may be useful in addressing our concern about whether our physical bodies are being so thoroughly appropriated in the ‘new enclosures’ that we have lost a crucial component of our selfhood. The question remains whether others are attempting to undermine our selfhood, to control ourselves and our powers, in such a way that our self-ownership, defined as moral agency, is threatened. In later chapters, particularly in the examples of Fiji and Tonga in chapter 8, I shall examine this contention at further length.

It might be said, however, that this reformulation stretches the notion of self-ownership to an unacceptable degree of looseness. The principle lacks concrete content, if defined neither in terms of particular powers of control nor of a tangible or intangible object of control. This objection would be similar to that detailed in the [previous chapter](#), about the vague content of the property bundle and of the very notion of property as lacking in determinative content.⁴⁴ Here, as there, this looseness seems to me to be productive and flexible, rather than damning. It is up to us

⁴² As does Cohen, in *Self-Ownership*, p. 210.

⁴³ E. Richard Gold, *Body Parts: Property Rights and the Ownership of Human Biological Materials* (Washington, DC, Georgetown University Press, 1996), p. 89.

⁴⁴ See Penner, *The Idea of Property*, and Richard Arneson, ‘Lockean self-ownership: towards a demolition’ (1991) 39 *Political Studies* 54, cited in Cohen, *Self-Ownership*, p. 213. For further discussions of self-ownership, see, *inter alia*, Daniel Attas, ‘Freedom and self-ownership’ (2000) 26 *Social Theory and Practice* 1–23; George Brenkert, ‘Self-ownership, freedom and autonomy’ (1998) 2 *Journal of Ethics* 27–55; Alan Ryan, ‘Self-ownership, autonomy and property rights’ (1994) 11 *Social Philosophy and Policy* 341; Christman, *The Myth of Property*; and Robert S. Taylor, ‘A Kantian defense of self-ownership’ (2004) 12(1) *Journal of Political Philosophy* 65–78.

to define which sticks in the bundle, or which powers of control, we need most urgently, in order to protect ourselves against the ‘new enclosures’. The concept of self-ownership, if extended to the further liberal premise that everyone enjoys full self-ownership compatible with such powers’ enjoyment by others,⁴⁵ does in fact dictate that certain rights and powers of control are fundamental.

The liberal notion of self-ownership, if distinguished from ownership of the physical body and linked to the delineation of particular forms of control, thus illustrates how property rights do underpin personal rights. However, even on the looser formulation of self-ownership employed above, women were not thought to own themselves unreservedly in Lockean liberal theory. Although Locke speculates about the possibility of divorce and of married women holding property, he never questions the natural basis of conjugal power: only how far the husband’s rights over the wife should extend. Some commentators have claimed that the actual worsening of women’s political and property rights under the legal system of coverture⁴⁶ during the high tide of liberalism was no coincidence, but a direct and intentional result of liberal thought. Although liberalism laid the foundations for human rights and democratic political participation, these rights were not extended to women; odder still, democratic liberals did not seem to notice that their construction of such notions as ‘universal suffrage’ meant ‘male suffrage’. Women’s democratic political rights were only granted anywhere between 150 and 200 years after men’s suffrage in most democracies. Was this an oversight, an unresolved contradiction, or a natural outgrowth of liberalism itself? If self-ownership really is universal – if everyone enjoys self-ownership – how did this anomaly arise, and why did it go unnoticed? This is not merely some arcane question whose relevance has disappeared with genuinely universal suffrage. We shall see in chapters 3 and 4 that in the new biotechnologies, too, women’s rights of ownership over their own tissue have not been recognised. The same phenomenon – counting women out – is occurring in new guises.

Conventional writers on canonical political theory have typically either ignored women’s exclusion from the political realm or mentioned it only

⁴⁵ Cohen, *Self-Ownership*, p. 213. I disagree with Cohen’s subsequent argument, however, to the effect that ‘to own oneself is to enjoy with respect to oneself all those rights which a slaveowner has over a complete chattel slave’ (p. 214). Here Cohen fails to separate out the sticks of the property bundle: there are other models of ownership than chattel slavery, employing different ‘mixes’ of ‘sticks’. In fact, Cohen has failed to distinguish between ownership of the body and ownership of labour.

⁴⁶ For a more detailed discussion of the restrictions imposed on women under coverture, see *Property, Women and Politics*, pp. 79–91.

in passing, as an oversight that time would put right.⁴⁷ Those liberals generally considered more feminist than Locke, such as Harriet Taylor and John Stuart Mill, did address women's simultaneous subjection and objectification, but thought women's inferior position was the last vestige of barbarism in politics. More recent feminist critics, such as Carole Pateman,⁴⁸ instead present liberalism as obstacle rather than solution. This viewpoint has important ramifications for property in human tissue, where at present a neo-liberal framework of regulation rules, to the extent that any framework rules at all. If this feminist viewpoint is correct, the semblance of contract (given, for example, by signing a consent form to unknown further uses of one's tissue) parallels the semblance of legitimacy given by the social contract in contractarian liberalism. Both are to be distrusted. Each merely legitimises what is in fact an assault on self-ownership, rather than an expression of it.

Here, then, is another concept from recent feminist theory which can help us to understand and resist the appropriation of bodies in modern biotechnology, particularly where female bodies are concerned, but also where all bodies are 'feminised'. The notion of the sexual contract might conceivably encompass surrogate motherhood, oocyte sale and other uses of female bodies which are justified by their proponents as being like any other economic transaction. Where women's bodies are concerned, however, the 'normal contractual manner' does not necessarily apply. Women's bodies are assumed to be 'open access' to such an extent that even when material such as ova for the stem cell technologies is taken from them in risky and laborious processes, no one notices what is going on. There are profounder reasons why transactions concerning the use of women's bodies, even if distinguished from the sale of women's bodies, cannot simply be assumed to be the same as any other economic transaction. To the extent that all bodies are now being treated like women's bodies, feminist theory alerts us to distrust the arguments in favour of contract in the body.

A feminist analysis such as Pateman's should warn us against the use of oversimplified, knock-down neo-liberal arguments about choice, consent and contract where female bodies are concerned, or indeed potentially of all bodies. Once the woman's supposed initial consent to the sexual or marriage contract has been given, all other rights are extinguished. This is the parallel to be drawn from Pateman's critique of self-ownership

⁴⁷ For example, John Dunn, 'Consent in the political theory of John Locke' in his *Political Obligation in its Historical Context* (Oxford, Oxford University Press, 1980); Alan Ryan, 'Locke, labour and the purposes of God' in his *Property and Political Theory* (Oxford, Blackwell, 1984).

⁴⁸ Carole Pateman, *The Sexual Contract* (Cambridge, Polity Press, 1988).

under contractarian liberalism, and a good illustration of the way in which feminist theory can afford unexpected insights into the ways in which the new enclosures threaten to limit the free agency and self-ownership of both men and women. As I remarked in chapter 1, a rather bastardised version of the personal rights model would have us believe that initial consent to tissue extraction extinguishes all other powers of control over the subsequent uses of the tissue. This widely accepted but legally dubious claim has direct relevance to patenting, considered in chapter 5, and to biobanks, in chapter 6.

That is indeed a useful warning against uncritical acceptance of neo-liberalism in the governance regimes of the new biotechnologies, but it is not necessarily a categorical argument against the use of contract, provided the contract can be made genuinely mutual. Contract has been used effectively by vulnerable groups to protect their rights in genetic material and tissue: I would not want to jettison so useful a weapon, but rather reformulate it to include new models such as benefit-sharing and the charitable biotrust. Similarly, in my critique of Pateman in *Property, Women and Politics*, I argued that ‘What makes the sexual contract an instrument of domination is not that it is a contract, but that it is sexual.’⁴⁹ Contract itself is neutral, I argued, or even implicitly egalitarian. While the sexual contract is gendered – made between men as subjects, concerning women as objects – liberal contractarianism points logically towards equal self-ownership for both sexes.

In its dislike for Lockean liberal concepts such as property and contract, feminist theory has not always been careful to keep the concepts separate from the society in which they arose,⁵⁰ but there are many aspects of contractarian liberalism which outstrip their legal and political background. The rights of first comers in Locke are also tempered by the proviso of ‘enough and as good’ left for late comers. This ‘Lockean proviso’ requires the first person appropriating part of a common resource to leave ‘enough and as good’ for others, and to avoid waste.⁵¹ That notion could be made more powerful than the law has so far done, restricting the rights of researchers, biotechnology firms and patent-holders rather than affording them unrestricted dominion over the genetic commons.⁵² Similarly, protest groups in the global South have used their own traditional notions of commons to denounce what they perceive as neo-colonialist

⁴⁹ *Property, Women and Politics*, p. 67.

⁵⁰ This is part of my critique of Pateman, in *Property, Women and Politics*, p. 71 *et seq.*

⁵¹ Locke, *Second Treatise*, s. 31 and 33.

⁵² This path is followed by Seana Valentine Shiffrin, in her ‘Lockean arguments for private intellectual property’ in Stephen R. Munzer (ed.), *New Essays in the Legal and Political Theory of Property* (Cambridge, Cambridge University Press, 2002), pp. 138–67.

biotechnology firms; the example of Tonga, in chapter 8, will illustrate how effective that protest can be.

These and other campaigners against the ‘new enclosures’ could also rely much more on the requirement in contract that both parties must derive a benefit or ‘consideration’, in the parlance of contract law:⁵³ contracts in which only one party benefits are legally void. When donors are asked to surrender not only their tissue but also all further say over its use in the future, even if later commercial uses contravene the altruistic purpose for which the donation has been made, it can be argued that the sole consideration for which they donated – altruistic satisfaction – has been negated, and that the ‘contract’ is invalid. Although the language of gift is often used to mask what is really going on, it is certainly arguable that in fact a contract has been set up between the donor and the recipient biobank, research organisation or hospital. Gifts are retractable, whereas the whole intention of such consent forms is to put paid to any future claims from the donors if the tissue turns out to be valuable. Although English law does not recognise a general doctrine of unequal bargaining power or ‘unconscionability’ in contract, it does accept three grounds of procedural unfairness which would have a similar effect, in the case of consent forms of this type:

- (1) dealings between sophisticated and less sophisticated parties, or between parties in a relationship of trust and dependency;
- (2) cases in which one party has effectively surrendered her judgement to another; and
- (3) instances in which one party is not fully aware of the meaning of terms or implications of the contract.⁵⁴

Any one of these three conditions may be enough to set aside a contract; all three can be said to apply when patients, in a relationship of trust with a doctor, surrender their judgement about what the best use of their tissue would be to the presumably altruistic researcher, and fail to understand the potential commercial value, finality or other implications of the contract. Thus, contract law can be an important weapon in resisting the ‘new enclosures’, and the absence of any such consideration might well invalidate the donation protocol in the case of ova extraction or a private cord blood contract.

With the key distinction between property in the body and property in the person borne in mind, liberal political theory can provide us with important concepts, including contract, with which to reclaim the body from the new enclosures, particularly in relation to female reproductive

⁵³ Stephen A. Smith, *Contract Theory* (Oxford, Oxford University Press, 2004), p. 215.

⁵⁴ Smith, *Contract Theory*, pp. 348–52.

tissue. However, I reject the liberal attempt to subsume all social relations to the contractual, including, in terms of the property bundle, the sale of body tissue on a contractual basis. In this respect I agree with the distrust of contract evinced in much feminism.⁵⁵ What feminist theory does is to make us wary of contract used as a knock-down argument, to alert us to hidden power imbalances in contractual relations.

In the [next section](#), however, I shall also argue that although there are very useful aspects of contractarian liberalism, its emphasis on individual property rights is less reliable a concept than Hegel's developmental, public model of property. Liberal arguments are not the be-all and end-all, and indeed their innate tendency to reduce social relations to transactions between individuals often blinds those writing in the liberal tradition to the wider social ramifications and background of what appear to be contracts between individuals. This is a besetting sin of much of the Anglo-American literature on the supposed free right to sell our body tissues: the reduction of everything to an individual transaction and the ignoring of relationship.⁵⁶ Civil law frameworks, and Continental theorists, are less prone to these 'Anglo-Saxon attitudes', as I shall elaborate in chapter 7 on France. In particular, Hegelian theory denies that we exist apart from our embodied selves, an insight which it shares with feminist approaches and with resistance from indigenous peoples and the environmental movement to the 'new enclosures'.

Contract, property and mutual recognition in Hegel

We have seen that the limitations of liberal thought relevant to the 'new enclosures', as seen through a feminist lens, include the following shortcomings.

1. Liberalism tends to take consent at face value, whereas feminist theorists such as Pateman are suspicious of the way in which an apparent initial consent, such as in the 'marriage contract', can justify relations of subordination in relation to the body. This mistrust can be instructive

⁵⁵ See e.g., Patricia J. Williams, 'On being the object of property' in D. Kelly Weisberg (ed.), *Feminist Legal Theory: Foundations* (Philadelphia, Temple University Press, 1992), pp. 594–602.

⁵⁶ David Resnik, in 'The commodification of human reproductive materials' (1998) 24 *Journal of Medical Ethics* 288–93, suggests that 'bodies that do not contain persons, such as anencephalic newborns, bodies in a persistent vegetative state (PVS), or cadavers, could be commodified without violating the dignity or worth of persons' (p. 389). He seems quite unaware of the effect on parents of anencephalic newborns, or relatives of persons in a persistent vegetative state: in short, of relationships extending beyond the patient as a single individual.

for policy formulation on property in tissue, which has been too ready to take consent as the best or indeed only form of protection.

2. In liberal thought, particularly in modern neo-liberalism, society is contract ‘all the way down’. This tendency is particularly troublesome because of its connection to the first problem: if contracts are not necessarily made between equals, the danger of subordination is reinforced if contract is the main model of relations between individuals or collectives. Similarly, and relevantly to point (1), we cannot assume that ‘gifts’ of tissue or other forms of alienation of tissue, including contracts of either gift or sale, are necessarily made between equals.

3. Although the social contract is ostensibly drawn up between individuals, in fact it is made in a context of prior relationships among groups, including the family. Male individuals act as heads of families, which pre-date the social contract, even in modern liberal theorists (for example, in the first edition of Rawls’s *Theory of Justice*).⁵⁷ Relationships among collectivities, and the ways in which power structures relationships within collectivities, are largely ignored by liberalism. This shortcoming has important ramifications for property in the body or in the human genome, not only in relation to women, but also for societies which view social life not in terms of individuals but in terms of collectives. Individual informed consent is insufficient or even meaningless for many indigenous peoples who are at risk from the global commodification of human tissue and the human genome.⁵⁸ This limitation will be further explored in chapter 8, on Tongan and Maori cultures’ resistance to international biotechnology firms.

4. The notion of self-ownership is central to liberalism, but it is by no means certain that women have been included in this core concept. Instead, in Pateman’s analysis, liberalism actually requires the ‘ownership’ of women by men in the sexual contract. Furthermore, ‘self-ownership’ oversimplifies our real relation to our bodies, whether male or female. We shall see in chapter 5 that self-ownership as a shibboleth lies behind much of the ‘moral panic’ over the patenting of the human genome.

5. The corollary of the above limitation is that women are not held to have the same sort of property in their own labour that men do. Even if women’s bodies are not literally the property of men, and even if we distinguish property in one’s body from property in one’s labour, women’s reproductive labour is not unequivocally their own. In terms of

⁵⁷ John Rawls, *A Theory of Justice* (Cambridge, MA, Harvard University Press, 1971).

⁵⁸ See also my article ‘Human tissue and global ethics’ (2005) 1(1) *Genomics, Society and Policy* 41–53.

commodification of the body, this will turn out to have important ramifications, which I explore further in chapters 3 and 4. Essentially, the argument there is that the labour which women put into processes such as oocyte and cord blood extraction is not recognised, nor counted as adding value to commodified products such as stem cell lines, because women's reproductive labour is not recognised in other contexts either. Liberal theory is not alone in this blindness – we have just seen a similar lack of awareness in Aristotle – but it is more at fault for failing to extend its own inner logic sufficiently.

These restrictions in liberal thought carry instructive parallels for commodification of the body, which I shall draw out in succeeding chapters. They also demonstrate some of the subtleties of objectification, and of the tricky relationship between self-ownership and ownership of the body. Hegelian and Marxist thought helps us to move beyond some of these limitations, although neither Hegelianism nor Marxism transcends them altogether.

The focus in the Hegelian model of property is on the experiential process of identity formation and recognition of others' subjectivities, and the Hegelian notion that 'everyone must have property' does not mean that everyone must hold private wealth. Relationship, rather than appropriation, is the question. Property, in Hegel, is not merely about relations of possession and control, but rather about the broader dynamics of social recognition. Because of this emphasis on relationship, feminists have been intrigued by Hegel, despite his ambivalent attitudes towards women's place in the home or in the world, with the largest body of feminist work centring on *The Phenomenology of Spirit*.⁵⁹ Feminists' interest, including Beauvoir's own work, has revolved around the meanings of Subject and Object in Hegel's master-servant dialectic. There has been less interest among feminists in Hegel's writings on property. My own view is that there are three potentially liberating elements in Hegel's political writings which tie up with crucial feminist concerns, and also with our concerns in bioethics about the 'new enclosures':

- (1) the justification of property in terms of self-development, social recognition and public good(s);
- (2) the importance of embodiment in self-development; and
- (3) the connected thoughts that contract reflects relationship, but that nevertheless not all relationships boil down to contract.

⁵⁹ G.W. F. Hegel, *Phenomenology of Spirit* (A. V. Miller (tr.), Oxford, Oxford University Press, 1977); Judith Butler, *Subjects of Desire: Hegelian Reflections on Twentieth-Century France* (New York, Columbia University Press, 1987); Luce Irigaray, *Le temps de la différence: pour une révolution pacifique* (Paris: Livre de Poche, 1989); Susan M. Easton, 'Hegel and feminism' in David Lamb (ed.), *Hegel and Modern Philosophy* (London, Croom Helm, 1987).

Although Hegel's *Philosophy of Right* is concerned with the development of the subject, it begins with property and contract, which appear to belong to the realm of objects. Only by engaging with the world of objects can we become full subjects. 'The Hegelian subject always has to go outside itself to know what is inside; by seeing itself reflected in the world it discovers relations constitutive of itself.'⁶⁰ Unlike in liberal theory, the high road to *individual* autonomy and self-awareness is through the recognition of *others* who also possess self-consciousness, who also own themselves – to put the matter in terms more familiar to liberal thought. Our individuality is not given but created, through active relationship with our environment, which of course includes other subjects. It 'translates' itself into reality 'through the use of its own activity and some external means',⁶¹ of which the first is property.

Perhaps more accurately, property is the first venue of interaction with the world, followed, in the *Philosophy of Right*, by contract, the family, civil society and then, only then, the state. Whereas in liberal contractarianism, disconnected individuals in the state of nature form the state in order to assure the security of their property and lives, in Hegelian thought the state is the final and highest stage of mutual recognition. Property is not guaranteed by the state apparatus subsequent to its formation by the social contract; rather, the order of events is reversed, so that property is a lower but still essential stage in the process of mutual recognition that eventually culminates in the state. Rights, including the bundle of claim-rights, privileges, powers and immunities⁶² which constitute property, are consequent to society rather than prior to it. As I noted in *Property, Women and Politics*:

Now this is not necessarily an argument for *private* property; it might be enough to participate in the creation and control of some collective enterprise. Individuality does not itself require limitless individually owned property.⁶³

What ramifications might this aspect of Hegelian thought have for resistance to private corporations' commercialisation of the body? The appeal of a societally rather than individually centred model of property is that it suggests *collective* mechanisms for governance of the new biotechnologies, vesting the controls that constitute property relations in genuinely communal bodies. I shall develop one such model in chapter 6: the charitable 'biotrust'. Thus, the Hegelian approach to property and

⁶⁰ Kathy E. Ferguson, *The Man Question: Visions of Subjectivity in Feminist Theory* (Berkeley and Oxford, University of California Press, 1993), p. 41.

⁶¹ Hegel, *Philosophy of Right*, p. 9.

⁶² W. N. Hohfeld, *Fundamental Legal Conceptions as applied in Judicial Reasoning* (New Haven, CT, Yale University Press, 1919).

⁶³ *Property, Women and Politics*, p. 97.

contract is neither liberal nor utilitarian. The usual consequentialist arguments for private ownership⁶⁴ foreground either the superior efficiency of private-property systems or the security which private property provides for the projects important to us. Instead, Hegel sees the stages represented by property and contract as emblematic of the individual's self-development.⁶⁵

So far I have mainly discussed the first of the useful elements which Hegelianism adds to the more limited analysis of liberalism, that is, the justification of property and contract as stages in self-development; now I want to move on to the second way in which it is more sympathetic to both feminist thought and the arguments against commodification of the body. Here I am concerned with the importance of embodiment in Hegel's thought.

The debate around patenting of the human genome or the commercial use of human tissue often comes down to opposing viewpoints about whether these developments threaten human dignity.⁶⁶ But why should the taking of bits of tissue threaten our essential selves in any way? – any more than having our hair cut does (with the possible exception of Samson and Delilah). If there is a Cartesian separation between mind and body, and if the self is identified primarily with the mind, there is no reason why our essential subjectivity should be harmed by the loss of body tissue. The argument might then boil down to which parts of our body do actually contain our personalities, in a way that shorn locks of hair supposedly do not. If we can separate our personalities from a particular body part, in the simple biological sense that we can survive without that

⁶⁴ For example, John Christman, in *The Myth of Property*, proposes a consequentialist justification of property rights and distributive justice, setting the well-off person's reliance interests in certain levels of income or security from property against the needs of the less well-off for security against propertylessness. Arguments in favour of patenting usually hinge on consequentialist arguments: that the patenting system produces desirable outcomes such as higher productivity for researchers, availability of beneficial therapies to society or greater national wealth. Increasingly, arguments *against* patenting the human genome or its sequences are also being made on a consequentialist basis. The argument that patents actually tend to stifle research is put forward by Lori B. Andrews in 'Genes and patent policy: rethinking intellectual property rights' (2002) 3 *Nature Reviews Genetics* 803–8.

⁶⁵ One limitation of Hegel's own thought, however, is that the individual who imposes his will on the world in this fashion is primarily a male individual in Hegel, and that the process of development is curtailed for women (Kathy E. Ferguson, *The Man Question: Visions of Subjectivity in Feminist Theory* (Berkeley and Oxford, University of California Press, 1993)).

⁶⁶ For a sceptical argument about the vague content of the notion of human dignity, see John Harris and John Sulston, 'Genetic Equity' (2004) 5 *Nature Reviews Genetics* 796–800. The 'dignitarian' approach is defended by Roger Brownsword in 'Biobank governance'. Dignity as a rationale against commodification is discussed at greater length in chapter 5, where it arises in the context of genetic patenting.

tissue, then this part might rightfully be the subject of property rights.⁶⁷ On this argument, cut hair, fingernails, DNA samples, oocytes and even single kidneys could be the subject of property rights, but hearts, livers and brains could not. The living body as a whole could not be alienated in any form, by gift or sale, and neither could any part of the body necessary to sustain life.

This seems a rather crass formulation, however, and one that fails to provide as firm a guarantee as we might like. If, say, through the ostensible wonders of stem cell research, biotechnology eventually learns to produce and implant fully functional and tissue-compatible brains, or hearts or livers, then we would have to say that there is no theoretical objection to selling brains, or hearts or livers. Because this style of argument is naturalistic, depending on what can be done to tell us what *should* be done, it is vulnerable to transformations in what *can* be done. On a more metaphysical basis, it also depends on a strict division between the self and the body, or parts of the body: a bifurcation which Hegel rejects, as has much feminist thought. In Hegel, my only real existence is as an embodied will; that embodiment is indissoluble and unified. While Hegel's own thought is limited by his belief that the anatomical differences between the sexes have a supposedly 'rational' basis, his position on embodiment, as seen through a feminist lens, nevertheless provides important insights for commodification of the body.

The third productive aspect of Hegel, for feminist thought and resistance to commodification of the body, is the insight that society is not 'contract all the way down'. Instead, contract is merely a necessary but preliminary stage among many, in terms of social relations and mutual recognition. Contract reflects relationships, but not all relationships can or should be reduced to contractual ones. As a simultaneously symbolic and practical mechanism of recognition of other wills, contract is neither a realm of subordination and domination over women, nor of fraternal bonding among men – the meanings assigned it in liberal theory, according to Pateman. Rather, it is a limited but significant progress from self-absorption:

A person by distinguishing himself from himself relates himself to another person, and it is only as owners that these two persons really exist for each other. Their implicit identity is realized through the transference of property from one to the other in conformity with a common will and without detriment to the rights of others. This is *contract*.⁶⁸

⁶⁷ This is the 'separability thesis' put forward by Penner, *The Idea of Property*, p. 111.

⁶⁸ G. W. F. Hegel, *Hegel's Philosophy of Right* (T. M. Knox (tr.), Oxford, Oxford University Press, 1967), 40, original emphasis.

Contract is not merely the instrumental means by which property is protected, as in liberal thought: rather, it has value in itself, as the symbol of the common will and mutual recognition of both parties. In relation to tissue or DNA donors, for example, a form of contract may be useful in forcing researchers to respect the donor as an equal, as a subject – which consent does not necessarily do. It is often argued that once we admit property and contract models into the discourse surrounding the body, we must see all relationships between donors and recipients of tissue as contractual, and also as diminishing trust or social solidarity.⁶⁹ This attitude underpins the French emphasis on gift and reluctance to employ property rights as a model, although some recent French academic writing does accept a modified notion of contract.⁷⁰ If we employ a Hegelian model, however, we may circumvent both this limitation and the tendency of liberalism to identify property as private.

Furthermore, the way in which Hegel deals with a central paradox of contract casts a clearer light on the ongoing duties of the recipient of a gift, which is highly relevant to the donation of tissue or genetic data. Although contract symbolises the recognition of my entitlements, normally when I alienate something to you through a contract, I apparently cease to have entitlements in it. This paradox holds whether I sell or give away the object of the contract, that is, regardless of the manner of its alienation. As Hegel puts it, ‘Contract is the process in which there is revealed and mediated the contradiction that I am and remain the independent owner of something from which I exclude the will of another, only in so far as in identifying my will with the will of another, I cease to be an owner.’⁷¹ His answer to this contradiction of his own creation reminds us, as he says, that property is not mere physical possession, but rather ‘the social recognition that something belongs to me’.⁷² This is why Hegel can make this rather surprising statement:

In a contract my purpose is both to acquire property and to surrender it. Contract is real when the action of both parties is complete, i.e. when both surrender and both acquire property, and when both remain property owners even in the act of surrender.⁷³

⁶⁹ A prime example is the 2002 UK Department of Health consultation document *Human Bodies, Human Choices*, with its continued emphasis on the gift relationship (Department of Health, *Human Bodies, Human Choices: The Law on Human Organs and Tissue in England and Wales* (London, DOH, 2002)).

⁷⁰ Draft works by Florence Bellivier and Christine Noiville, ‘The commercialisation of human biomaterials: what are the rights of donors of biological materials?’ and ‘La circulation du vivant humain: modèle de la propriété ou du contrat?’, papers presented at seminar at Faculté de Droit, Université de Paris-I, October 2004.

⁷¹ Hegel, *Philosophy of Right*, 72.

⁷² William E. Connolly, *Political Theory and Modernity* (Oxford, Blackwell, 1988), p. 117.

⁷³ Hegel, *Philosophy of Right*, 76A.

If this is so, then the natural tendency of contract, as opposed to the one-off nature of informed consent, is to require *ongoing* recognition of the donor by the recipient. I have already suggested a simple metaphor about the continued interest donors have in the use of their gifts: the rudeness of selling something one has received for Christmas. Now it begins to look as if this commonsense metaphor has some serious philosophical content, in Hegel. In a Hegelian contract both partners are equals. Their nature as equals requires the ongoing recognition of each other's rights even after the transfer or alienation of the object which the contract concerns. That object is less important than the mutual recognition itself.

My task in later chapters will be to tease out what that recognition might imply in practical terms, and where its rightful limits lie. Before that, however, I want to look at one last concept from my feminist analysis of property in the body: property in reproductive labour. Although there is a Hegelian link here – a failure of mutual recognition – the canonical theorist who has the most to say about this concept is, of course, Marx.

Marx, Delphy and Arendt: alienation and women's reproductive labour

It is well known that Marx and Engels believed that the solution to women's oppression was to bring them out of the archaic isolation of the home and into productive employment. We might say that modern biotechnology has achieved this transition in a way that Marx and Engels could never have foreseen. Women's labour in producing oocytes for private IVF clinics and the stem cell technologies has brought the most intimate, 'archaic' biological functions into the marketplace.

I say this with tongue firmly in cheek, of course, because this form of women's reproductive labour is actually a further site of oppression. It is not that women are not paid for these functions, which I would oppose as a form of commodification; it is rather that their labour goes almost entirely unnoticed. The 'cloning wars' concern the moral status of the embryo; few bring the question of women's exploitation into the debate concerning therapeutic cloning or stem cell therapies.⁷⁴ Women's labour in pregnancy and childbirth is likewise ignored when 'surrogate'

⁷⁴ The Nuffield Council on Bioethics concluded that stem cell therapies were acceptable on ethical grounds because 'the removal and cultivation of cells from a donated embryo does not indicate lack of respect for the embryo'. The ethical debate was felt to stop there, apparently, without discussion of whether extraction of ova for use as enucleated eggs in the production of stem cell lines indicates lack of respect for the woman (Nuffield Council on Bioethics, *Stem Cell Therapy: The Ethical Issues, A Discussion Paper* (London, Nuffield Council on Bioethics, 2000)).

motherhood is depicted as merely renting out their wombs, turning these women into a 'biological *lumpenproletariat*'.⁷⁵

Why is women's labour so routinely ignored in the new biotechnologies? In Marx, the alienated worker's labour is always in fact the symbol of his oppression, not of his freedom, although under capitalism he is not a slave. In the capitalist system, writes Marx, labour is none the less external and forced, even though the labourer is not physically compelled to work, as the slave is.⁷⁶ But at least Marx credits the worker with a property in his own labour, which is more than women have in relation to the new reproductive technologies.

Feminist theorists might point out that this is not in fact an anomaly. From Mary Wollstonecraft onward, feminists have extended the notion that women's labour is forced and external into the domestic realm, including the creation of that most intimate 'product', children. The effect of the new biotechnologies is to take that propertylessness in the labour of reproduction back to stages before the birth of children: to the production of ova for the stem cell technologies, for example. At the same time, childbirth itself is now valued not just for the sake of the child as 'product', but also for the harvesting of an additional product, umbilical cord blood. Both cord blood and ova for the stem cell technologies have commercial value, but that value does not accrue to the women who produce them. Indeed, in the case of cord blood, the mother actually pays the cord blood bank for the privilege of storing her blood, which in fact is rarely recognised as hers in either the academic literature or the contract with the blood bank.

A Marxist feminist analysis of the new reproductive technologies might present them as the apotheosis of the way in which capitalism degrades women's labour. Under the conditions of IVF, for instance, the circumstances under which women perform the task of reproducing the species

⁷⁵ The idea of the 'biological *lumpenproletariat*' originates in Dorothy Nelkin's *Dangerous Diagnostics: The Social Power of Biological Information* (Chicago, University of Chicago Press, 1994), but Nelkin does not apply it to women: rather to those who are unable to get work or insurance because of unfavourable genetic profiles. My usage of it here is influenced by Jennifer Merchant's *synthèse* submitted for her *habilitation à diriger les recherches*; I served on the panel for her HDV in December 2004, and am grateful to her for this application of the concept. On the commodification of surrogacy, see Radin, *Contested Commodities*, pp. 134–53; Elizabeth Anderson, 'Is women's labor a commodity?' (1990) 19 *Philosophy and Public Affairs* 71–92; Arneson, 'Commodification and commercial surrogacy'; and Property, *Women and Politics*, ch. 7.

⁷⁶ Karl Marx, *Grundrisse: Foundations of the Critique of Political Economy* (Martin Nicolas (tr.), New York, Vintage Books, 1973), p. 611. See also the comparison of Marx's position on male labourers compared to the situation of women workers in *Property, Women and Politics*, pp. 123–4.

become more and more external and less 'natural'. Just as the Marxist feminist Ann Ferguson asks whether contemporary high-technology childbirth is a form of alienated labour,⁷⁷ so might one ask whether even higher technology processes such as superovulation and 'egg harvesting' also fit this Marxist mould.⁷⁸

Although the processes of commodification have doubtless accelerated under late capitalism, however, it is a mistake to think that women's alienation from their own reproductive labour is limited to the modern period. The short survey of Athenian property systems at the start of this chapter demonstrates that much. The question, then, is whether the Marxist concept of alienation can still be useful, even if it is not an 'unnatural' condition, as it is to Marx, who believes that the worker always 'naturally' and rightfully has a property in the labour of his person. In particular, the Marxist concept of alienation is limited in relation to the new reproductive technologies by Marx's own belief that women's reproductive labour lies outside the realm of productive work. What women do, in giving life, is, to Marx, like what the earth does: it is natural, not social, and it cannot confer added value. Perhaps those who fail to see how much added value women impart in the new reproductive technologies are secret Marxists: at any rate, they seem to share the same blind spot.

Pressing the Marxist distinction between labour and work further, Hannah Arendt writes: 'The mark of all laboring is that it leaves nothing behind': it is mere futile repetition of the effort necessary to sustain life, even though life itself depends upon it.⁷⁹ Arendt contrasts the *animal laborans* with *homo faber*, who transcends the endless cycle of grim necessity through creative and productive work. 'Unlike the productivity of work, which adds new objects to the human artifice, the productivity of labor power produces objects only incidentally and is primarily concerned with the means of its own reproduction . . . it never "produces" anything but life.'⁸⁰ In this analysis, women's labour in childbirth might epitomise the round of endless reproduction of life, the curse of Eve, rather than creative, value-adding work. But even if that much is granted, what women do in labouring for the new reproductive technologies is clearly productive work, not 'merely' reproductive labour. 'New objects to the human artifice' – stem cell technologies, the apotheosis of scientific progress

⁷⁷ Ann Ferguson, *Sexual Democracy: Women, Oppression and Revolution* (Boulder, CO, Westview Press, 1991).

⁷⁸ For a more extended discussion of this point, see my 'Property and women's alienation from their own reproductive labour' (2001) 15(3) *Bioethics* 203–17.

⁷⁹ Hannah Arendt, *The Human Condition* (2nd edn, Chicago, University of Chicago Press, 1998), p. 87.

⁸⁰ Arendt, *The Human Condition*, p. 88.

to many commentators – depend on the work and value generated by women's contribution of extracted ova.

The French feminist Christine Delphy has added to classical Marxism an explanation of why women are not seen to own their reproductive labour, and why their labour can be properly regarded as alienated. In what she calls 'domestic relations of production', women produce value but receive no share in it. Indeed, in conventional Marxism, domestic work which supposedly produces no exchange value, such as cooking for one's family, is actually regarded as consumption and not as production at all. To call women's domestic labour consumption rather than production, Delphy says, ignores the question of why what women produce is not seen as adding value, even when products such as food would have exchange value if purchased in the marketplace. (We encountered a similar question in relation to the Athenian household, illustrating once more that women's propertylessness in their labour is not confined to capitalism.) Thus, as Delphy writes:

[F]ar from it being the nature of the work performed by women which explains their [women's] relationship to production, it is their relations of production which explain why their work is excluded from the realm of value. It is women as economic agents who are excluded from the (exchange) market, not what they produce.⁸¹

In what Waldby and Mitchell call the 'tissue economies' of late capitalism,⁸² we are now witnessing the extraction of surplus value from women's reproductive labour, or the extrapolation from women's propertylessness under the domestic mode of production even when the production is no longer domestic. The products of women's bodies are commodified, gaining tremendously in value, but women's contribution to that use-value is not recognised in the marketplace because it is viewed under the same rubric as 'home production'. What women do in providing reproductive tissue for the new biotechnologies is implicitly viewed as no different from the 'natural', non-market processes of pregnancy and childbirth. Yet there is nothing remotely 'natural' about the processes of ovarian stimulation and egg extraction, as I shall demonstrate in the next chapter.

By preserving women's domestic labour as the unpolluted realm free of market forces, writes the feminist historian Leonore Davidoff, early capitalism conducted a 'struggle to keep unlimited calculation from creeping

⁸¹ Christine Delphy, *Close to Home: A Materialist Analysis of Women's Oppression* (D. Leonard (tr. and ed.), London, Hutchinson with the Explorations in Feminism Collective, 1984).

⁸² Catherine Waldby and Robert Mitchell, *Tissue Economies: Blood, Organs and Cell Lines in Late Capitalism* (Durham, NC, Duke University Press, 2006).

into every sphere of life'.⁸³ In late capitalism we see the same process at work, using a feminist Marxist analysis: by refusing to recognise that women's reproductive labour in fact produces material of tremendous value in the marketplace. The commodification of women's reproductive tissue, ironically, can proceed unfettered so long as we refuse to recognise women's reproductive labour as being capable of commodification. Bioethicists have rightly been concerned to preserve some space free of commodification, but this is not the way to do it. In the succeeding chapters, I now want to ask what *is* the right way to do it.

⁸³ Leonore Davidoff, 'The rationalisation of housework' in *Worlds Between: Historical Perspectives on Gender and Class* (Cambridge, Polity Press, 1995), p. 83.