Elvis' Fame: The Commodity Form and the Form of the Person

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*no picture is made to endure nor to live with
but it is made to sell and sell quickly¹*

In honoring Wolfgang Holdheim with this *Festschrift*, we are also, I think, honoring two institutions to which he devoted his life. One is the system of graduate education in the United States, which made it possible for non-Americans like me (and for students, Americans, and foreigners alike, who had no financial resources) to receive an education of extraordinary quality. The second is the discipline of Comparative Literature, of which Wolfgang was so eminent a practitioner, and especially that tradition of Comparative Literature which was formed around a generation of refugees from Nazism. From Wolfgang and from the discipline he taught, I learned a set of rigorous standards of scholarship and an ethos of theoretical reflection which have been formative for my work. They also opened my mind to a practice of interdisciplinarity which has taken me in unexpected directions — not the least of them the strange pathways of the law.

This essay is part of a larger project in which I examine the line drawn between the domains of the gift and the commodity in contemporary capitalist societies, and in which I try to specify the logic (or the conflicting logics) that allow it to be drawn at a particular point. My focus is the category of the person insofar as it is both a key support of the institution of private property and in some respects its opposite. I examine some of the struggles that are taking place to commodify aspects of this category that were previously uncommodified, and I ask whether and why it matters that they should be reserved from commodification. In trying to map these shifts in the status of the person, I make extensive use of changes in legal doctrine, since they offer a relatively precise way of tracing and documenting an often diffuse and generalized process of social change. Since the law is never a simple reflection or instrument of socio-economic

processes, it can register with detailed exactitude the slow historical transformation of social categories.

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The commodity form is a social relationship, and a commodity is anything that is governed by it. In the banal usage of neoclassical economics, however, the social texture of the commodity is erased: the word comes to designate any object produced for use or exchange, or it is given the specialized sense of an unelaborated primary product, or else it is displaced by the unspecific term "goods." A generalized abstraction, it loses all its historicity and its social particularity.

Without simply juxtaposing to this usage a Marxist definition of the commodity form (since that definition is part of the problem I shall be exploring), I want nevertheless to call upon certain aspects of Marxism's relational and historical theorization of the commodity. In its simplest form, the Marxist concept of the commodity refers to things produced for exchange rather than for immediate use; in this broad sense, the commodity is to be found (although episodically rather than as a dominant form) in many pre-capitalist societies. In its more complex definition, the concept refers to a matrix of conditions of exchange (the capitalist market), conditions of production (capital investment and wage labor, which is itself a commodity at another level), and conditions of consumption (private rather than collective appropriation of goods). Whatever the problems raised by this definition,² it has the great virtue of enabling analytic differentiation between historical systems, and between stages or levels of particular systems.

The classic historical studies of commodification have been directed to land, labor, money, risk, and art. It is the interlocking commodification of land and labor, which, by offering an explanation for the formation of a new class of landless laborers and for the primitive accumulation that generated capital for the industrialization of farming, for petty commodity production, and for industrial capitalism, has provided the key narrative of the rise of the capitalist mode of production. The clean lines of this narrative are necessarily complicated by the length and complexity of the "transition," by the role of mercantilism in the 16th and 17th centuries, and by the major importance of plantation agriculture and the slave trade

(the commodification of persons) in the 18th century, which recent historians are now more likely to see as the decisive factor in the provision of capital for the industrial revolution.

In England, the commodification of land, the demise of serfdom, and the development of a wage labor system seem all to have been in place by about 1400, and the English legal system was fully mature by the end of the 13th century. Although feudal property is based in the legal fiction of the mutually obligating gift (the "fee" or "feud") from sovereign to lord and so on down the line, and although the transfer of property was, until well into the 18th century, hedged by the restrictions of entail, it nevertheless does seem that land could be bought and sold with relative ease since at least the 13th century. What is clear in the long term is a movement from one form of property right (the very limited rights of exclusion given by feudal law throughout medieval Europe, qualified as they are by communal rights of grazing, rights to collect the fruits of nature, rights of turbary and so on) to a Blackstonean conception of property as *essentially* the right to exclude all others. The enclosure movement, which in England lasts from the 15th to the 19th centuries, represents the practical reworking of communal and customary notions of property, and it is both reflected in and furthered by the legal transformation. E.P. Thompson writes that "what was happening, from the time of Coke to that of Blackstone, was a hardening and concretion of the notion of property in land" and he characterizes the enclosure movement as "a wholesale transformation of agrarian practices, in which rights are assigned away from users and in which ancient feudal title is richly compensated in its translation into capitalist property right."³ This commodification of real property is the model for the extension of exclusive property rights to other forms of value, and as the legal historian George Armstrong argues, "the expansion of commodification to include ever more forms of value fosters an ideology supportive of this process so that stable ownership, the right to exclude and to alienate, are no longer the characteristics of some forms of value, they are a social expectation for all forms of value."⁴

The history of the capitalist mode of production is, on this account, a history of the progressive extension of the commodity form to new spheres. The most succinct formulation I know of this historical logic is Wallerstein's statement that capitalism's endless drive to accumulate capital "pushes towards the commodification of everything."⁵ Kloppenburg

similarly speaks of capitalism's "progressive generalization of the commodity form," and explains why this is a process without end:

The apparent ubiquity of commodities should not blind us to the fact that capital constantly seeks to force *all* use-values to submit to the commodity form and to convert simple commodity production to capitalist commodity production wherever and whenever it can. Indeed, primitive accumulation may be a *permanent* process, because capital systematically seeks not only to make a commodity of all use-values but also to create *new* needs whose satisfaction entails new use-values that in turn can be commodified.⁶

This is a stark narrative of a logic of historical tendency — a teleological narrative of the kind that we have come deeply to distrust. Can it be called into question by counter-examples of processes of *de*-commodification?

Several such examples come to mind. Perhaps the most powerful is the abolition (in principle, if not everywhere in practice) of slavery — that is, of the treatment of human beings as chattels to be bought and sold. This genuine act of decommodification must, however, be understood comparatively in its historical relation to the development of wage labor. A second example is the abolition of the sale of political office and of bureaucratic appointments which characterized most political regimes before the 20th century; what has changed is perhaps not so much the practice as its public acceptability. Other examples might include the partial decommodification of labor and of housing through state regulation of the conditions of work and of rental contracts;⁷ or the "sentimentalization" of love and of nature as a kind of paradoxical counter to the commodification of other domains. It is crucial to remember, too, that every extension of the commodity form has been met with resistance and often with reversals; the struggles over enclosure, over the length of the working day, and over the privatization of common resources of many kinds are central to the global development of capitalism. Yet none of this seems to undermine the narrative of a progressive extension of commodification: these counter-examples qualify it, they deny it any ineluctability, but the logic of historical tendency, however uneven, however checked, and

however multiply determined, retains its force. (To speak of "logic" is not, of course, to invoke a mysterious and autonomous spirit of history; the word is a shorthand for the organization of a system structured around the dynamic increase of wealth in the cycle of capital investment under very specific historical conditions. I assume that capitalism *is* a system — rather than a contingent aggregate of circumstances — but not that its logic is either totalizing, affecting all aspects of social life in the same way, or that it possesses any pregiven necessity.)

The real difficulty seems to me to lie elsewhere. It has to do with questions of interpretation and value: what are we to *make* of this narrative? Is the commodity form necessarily and always less humanly beneficial than noncommodified use values, and is its historical extension necessarily and under all circumstances a change for the worse?

In one sense this is an unmanageably vast question, tantamount to asking what we are to make of the history of the modern world: of the transformation of peasant agriculture and traditional ways of life, of the organization of work as paid labor, of the creation of global markets in commodities and capital — of almost all of the conditions of capitalist modernity. But the question can also be posed more narrowly. Let me do so by talking about a specific example.

In the early 1970's, a "new" mode of painting emerged among the Aboriginal people of the Australian Western Desert. It was the product of a curious syncretism: a young white schoolteacher, Geoff Bardon, introduced acrylic paints to the Papunya community, and the medium was then adopted by the older men — first for the completion of a school mural in the traditional rock-painting style, then for use on plywood and linoleum, and finally, as a market began to develop for this work, for painting on stretched canvas.⁸ But this style, the acrylic dot-painting known as *Papunya Tula* (which later in the 1970's was taken up and modified by other Western Desert communities, especially at Yuendumu) is syncretistic as well in its fusion of a series of cultural functions that we would probably call "religious" and a series of aesthetic functions which organize its value within the Western art market and endow it with author functions and values of "authenticity" that are largely irrelevant to its initial context.⁹ In a sense the market success of this style is based on an immensely productive mistake: despite its recontextualization within the Western art system, the concerns of its producers are with a communal

enterprise that has to do with the "territorial" mapping of the sacred, with the authorization and coding of the knowledges conveyed by such mapping, with iconology rather than formal pattern (or rather this opposition becomes unworkable), and with the elaboration of a form of access for outsiders which at once reveals the knowledge of the Dreaming and conceals its secrets.

At another level, however, there is no mistake: the art of the Western Desert is a major source of income for these desperately poor communities, it was called into being by the formation of markets for it (and by the marketing activities of white advisers, community art cooperatives and specialist dealers in Alice Springs and Sydney), and it is sustained by its commodity status. As Anderson and Dussart argue, "If non-Aborigines stopped buying the paintings, the Aborigines would stop producing them."¹⁰ Although this is not tourist art, there are similar stories to be told about the formation of both markets and skills for indigenous art (as well as the application of the category of "art" itself) throughout the world.¹¹

Of course it is possible to express reservations about this process. Anderson and Dussart argue that acrylic painting "to some extent converts religious art into a commodity, thereby alienating the art from religious practice;" the result is that "Aboriginal painters are now confronted with the alien notion of a form of personal expression that overrides ancestral heritage and obligations" and that there is thus "an increasing identification of and association with paintings not just as depictions of Dreamings, but also as individual creations and professional achievements."¹² But this language of alienation belongs to precisely the same metaphysics of the person as does the concept of "individual creation" which they are here rejecting, and there is little evidence that Aboriginal people have found the tension between religious practice and the art market unmanageable. To the contrary, they seem to have managed it with remarkable grace and irony.

The conclusion I draw from this fable is that the commodity form has the potential to be enabling and productive, as well as limiting and destructive. Historically, it has almost always been both of these things at the same time, and the balance of gain and loss has rarely been easy to draw. Why is this so?

The commodity form does three things. First, it channels resources of capital into an area of production in order to expand it to its fullest capac-

ity,¹³ at the same time destroying all productive activities which are not themselves commodified. Second, it transforms the purpose of production away from the particular qualities of the thing produced and towards the generation of profit; production is the indifferent medium for capital valorization, and the qualities of the thing produced are incidental to this end. Third, it transforms previously or potentially common resources (both raw materials and final products) into private resources; the allocation of these resources normally takes place according to economic criteria (ability to pay rather than moral or civic entitlement), and it may be either restrictive or expansive in its effects. In the case of most cultural production — for example of books, perhaps the oldest of all commodities, or of movies, which would not have come into being without extensive capital investment — the effects of commodification have been massively expansive.¹⁴

The commodification of culture, as of any other domain, does not happen in a single stroke (and this is why there are such great difficulties in periodizing the process).¹⁵ Rather, it takes place on a number of different semiotic levels corresponding to different historical “stages.” In the case of printed texts, we could distinguish between an initial commodification of the material object (“the book”), virtually coeval with the invention of the printing press;¹⁶ a second stage of commodification of the information contained within the material object (and conceptualized in legal doctrine as “the work”), of which the major historical expression is the development in the 18th century of copyright law and the modern system of authorship;¹⁷ and a third, contemporary moment, developed in relation to electronically stored information, which, in addition to the copyrighted information itself, commodifies access to that information. These are “stages” in the sense that this sequence is normally progressive (although it may be condensed and is by no means uniform in its effects), and corresponds both to an application of property rights to increasingly immaterial entities and to the development of markets which are increasingly fine-grained in their scope. Each of these moments is, paradoxically, at once a way of restricting the use of the commodity and of expanding its controlled use to as broad an audience as possible.

If it is true that the commodification of cultural objects is a process that extends, in a series of movements, over many centuries, then the theoretical commonplace that locates this process exclusively or largely in the

20th century refers to something rather different: on the one hand, to the development of major new cultural industries in this period (radio, the movies, broadcast and narrowcast television, video games, and the Internet); on the other, to the industrialization, or to the more intensive industrialization, of traditional areas of cultural production (mass-market paperback books, recorded music, and mechanically reproduced images). Industrialization is not the same thing as commodification, although the two are closely intertwined. The Romantic and post-Romantic critique of the commodity form is perhaps more properly seen as a critique of the serial and formulaic mode of industrialized mass-cultural production, to which it opposes the singularity and originality that is thought to characterize authentic art forms — a singularity and originality which, with a perverse irony, have come to be central to the system of authorship, the drive to signature as scarcity value, that organizes the second major moment of the commodification of culture.

Such an ethically and, ultimately, aesthetically grounded critique has been integral to the Marxist conceptualization of the commodity form. There are two major strands in this tradition. The first is centered on the concept of alienation (*Entfremdung*) and derives from the Schillerian category of labor in Marx's early writings, which represents an ideal of self-directed and self-realizing activity.¹⁸ The separation of workers from the means of production and their reinsertion into a system where they have no control over either the process of work or its product have the effect, Marx argues, of constructing both the product and the capacity for work itself as something separate from the worker's human powers, their being as a subject. This separation is expressed through the recurrent metaphor of the process of *Vergegenständlichung*, "objectification": the process by which something that belongs to me or is produced by me as subject comes to "stand over against" me, taking on a life of its own, confronting me as an alien and threatening force.¹⁹ In this line of argument, it is labor itself that figures crucially as a commodity, and the threat posed by commodification is its destruction of that activity which is most essentially human.

The second major strand of Marxist thinking about the commodity is centered on the concept of commodity fetishism, which is again a concept of objectification. The threat here is epistemological: with the advent of widespread commodification, the social relation between people which

is the reality of human work and exchange comes to assume the "fantastic" form of a relation between things. The structure of the commodity, in which local and specific use value is subordinated to the abstract universality of exchange value, effects a mystified conversion of "the social characteristics of men's own labor" into what seem to be "objective characteristics of the products of labor themselves."²⁰ Persons and things both become thinglike, and the causal relation between work and value is inverted. This strand is clearly continuous with the first, but whereas the concept of alienation foregrounds a transcendental notion of the person, the concept of commodity fetishism turns its focus to the opposition between a simple and a complex social relation: an opposition between the immediacy of relations among direct producers of use values, and the highly mediated and abstract structure of commodity relations.

Both of these strands are taken over into Lukács' influential theorization of the commodity form in *History and Class Consciousness*. The concept of reification (*Verdinglichung*) at first follows closely Marx's account of commodity fetishism in describing the transformation of labor into an objectified, alien, and autonomous force drawn from and inverting the concrete materiality of work. But it then merges with two concepts taken from Simmel and Weber: respectively, those of abstraction and rationalization. The objectification of alienated human labor as an exchangeable commodity involves a process of abstraction that corresponds to the abstract universality of the commodity form. In one respect, this is a matter of the construction of a formal equivalence between an open series of quite dissimilar use values; at the same time, however, the nature of work itself is transformed as it is subjected to "a continuous trend towards greater rationalization, the progressive elimination of the qualitative, human and individual attributes of the worker."²¹ This trend (the shorthand name for which is Taylorism) breaks the process of labor down into "abstract, rational, specialized operations so that the worker loses contact with the finished product and his work is reduced to the mechanical repetition of a specialized set of actions."²² Calculation and specialization are the two instruments through which the "rationality" of the capitalist production process is asserted. By these means, the organic unity of the thing produced is broken down into a synthetic unity of arbitrarily connected parts, and the dynamic and qualitative movement of time is frozen into "an exactly delimited, quantifiable continuum filled with quantifiable

'things,'"²³ and the subject form itself is fragmented in the quantification and specialization of the work process.

Lukács' rhetoric, which flows through to the writings of the Frankfurt School and its successors, has the nostalgic structure of all of the great post-romantic binarisms that oppose a state of immediacy to a state of mediation (i.e., the authentic to the inauthentic, the organic to the mechanical, nonreflexive experience to abstract rationality). The commodification process conceals "the immediate — qualitative and material — character of things as things," their "original and authentic substantiality,"²⁴ and it replaces "natural" and "personal"²⁵ relations with relations that are "more complex and less direct."²⁶ Complex and highly mediated systems are taken to be inherently incompatible with human value. Insofar as the Marxist account of the commodity form is an analysis of semiotic value, its tendency is to oppose use value to exchange value as matter to representation, and as immediacy to mediation.²⁷ More broadly, despite the force of its historical and relational conception of the commodity form, its conceptual ground is a myth of presence which leads it to understand this form on the one hand as the alienation of the integrity of the person, and on the other as the replacement of the simplicity, transparency and immediacy of use value with a complex system of representations. The opposition of the commodity to the gift is a subset of this dichotomy, and the question that I now pose is whether it is possible to untie the theorization of the commodity form from these assumptions.

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That question is taken up more concretely in the case studies around which the later part of this essay is organized. Before I come to them (and to a more detailed consideration of the category of the person), I want to broach a model of the commodity form that problematizes its stability in relation to the material things that it regulates.

Within the framework of the broadly anthropological model developed by Arjun Appadurai, Igor Kopytoff and others in *The Social Life of Things*, the commodity form is not restricted to capitalism. It is fully distinct neither from barter nor from the gift, in so far as there is a "calculative dimension in all these forms of exchange."²⁸ If the commodity is defined in terms of a *situation*, in which "its exchangeability (past, pre-

sent, or future) for some other thing is its socially relevant feature," then all things are potentially commodities.²⁹ Objects can therefore move, under the appropriate circumstances, in and out of the commodity state (that is, between use value and exchange value).

The notion of a movement *out* of the commodity state makes it necessary to posit a counter-logic to that of commodification, a logic of de- or anti-commodification that would specify which things are to be precluded from commodity status. In state societies there are restrictions on the disposal of state property (such as public lands, monuments, state art collections, the paraphernalia of political power, royal residences, chiefly insignia, and ritual objects). There may be a highly delimited and specialized domain of objects available to be exchanged, or there may be some form of "terminal commoditization," in which further exchange is precluded by fiat: personalized or prescription medicines would be one example, indulgences sold by the Catholic Church would be another. In general, however, "the fact that an object is bought or exchanged says nothing about its subsequent status and whether it will remain a commodity or not." Thus, slaves will not necessarily remain so, or necessarily do degrading work (they exist as *pure* commodities only at the moment of sale).³⁰

Unless they are formally decommodified, however, "commoditized things remain potential commodities — they continue to have an exchange value, even if they have been effectively withdrawn from their exchange sphere and deactivated, so to speak, as commodities."³¹ If, as Appadurai argues, "it is typical that objects which represent aesthetic elaboration and objects that serve as *sacra* are, in many societies, not permitted to occupy the commodity state (either temporally, socially, or definitionally) for very long," this is because there is a "perennial and universal tug-of-war between the tendency of all economies to expand the jurisdiction of commoditization and of all cultures to restrict it."³²

The question this raises is of the extent to which the logic of the "cultural" is able to restrict the logic of the economic; and of the possibilities of movement out of the commodity state. To what extent, for example, can cognitive, ethical, affective, and aesthetic processes resist commodification — for example, the commodification of knowledge in industry, of ethical decision in professional or commercial relations, of affect in service work,³³ and of the aesthetic in commercially available works of art?

And what sort of value judgement should be made of these processes?

In advanced capitalist societies it has now become difficult to separate the commodification of material from that of immaterial goods, including such "services" as knowledge and feelings. Certainly there are still firmly defined non-commodity spheres in our society (i.e., marriage, social exchanges, exchanges of personal or professional favors are all non-monetized, although this exemption is in many ways an ideology; the status of women in marriage, for example, is hardly to be thought outside of a model of property);³⁴ and there is certainly a culturally specific moral concern in the West "about the commoditization of human attributes such as labor, intellect, or creativity, or, more recently, human organs, female reproductive capacity, and ova."³⁵ At the same time, however, there are a number of areas of increasing uncertainty, including that of the aesthetic, especially in its growing integration into advertising and marketing. Professional sports, to take a different example, have become highly commercialized in the last twenty years and have not yet resolved many of the ethical dilemmas posed by the saleability of skills in the context of an overriding importance placed on successful performance. It is perhaps this ambivalence, or this sense of a tension between countervailing forces, that now most precisely characterizes the status, midway between the private and the publicly saleable, of that set of attributes of "the person" and the personal which have defined in our society the protected domain of the human.

In this respect, Kopytoff has pointed to cultural strategies of singularization (for example of sacred objects) or re-singularization as one of the key mechanisms for movement out of the commodity state. One of the distinctive features of complex societies, he writes,

is that their publicly recognized commoditization operates side by side with innumerable schemes of valuation and singularization devised by individuals, social categories, and groups, and these schemes stand in unresolvable conflict with public commoditization as well as with one another.... There is clearly a yearning for singularization in complex societies. Much of it is satisfied individually, by private singularization, often on principles as mundane as the one that governs the fate of heirlooms

and old slippers alike — the longevity of the relation assimilates them in some sense to the person and makes parting from them unthinkable.³⁶

It is on this principle that the valorization of old objects such as cars or houses functions as a singularization that moves its objects out of their commodity status. The odd result of such moves, however, is that the process of singularization may in fact enhance the object's exchange value. It is the singularity of the signature that guarantees aesthetic value and, by direct extension, monetary value. By analogy, the gentrification of degraded housing stock can be understood through an ideology of personal, as opposed to financial, investment, and conceived as a positive aesthetic or historical project; but it tends to result in the paradox that this personal investment ("sweat capital") may well turn out to have constituted a shrewd financial speculation, thereby undermining precisely the singularity that justified the project in the first place.³⁷

Appadurai gives a number of other examples of the diversion of objects back into the trajectory of the commodity. These include economic hardship (leading to the commodification of household possessions), war and plunder (which function as the inverse of trade), and theft. A somewhat different example is that of tourist art, "in which objects produced for aesthetic, ceremonial, or sumptuary use in small, face-to-face communities are transformed culturally, economically, and socially by the tastes, markets, and ideologies of larger economies."³⁸ But perhaps the most interesting examples from contemporary culture of the diversion of commodities from their original nexus can be found

in the domain of fashion, domestic display, and collecting in the modern West. In the high-tech look inspired by the Bauhaus, the functionality of factories, warehouses, and workplaces is diverted to household aesthetics. The uniforms of various occupations are turned into the vocabulary of costume. In the logic of found art, the everyday commodity is framed and aestheticized.... It is the aesthetics of decontextualization (itself driven by the quest for novelty) that is at the heart of the display, in highbrow Western homes, of the tools and artifacts of the "other": the Turkmen saddlebag, Masai spear, Dinka bas-

ket. In these objects, we see not only the equation of the authentic with the exotic everyday object, but also the aesthetics of diversion. Such diversion is not only an instrument of decommodification of the object, but also of the (potential) intensification of commoditization by the enhancement of value attendant upon its diversion.³⁹

As one of the strongest manifestations of this twist, we should note the paradox that the concept of the unique and self-determining person — precisely what seems most to *resist* the commodity form — lies at the basis of the values of “singularity” and “originality” that have come to be central to the market in industrially produced aesthetic goods, and underlies the commodification of knowledge in many areas of intellectual property law.⁴⁰

Let me recall here my initial distinction between two kinds of cultural context governing the status of things in exchange: the moral economy of the gift, and the marketplace in which commodities are bought and sold. The corollary stress laid by Appadurai and Kopytoff on the possibilities of movement between different contexts makes it difficult to continue using the notion of the commodity form as a sign of essential identity.⁴¹ Thus, whereas the whole logic of Lukács’ argument⁴² is that the commodification of labor and of goods entails an ineluctable process of historical decline (which can be transformed only in the moment of revolution) and a progressive contamination of all other areas of life, we might argue instead that while commodification has definite effects upon persons and goods, it does not affect them in their totality: my labor power is bought and sold on the market, but my value as a moral person is not thereby necessarily degraded; an acrylic dot-painting from the Western Desert will continue to have valid religious and aesthetic functions despite its production directly for the market (it is made “to sell and sell quickly,” but it is *also* made “to endure [and] to live with”). Jane Gaines puts it this way, drawing an analogy from discourse theory: “We understand, primarily from Volosinov, that although the sign may have an existence as a commodity, it may have another life and another meaning, and it may well have had a past life — a separate history which is not cancelled out by its life as a commodity.”⁴³ This is not to argue, however, that the social destinies of things are purely indeterminate, or that they possess an inner

force that drives them to resist the limitations of context: the production of things for specific uses will tend to exercise a determinate constraint upon their destinies, and their entry into different social contexts is a matter of the multiplication and complication, rather than the absence, of determinations.

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In seeking to define what it is that underlies the logic of decommodification and singularization, Appadurai and Kopytoff invoke, at various times, the categories of culture and the person. In societies characterized by a high degree of commodification, however, neither of these can be situated unproblematically as the opposite of the commodity form.

In one of the most thoughtful recent discussions of the limits of commodification, Margaret Radin proposes the concept of *market-inalienability* as a way of exploring the scope of that domain of rights or things that, like Annette Weiner's "inalienable possessions,"⁴⁴ can be given away but not alienated by sale in the market. This domain includes personal attributes and the integrity of the body, sacred objects, and kinship relations. The kinds of things that test its limits are, for example, the possibilities of creating a market in babies or in fetal gestational services, the sale of blood, of human organs, or of sexual services, or the payment of "amateur" athletes.⁴⁵

Radin's point of reference is the tradition of Western liberalism, with its simultaneous (and potentially contradictory) belief that the right to hold property is inalienably given, but that any particular property rights ought in principle to be able to be freely disposed of in the market. It is this potential contradiction that gives rise to neoliberal economic analysis, which implicitly challenges the distinction between inalienable and alienable rights and has thereby "invited markets to fill the social universe."⁴⁶ Economic analysis is a vision of universal commodification: all human interactions are understood as sales and are subject to a cost-benefit analysis, and market trading represents an ideal of human freedom. Laissez-faire markets are presumptively efficient because, "under universal commodification, voluntary transfers are presumed to maximize gains from trade, and all human interactions are characterizable as trades. Laissez-faire also presumptively expresses freedom, because freedom is

defined as free choices of the person seen as trader.”⁴⁷ As an example of the workings of this model, Radin cites Richard Posner’s application of a market rhetoric to the analysis of rape, where he writes that “[t]he prohibition against rape is to the marriage and sex ‘market’ as the prohibition against theft is to explicit markets in goods and services.”⁴⁸

Against this tradition, Radin sets the vision of universal noncommodification that has largely been the province of Marxism. Covering much the same ground as I did above, she concludes that there is little scope for a concept of market-inalienability in Marxist thought, since the concept “posits a nonmarket realm that appropriately coexists with a market realm, and this implicitly grants some legitimacy to market transactions.”⁴⁹ More broadly, she argues that for both evolutionary and revolutionary (socialist and Marxist) versions of universal noncommodification, the problem of transition from a market to a non-market society poses severe difficulties: a gradualist approach will need to make use of market structures, which may undermine the eventual goal, and an approach that stakes everything on the moment of revolution can guarantee neither an instantaneous transition to non-market relations, nor that a principled decommodification during the transition process will not wreak injustice.⁵⁰

What Radin wants to take from the argument for universal noncommodification is not practical politics but an understanding of the effectivity of market rhetoric as a force in its own right. To do this, she sets up her own version of the relation between alienable and inalienable possessions. Distinguishing between “fungible” forms of property (property that is readily exchangeable for money) and “personal” forms (property that has become identified with the core of a person’s identity),⁵¹ she suggests that market rhetoric treats bodily integrity as a fungible object, replaceable with money and able to be alienated without affecting the person. But “thinking of rape in market rhetoric implicitly conceives of as fungible something that we know to be personal, in fact conceives of as fungible property something we know to be too personal even to be personal property. Bodily integrity is an attribute and not an object, and to treat it as such is inherently degrading.”⁵² In making it easier both to envisage and to countenance the loss of personal attributes, the rhetoric of the market represents an “inferior conception of human flourishing.”⁵³ In Posner’s cost-benefit analysis of rape, which weighs the “benefits” to the rapist

against the "costs" to the person raped, for example, "the 'pleasure' and 'satisfaction' of maintaining one's bodily integrity is commensurate with the 'pleasure' and 'satisfaction' of someone who invades it. Thus, there could be circumstances in which the satisfactions or 'value' to rapists would outweigh the costs or 'disvalue' to victims. In those situations rape would not be morally wrong and might instead be morally commendable."⁵⁴ The idea of the fungibility of personal attributes is incompatible with the idea of human uniqueness, and in its extreme form can comprehend human freedom only in terms of the activity of "buying and selling commodified objects in order to maximize monetizable wealth."⁵⁵

Much of Radin's article is made up of a detailed and rigorous analysis of the philosophical infrastructure of liberal pluralism, which with its negative conception of liberty (liberty as the freedom of individuals to act as they choose as long as no others are harmed) and its constitutive notion of property (social personhood flows from a primordial self-possession, a property right in one's self) assumes both that buying and selling constitute acts of freedom or enhance freedom, and that inalienabilities (restrictions on the market) are paternalistic limitations on freedom. Within this schema there is no secure place for the fundamental inalienability that applies to the freedom of the person itself. Hence, the difficulty that Mill finds in arguing against the freedom to sell oneself into slavery.

What Radin gets at nicely, in other words, is the economic core of the liberal conception of the person, as well as its complicity with some of the uglier aspects of neoliberal economics. She is able to counterpose to it, however, at most the *assertion* of a countervailing conception of "human flourishing." This conception, which she bases in a "positive" notion of human liberty that includes human self-development as a central component, requires us to decide "what market-inalienabilities are justified by the need to protect and foster personhood," and to work out "why these inalienabilities seem to us to be freedom enhancing."⁵⁶ At its heart is an argument that both personal attributes and the contexts within which development is realized (politics, work, religion, family, love and sexuality, moral commitment, etc.) are integral to selfhood and should therefore not be treated as full commodities. To conceive either of attributes or the "things" that are extensions of our personhood as detachable parts of our self is to assume

that persons cannot freely give of themselves to others. At best they can bestow commodities. At worst — in universal commodification — the gift is conceived of as a bargain. Conceiving of gifts as bargains not only conceives of what is personal as fungible, it also endorses the picture of persons as profit-maximizers. A better view of personhood should conceive of gifts not as disguised sales, but rather as expressions of the interrelationships between the self and others. To relinquish something to someone else by gift is to give of yourself. Such a gift takes place within a personal relationship with the recipient, or else it creates one. Commodification stresses separateness both between ourselves and our things and between ourselves and other people... [G]ifts diminish separateness.⁵⁷

Radin does not, however, espouse a theory of total decommodification. Unlike various other proposals for checking the commodification of personal attributes and relations — what she calls a “prohibition theory,” which “stresses the wrongness of commodification — its alienation and degradation of the person,” and a “domino theory,” which “stresses the rightness of noncommodification in creating the social context for the proper expression and fostering of personhood”⁵⁸ — she rejects the assumption that processes of commodification are totalizing in their effects. The corollary of this argument is then that incomplete or limited commodification (for example, the social regulation of markets in labor, housing and tenancy) may in many circumstances be the most effective check on alienation, and “can sometimes substitute for a complete non-commodification that might accord with our ideals but cause too much harm in our nonideal world.”⁵⁹ The question of the desirability and extent of decommodification can only be decided on a case by case basis, and the remainder of Radin’s essay is devoted to analyzing the ethical, legal and political complexities that beset the actual or potential commodification of three aspects of sexuality and reproductive capacity: sex itself (prostitution), the sale of babies, and the sale of surrogacy services.⁶⁰

The major weakness of Radin’s argument is that in asserting the category of personhood against liberalism, she is insufficiently attentive to

the central role that personhood already plays there as a category of property. "The person" is neither a real core of selfhood nor a transcendental principle that inherently resists being alienated in the market, because it is always the *product* of the social relations formed by the distinction between alienable and inalienable possessions. Nor is it simply on the side of the latter: what Marilyn Strathern calls "Western proprietism"⁶¹ is based on self-possession, a primordial property right in the self which then grounds all other property rights. "The person" is at once the opposite of the commodity form *and its condition of existence*, and in some cases (which I discuss below) enters directly into its philosophical rationale. Let me now make this argument more explicit by introducing two case studies.

* * * * *

In 1991 the Human Genome Diversity Project was initiated as — amongst other things — a response to the criticism that its parent, the Human Genome Project (HUGO) which is currently in the process of mapping the entirety of the human gene system, takes as its norm a standardized model of European genetic material.⁶² In collecting DNA samples from hundreds of indigenous populations, including genetically isolated peoples such as the !Kung, the Hadza of Tanzania, the Yamomami, the Chukchi of Siberia, and the Onge from the Andaman islands off Malaysia, the Diversity Project hoped "to counteract in some measure the excessive standardization and parochialism associated with HUGO, while at the same time contributing to a further debunking of racial mythologies by showing the paramount importance of individual variation."⁶³

It has, however, been a contentious project. In a sense, there is already a contradiction in its deduction of genetically uniform populations from ethnic groups, since few socio-cultural groups have managed rigorously to block the advent of strangers through intermarriage and migration. Furthermore, the project's own starting point is the well-grounded assumption that genetic variation is much more marked at the level of the individual than at that of social and cultural demarcations: the concept of the genetic population, "far from being a readily definable natural fact, is a contested and pliable concept, created to assist in the answering of specific questions and hypotheses."⁶⁴ More immediately contentious, howev-

er, has been the project's focus on "unique, historically vital populations that are in danger of dying out or being assimilated"⁶⁵ — a focus dictated by the interests of collection rather than by concern for the fate of these peoples — and the issue of how "informed consent" could possibly be given by members of isolated tribal cultures with little knowledge either of Western scientific cosmologies or of the possibilities of commercial exploitation of their cell lines.

Commercial exploitation is, ultimately, the name of the game, and the crucial practical question is this: who owns the "immortal" cell lines developed from this sampling process? Indeed, is it conceivable that the genetic commons — the common genetic material of the human race — can be privatized for commercial gain? One group strongly critical of the Human Diversity Genome Project, the Rural Advancement Fund International, found in 1992 that "the American Type Culture Collection already contains 1094 human cell line entries, and patent applications have been made on more than one third of them."⁶⁶ In 1991, for example, the U.S. Government applied for a patent on the cells of an unnamed Guaymi woman. The Panamanian Guaymi carry the Human T-Lymphotropic Virus (HTLV-II), without apparent harm to themselves, and their DNA consequently has enormous medical potential. The community had, however, placed a veto on the taking of blood samples. The patent application was withdrawn after considerable international pressure, but was replaced in 1992 by two further applications for patents on the cells of individuals from Papua New Guinea and the Solomon Islands, each of them carriers of the HTLV-I virus.⁶⁷

Behind these applications stands a 1990 California Supreme Court decision that has been of singular importance in defining the questions of property rights in the human body that are at issue in the political debate over these patent applications. The decision opens up the most fundamental questions about the nature and legal status of the person and about the limits and consequences of private property.

John Moore, a Seattle businessman, was treated at the UCLA Medical Centre in 1976 for a rare disease of the blood called hairy-cell leukemia. In order to slow the progress of the disease, he underwent a splenectomy and signed a consent form for the operation. Moore explicitly excluded the option on the consent form that permitted the use of his tissue for the development of a cell line. Nonetheless, sections from the excised spleen

were sent to a research laboratory and used to establish a cell line. During subsequent visits to the hospital between 1976 and 1983 additional samples of blood, blood serum, skin, bone marrow aspirate, and sperm were removed. According to Moore, he was repeatedly assured by his doctor that these samples were to be used only for therapeutic purposes and had no research applications or commercial potential.

The "Mo" cell-line, which was developed some time before August 1979, did in fact have enormous commercial potential, estimated by one commentator to be worth approximately three billion dollars by the year 1990.⁶⁸ The line was established from Moore's T-lymphocytes — a type of white blood cells that produce proteins called lymphokines that regulate the immune system. The value of the cells in Moore's case was that his virus-infected lymphocytes overproduced lymphokines, thus drastically simplifying the needle-in-a-haystack process of locating the corresponding gene. A patent on the Mo cell line was applied for by the Regents of the University of California in 1981 and was granted in March 1984. Moore's physician, Dr. David Golde, and a researcher, Ms Shirley Quan, were recognized as the "inventors" of the cell line. Commercial development of the line was then undertaken by the Genetics Institute and the Swiss-based multinational Sandoz. Moore was not informed about any of this, and received no payment.

When he finally found out about the use that had been made of his body tissue,⁶⁹ Moore sued the Regents, Golde, Quan, Genetics Institute, and Sandoz, claiming that they had appropriated his own property. The secondary cause of action for breach of fiduciary duty on the part of the doctors was upheld by the Supreme Court, but the cause of action for "conversion" (defined as interference with "possessory and ownership interests in personal property") was not. The legal process was in fact a complex one: the lower court held against Moore, the Appeals Court supported him (with one substantial dissenting opinion), and the California Supreme Court found against him on the conversion cause of action with one partially concurring and partially dissenting opinion, and one fully dissenting opinion. More interesting than the actual outcome, perhaps, is the array of arguments marshalled around the question of whether Moore holds property rights in his own body.

At first sight, the Supreme Court's decision that he does not seems counter-intuitive: it goes against both "the strong naturalistic presump-

tion that one owns one's own body, and... the ethically unattractive behavior of Mr. Moore's doctors."⁷⁰ Indeed, one of the absurd consequences of the decision is that Sandoz, the owner of the very profitable patent in Moore's cell line, could in principle sue him were he to sell his own cells to another company.⁷¹ But the logic of the decision has to do with the fact that there are two different property claims in play here, and that both have to do with an entity, the human body, that has traditionally been excluded from commodification (or which, in the instance of slavery, has a shameful history of commodification). It is no accident, then, that many of the opinions and commentaries on the case deploy the rhetoric of the gift, of inalienable possession.

Thus, Justice Arabian, concurring with the Supreme Court majority, writes that Moore "has asked us to recognize and enforce a right to sell one's own body tissue *for profit*. He asks 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."⁷² Similarly, Justice George, dissenting from the Appeals Court majority, invokes the two major pieces of federal legislation governing the transfer of human tissue, both of which, he argues, allow such transfer only as a gift.⁷³ What these appeals to the sanctity of the human body overlook, however, is that one way or another Moore's body tissue is already and irreversibly a commodity: to deny a property right to Moore is to concede it to the patent-holders, and, as the Appeals Court majority bitingly points out, the "[d]efendants' position that plaintiff cannot own his tissue, but that they can, is fraught with irony."⁷⁴

Much of the opinion and commentary on the case stresses the unprecedented commercial value which the human body has recently acquired, and the challenge this poses to a corpus of legal doctrine predicated on the spiritual, but not material value of the body. The tendency of the Supreme Court is to apply a restrictive definition of what counts as property: since Moore would be prohibited from selling his tissue, he fails to meet one of the central principles in the bundle of rights that make up the property right, and so cannot claim his excised cells as "a species of tangible personal property capable of being converted."⁷⁵ Justice George, dissenting from the Appeals Court decision, similarly argues that "unlike the gizzards of domestic poultry... the spleens of human beings do not

come within the definition of 'goods' or 'chattels';" things must be able to be sold, inherited, seized in bankruptcy, and protected from invasion if they are to qualify as property.⁷⁶ Others argue, however, that the bundle of rights making up property is variable, and that alienability is not indispensable to it: I can be said to "own" prescription drugs or a professional license, for example, even though I cannot legally sell them. One frequently cited precedent for property rights in the body is the *Venner* case, in which a man whose feces were examined in a hospital for evidence of drugs secreted in a condom successfully asserted a continuing property right in waste matter from his body.⁷⁷ A "quasi-property" right in cadavers (sufficient to allow legitimate appropriation for the purpose of disposal) has been recognized since the 19th century,⁷⁸ and various other decisions and statutes recognise rights of disposal and exclusion. Jaffe gives particular weight to the right to exclude others, which has consistently been recognized as the central element in modern conceptions of property; on this view, the human body is the object of a "rather substantial bundle of rights, while falling short of full commercial ownership due to the limited right to sell."⁷⁹

Bernard Edelman argues in his commentary on the Appeals Court decision that *Moore* exposes a central absence in the Western legal tradition: its consistent repression of the relation between the person and their body. Bodies are conceived "from the outside" (as the object of assault, for example), but the legal subject — the subject of rights, of will, of legal standing — lacks any legal relation to its physical body. The one substantial precedent in Western law for property rights in the human body is the institution of slavery, and it is for this reason, Edelman argues, that the metaphor of slavery plays such a crucial role, as a kind of constitutive unease, in organizing the Court's discourse on the commodification of the body.⁸⁰ The Court writes, with a flourish of historical triumphalism, 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. There is, however, a dramatic difference between having property rights in one's own body and being the property of another. To our knowledge no public policy has ever been articulated, nor is there any statutory authority, against a property interest in one's own body."⁸¹ Justice Mosk, writing a dissent to the Supreme Court decision, likewise

derives the need for a legally protectable property interest in the body from the metaphor of slavery:

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. Lesser forms, such as indentured servitude or even debtors' prison, have also disappeared. Yet their spectre haunts the laboratories and boardrooms of today's biotechnological research-industrial complex. It arises wherever scientists or industrialists claim, as defendants claim here, the right to appropriate and exploit a patient's tissue for their sole economic benefit — the right, in other words, to freely mine or harvest valuable physical properties of the patient's body.⁸²

Justice Mosk's reference to the economic exploitation of the body "for the sole benefit of another person" indirectly raises (by avoiding it) the question of wage labor: that is, of the most widespread form in which the commodification of the body is expressed. The Appeals Court and Hardiman both refer explicitly to paid work as a source of value or profit,⁸³ and these references implicate that whole Lockean tradition that derives economic value from the fruits of human labor. To put this very simply: economic entitlement is deduced from the application of work to a raw material, where work expresses the creativity and uniqueness of the human person. Moore failed in his claim to the cell line because his contribution failed to qualify either as unique⁸⁴ or as creative work.

Justice George gives the most lucid expression of this dilemma, while he brings out with great clarity its aesthetic dimension when he states, "Although the raw material from the plaintiff's body may have been unique, it evolved into something of great value only through the unusual scientific expertise of the defendants, like unformed clay or stone trans-

formed by the hands of a master sculptor into a valuable work of art.”⁸⁵ The argument is taken up by the Supreme Court: the Mo cell line “is both factually and legally distinct from the cells taken from Moore’s body,” and the patent law that governs ownership of the cell line rewards “inventive effort,” not “the discovery of naturally occurring raw materials.”⁸⁶ As James Boyle argues, the crucial underlying metaphor here is (as in copyright law) that of authorship. Moore’s claim is that he should be recognized as the “author” of his own body tissue; but in fact he is rather poor author material, since he plays a purely passive role in relation both to his cells and to the created cell line. In denying any uniqueness or originality to Moore’s lymphokines, the Court casts not Moore, but his doctors in the role of the romantic author, whose creative endeavors turn a passive material into a valuable product, an *oeuvre*. “There is something wonderful,” states Boyle, “in the way that Mr. Moore becomes a ‘naturally occurring raw material’, whose ‘unoriginal’ genetic material is rendered unique and valuable by the ‘inventive effort’, ‘ingenuity’, and ‘artistry’ of his doctors. If we look at this case through the lens of the romantic author, then Mr. Moore’s case is as ridiculous as if Huey Long had laid claim to ownership rights over *All the King’s Men* or the baker of madeleines to *Remembrance of Things Past*.”⁸⁷

The *Moore* case sets up two alternative ways in which I can formulate my relation to my body. In the first, I have a property right, which means that others cannot appropriate parts of my body without my consent, but also that I have the right to sell all or part of my body. In the second, I have no property right; I cannot alienate it, but it has become a commons to which others may lay claim. In both cases, one property right pushes out another. The aporia (at least in this unqualified form of the argument) stems from the central place occupied in liberal thought by the necessary link between self-possession (the form of the person) and property (the commodity form).

The classic definition of the category of self-possession, with its curious reflexivity by which the subject form is split between that which owns and that which is owned, is Locke’s: “Every Man has a *Property* in his own *Person*. This no Body has any Right to but himself.”⁸⁸ This self-possessing subject is both the foundation of all other property rights,⁸⁹ and the prototype of those things that cannot be alienated in the marketplace. This is to say that the system of property rights in the liberal state is paradox-

ically founded on the withdrawal of its founding moment from that system; but this withdrawal is always problematic. Hence one of the central cruxes for liberalism has been the question of whether an individual has the freedom to sell himself into slavery. In Mill's *On Liberty*, for example, this question — the apparent contradiction of a freedom that destroys freedom⁹⁰ — is bound up with the question of the limits of the market, and in particular the question of whether and why the human person should be considered non-commodifiable. To the extent that they take "the person" as a point of departure rather than as the historical outcome of categories of ownership, these are questions that cannot be answered.

One further case study will help me to develop the complexity of the relation between the category of the person and the commodity form that it both opposes and subtends. It concerns the emergent right of personhood in United States law.

* * * * *

Ownership not of the body but of the "person," the core of selfhood, is what is at stake in the right of publicity that has developed over the last four decades in the United States. Consider the fame of Elvis Presley.

During his lifetime Presley entered into a merchandising agreement with Boxcar Enterprises, of which the majority shareholder was his manager, Colonel Tom Parker: in effect, Presley assigned the exclusive rights of commercial exploitation of his name and likeness (his right of publicity) to this company, which immediately after his death in 1977, sold the manufacture and merchandising rights to Presley souvenirs to Factors, Etc., Inc. At around the same time, however, a non-profit organization, the Memphis Development Foundation, began fundraising for the erection of a large bronze statue of Presley in downtown Memphis, and presented donors with eight-inch pewter replicas. Factors attempted to prevent the distribution of the replicas, and a lawsuit ensued.⁹¹

In finding that a property right in Presley's fame could not survive his death, the court went against several earlier judgements involving the Presley estate which had confirmed the existence of a right of publicity that could descend to Presley's heirs.⁹² The court in the later case argued

that it was inappropriate to grant a private property right in fame because of its transience and because of the contribution of the public to its creation:

The intangible and shifting nature of fame and celebrity status, the presence of widespread public and press participation in its creation, the unusual psychic rewards and income that often flow from it during life and the fact that it may be created by bad as well as good conduct combine to create serious reservations about making fame the permanent right of a few individuals to the exclusion of the general public.⁹³

Fame derives from the public domain and should return to it, although it is worth noting that what the court understands by the public domain is the freedom of anyone, without restraint, to make a profit on the replication of the Presley persona: "The memory, name and pictures of famous individuals should be regarded as a common asset to be shared, an economic opportunity available in the free market system."⁹⁴ The whole trend of right-of-publicity doctrine, however, has gone in the direction of the excision of an exclusive property right from the public domain.

The right of publicity is a protection for the commercial rights that celebrities hold in exploitable aspects of their "identity" or "personality." It is distinguished from the cognate right of privacy by virtue of the fact that it is a proprietary right: as the court in one of the earlier Factors cases argued, "When a 'persona' is in effect a product, and when that product has already been marketed to good advantage, the appropriation by another of that valuable property has more to do with unfair competition than it does with the right to be left alone."⁹⁵

The right of publicity did, however, have its origins in that more general (but also recently developed) "right to be left alone," the right of privacy; paradoxically so, since in many ways the two rights are in direct opposition to each other. Privacy doctrine was first mooted late last century in a seminal article by Warren and Brandeis⁹⁶ in which the authors argue that what they call the "inviolable personality" has the right to be protected from the intrusion of the press into personal affairs. The right was fairly quickly taken up and consolidated; in response to public anger

over a decision in which a flour-mill company was found not to be liable for its unauthorized use of a photograph,⁹⁷ the state of New York enacted in 1903 a statutory "right of privacy."

While Warren and Brandeis' concern was with seclusion from journalistic intrusion, the problem manifested in this case and in many later ones was rather that of unauthorized commercial use; it had to do less with questions of intrusive misrepresentation than with the circulation of representations without consent or recompense. Despite this, as Oliver Goodenough argues, the lack of a recognized property right meant that cases dealt with within this framework had to rely upon Warren and Brandeis' rationale of personal distress and harm. The problems associated with this rationale were threefold: first, public persons, who were expected to have waived their rights to privacy because of their inurement to public exposure, were therefore denied protection; second, there was a lifetime limit on the right to privacy, since the problem of intrusion of course disappears with the death of the person concerned; and third, "since privacy was only a personal right to be left alone, there was no piece of property to transfer to a third party."⁹⁸

The crucial shift that took place over the course of this century was the development of a property-based right in personality. This right, the right of publicity, eventually came about as a piece of judge-made law in 1953 when Judge Jerome N. Frank marked out a direct extension from the concept of privacy rights, and argued that more is at stake than the personal distress suffered by baseball players:

For it is common knowledge that many prominent persons (especially actors and ballplayers), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing their countenances, displayed in newspapers, magazines, buses, trains and subways. This right of publicity would usually yield them no money unless it could be made the subject of an exclusive grant which barred any other advertisers from using their pictures.⁹⁹

This decision was actively supported in an article the following year by the copyright specialist Melville Nimmer, arguing that "the publicity

right, tied to a property approach, gave a sound theoretical basis to a market in publicity values that already existed."¹⁰⁰

Through the late 1970's and early 1980's protection for "personality" as property was consolidated and clarified. A key case was *Zacchini v. Scripps-Howard Broadcasting Co.*,¹⁰¹ in which the Supreme Court confirmed the existence of a publicity right and spelled out its difference from the privacy right in two respects: first, that it gives protection to a property interest rather than reputation; and second, that it is analogous in this to the goals of copyright and patent law.

Two rather different traditions of what we might more generally call rights of personality have developed in the two major centers of the culture industries in the United States, New York and California. New York adopted a right of privacy early, and developed a right of publicity only within its confines. One effect of this early resolution has been a continuing problem as to whether rights exist after death. California (after a long process of development, including the seminal but ambivalent *Lugosi* case)¹⁰² enacted in 1985 a statutory right of publicity (Code 990 of the California Civil Code) which made rights fully assignable and descendable, and accordingly restricted the circulation of the images of celebrities through the public domain.

The core of the right of publicity, according to the commentator Thomas McCarthy, is that it recognizes "the potential *commercial* value of every person's identity... and assigns that value to the person in question."¹⁰³ Unlike the right of privacy, which is designed to shelter an individual from the outside world and introduces a subjective measure of harm, the right of publicity is formulated in such a way as to allow the exploitation of attributes of personality in the open market. The crucial difference is precisely that it is a property right, which means that ownership of the name, the image or any other commercially exploitable attribute of identity can descend to heirs and can be assigned to others. As James Boyle notes, the classic publicity rights cases pay great attention to "the importance of commodification, alienation, and transfer of the protected interest," and very *little* attention to questions of privacy. Boyle states, "To a greater or lesser extent... each case treats fame as a partial public good — something unique and personal that can be gainfully exploited only if it can be commodified and others excluded from its use except on pain of payment."¹⁰⁴

This development of the right of publicity out of the right of privacy was historically bound with the commercial value of reputation or celebrity in the star systems of film and sport. In her reading of Hollywood star contracts, Jane Gaines has made the case that after World War II, actors came increasingly to be organized as independent businesses for the marketing of their images, and were thus increasingly in competition with the studios. An important aspect of these businesses was the selling of merchandising tie-ups and of product endorsements.¹⁰⁵ Celia Lury's analysis of the star system draws an analogy with the way a personally-grounded property right is protected in copyright regimes: "In many ways," she writes, "the star-function can be seen as a transformation of the author-function in the later stages of corporate production for a market in that the imprint of the star acts as a means of linking the signs of creative labor with the exhibition value of the works produced."¹⁰⁶

Exercise of the right of publicity has the effect of withdrawing a public icon from the public domain. In principle, there is no reason why not only "celebrities" but any public figures whatsoever, as well as the later generations who inherit their property rights, should not seek to control the flow of representations of their person. The heirs of Al Capone sought to do so in 1965, but failed on the grounds that the pecuniary value of Capone's identity had not been exploited before his death.¹⁰⁷ However, a relatively recent case in which the Georgia Supreme Court granted the heirs of Martin Luther King the right to control representations of King, has opened the possibility of an extensive privatization of the persona of major historical figures.¹⁰⁸

Gaines, like Boyle, has drawn attention to the contradictory nature of the relation between the rights of privacy and publicity:

Paradoxically, over the course of this century, the same doctrine that promised to shelter private persons from the public circulation of their names and likenesses (an inevitability produced by the development of mass information technologies) has come to allow the reverse. Privacy law as it becomes publicity law makes it possible for celebrities to circulate their images in public without fear of commercial piracy.¹⁰⁹

Gaines' argument is that these two rights are unified by their com-

mon origin in "the rights-holding subject who has property in himself. Whereas the one right finds its support in the human subject, the other finds its support in the self as property and in the property produced by expenditure of labor. The right of publicity is nothing more nor less than a personal monopoly reinforced."¹¹⁰ Gaines goes on to draw an analogy with the workings of copyright law, in particular with the strategy of those English publishers, "who, faced with the expiration of their licenses after the Statute of Anne, borrowed the monopoly in perpetuity of authors' rights to extend and fortify their own rights to the literary works they published."¹¹¹

This is to say that the logic by which a right initially proposed as a protection of the inviolability of the person turns into a right allowing personal identity to be considered as property and exploited either by oneself or by others is, in some sense, akin to the logic by which copyright law works. This logic is that of a two-step process in which (1) a property right is established on the basis of the person as origin and as self-identity (hence copyright law's provisions for "something unique," however minimal, for "originality"),¹¹² (2) this property right then forms the basis of an industrial — that is, a non-individual — regime of ownership, in which the key players are the movie, publishing, and recorded music industries, the software industry, and corporations seeking protection for information.¹¹³

This discussion of rights in the self is complicated, however, by the fact that what we are dealing with in all of these cases is not personal identity but rather *representations* of personal identity. Much of the interest of the major right-of-publicity cases lies precisely in the ways in which they establish a relationship between identity and particular personal attributes by which identity is signified.

Initially, both the right of privacy and the right of publicity were restricted to protection of the name and the image, both of which — for particular historical reasons — are assumed in Western culture to be deeply bound up with personal identity. Both operate through a kind of sympathetic magic by which a closely associated metonym — a picture, or a proper name — comes to stand for the person. In the following line of cases, however, the tokens of personal identity were extended much more widely:

In *Cohen v. Herbal Concepts, Inc.*,¹¹⁴ a mother and daughter were photographed without permission while bathing naked in a secluded spot. The case turned on whether the rear view of the two women later used without their consent on a product label was sufficient to count as an indication of their identity. The court accepted the word of their husband and father that the image did indeed constitute what the statute calls an "identifiable likeness."

In *Motschenbacher v. R.J. Reynolds Tobacco Company*,¹¹⁵ the racing driver Lothar Motschenbacher complained of an advertisement which used a car he claimed was recognizably his and with which he was closely identified. Although details of Motschenbacher's car had been modified and the face of the driver was indistinguishable, the court found both that it was clear to knowledgeable people what the car was, and that this identification constituted a metonymic link with the identity of its driver.

In *Onassis v. Christian Dior-New York, Inc.*,¹¹⁶ a case which is discussed at some length in Jane Gaines' *Contested Culture*, Jacqueline Onassis complained about an advertisement for Dior which featured the wedding of a mythical threesome, "the Diors," flanked by a number of minor celebrities and by what seems to be Mrs. Onassis. The face is in fact that of a Washington secretary, Barbara Reynolds, an Onassis lookalike. The defense reasonably claimed that Onassis could not claim property rights in someone else's face and had no right to enjoin its use. Lawyers for Onassis argued that the "likeness" was recognizably that of the public figure, Jacqueline Onassis, not that of the model. Both sides depend upon what Gaines calls the "unexamined assumption that the unauthorized use of a photograph is an appropriation of the identity of the person photographed."¹¹⁷ What the court had to decide was an issue between the actuality of the referent and the constructed fact of resemblance, and it

did so by means of the notion that public fame and public identity is a commercially valuable asset which is indeed carried by iconic likeness. In this ruling, privacy law comes close to the law of unfair competition.

In *Carson v. Johnny Portable Toilets, Inc.*,¹¹⁸ the late-night talk-show host Johnny Carson objected to the use by a portable toilet company of the phrase "Here's Johnny" which, Carson claimed, was characteristically associated with the introduction to his show. The defense agreed that they were making a reference to the Carson show, but argued that the phrase was too ordinary to be withdrawn from free public circulation. What is interesting about this case, I think, is just that assumption that both sides in the case make, that a piece of language contingently associated with a celebrity can count as an aspect of that person's identity.

In *Midler v. Ford Motor Co.*,¹¹⁹ singer Bette Midler complained of an advertisement which used a version of the Bette Midler hit "Do You Want to Dance," sung in such a way as to resemble Midler's voice. Nancy Sinatra had previously failed in an attempt to claim property rights in her voice and style.¹²⁰ In this case, however, the court ruled that her voice constituted "an attribute of Midler's identity" and allowed compensation accordingly.

In all of these cases, it is clear that privacy and publicity law equate representations and metonyms of identity with the substance of identity itself. It seems that so does the law relating to the passing-off tort, which is the primary mechanism used by English and Australian courts for the protection of property rights in personal identity.¹²¹ In two Australian cases involving the passing off of the character of Mick Dundee by other commercial interests, Paul Hogan was assumed to be identical to the character he portrayed.¹²² If this is so, however, then what is alienated in commercial uses of identity would be the subject form itself, rather than the representations through which it is carried. (If, conversely, it is merely the representations that are put to commercial use, then it is not clear on

what basis a property right founded in personal identity can be established in them.)

The concept of person implied by the right of publicity (which is based in self-possession and the alienability of representations of the self, as well as in a sense in the merging of the self with its representations) is not a piece of ideology that can be demystified and then discarded. It is continuous with a millenia-long process of elaboration of the legal conception of the person, and it is intricately bound up with the workings of an entire mode of production. It corresponds in complicated ways to the imaginary forms of selfhood through which we experience the world and our relation to it. A historical effect rather than the ground of all history, formed at the intersection of the culturally specific distinction between the moral economy of the gift and the market economy of the commodity, the category of the person lacks any transcendental reality. Like the concept of "rights," it designates not a set of inherent attributes, but a historical project and a site of intense social struggle. It is a category in the process of constant evolution, and its status is capable of substantial modification in the process by which new legal and political rights are formed.

- 1 Ezra Pound, *Cantos* (New York: New Directions, 1970), Canto XLV.
- 2 These largely concern the specification of a system: is wage labor, for example, indispensable to the concept of commodity production, and if so, is it requisite in each instance or only through its generalization within an area of production?
- 3 E.P. Thompson, *Customs in Common* (London: Penguin, 1993), pp. 135, 137.
- 4 George M. Armstrong, "The Reification of Celebrity: Persona as Property," 51 *Louisiana Law Review* 443, 450 (1991).
- 5 Immanuel Wallerstein, "Household Structures and Labor-Force Formation in the Capitalist World-Economy," in Étienne Balibar and Immanuel Wallerstein, *Race, Nation, Class: Ambiguous Identities* (London: Verso, 1991), p. 107.
- 6 Jack Ralph Kloppenburg Jr, *First the Seed: The Political Economy of Plant Biotechnology, 1492-2000* (Cambridge: Cambridge University Press, 1988), pp. 24-25.
- 7 Margaret Jane Radin, "Market-Inalienability," 100 *Harvard Law Review* 1849, 1919 (1987).
- 8 Christopher Anderson and Françoise Dussart, "Dreamings in Acrylic: Western Desert Art," *Dreamings: The Art of Aboriginal Australia*, Peter Sutton, ed. (Ringwood: Viking/Penguin, 1988), p. 97.
- 9 Cf., Eric Michaels, *Bad Aboriginal Art: Tradition, Media, and Technological Horizon* (Sydney: Allen and Unwin, 1994), especially the title essay, pp. 143-64.

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- 10 See Anderson and Dussart, *supra* note 8 at 142.
- 11 Cf., Benetta Jules-Rosette, *The Messages of Tourist Art: An African Semiotic System in Comparative Perspective* (New York and London: Plenum Press, 1984).
- 12 See Anderson and Dussart, *supra* note 8 at 140, 142.
- 13 That is, to whatever capacity will generate the maximum return on investment at a given time.
- 14 This account of course is schematic and ahistorical. Historically, the extension of the commodity form takes place through different strategies: through an expansion of production or of consumption, through the multiplication of productive activities or through monopolistic restriction, and so on.
- 15 Cf., Dan Schiller, "From Culture to Information and Back Again: Commodification as a Route to Knowledge," 11 *Critical Studies in Mass Communication* 93 (1994), for an account of some of these difficulties.
- 16 Cf., Lucien Febvre and Henri-Jean Martin, *The Coming of the Book: The Impact of Printing 1450-1800*, David Gerard, trans. (London: Verso, 1984), especially Chapter 4.
- 17 Specifically on the historical emergence of the concept of "the work," cf., Peter Jaszi, "Toward a Theory of Copyright: The Metamorphoses of 'Authorship,'" *Duke Law Journal* 445, 473-74 (1991). In the course of the 18th and 19th centuries "the work" is progressively separated from its physical incarnations, to become a complex object in which limited property rights can be vested in the "expression" but not the "ideas."
- 18 Cf., Stephen Gaukroger, "Romanticism and Decommodification: Marx's Conception of Socialism," 15 *Economy and Society* 305-08 (1986).
- 19 Cf., Karl Marx, *The Economic and Philosophic Manuscripts of 1844*, Martin Milligan, trans. (New York: International Publishers, 1964), p. 107: "The alienation of the worker in his product means not only that his labor becomes an object, an external existence, but that it exists outside him, independently, as something alien to him, and that it becomes a power on its own confronting him. It means that the life which he has conferred on the object confronts him as something hostile and alien."
- 20 Karl Marx, *Capital: A Critique of Political Economy*, Vol. I, Ben Fowkes, trans. (Harmondsworth: Penguin, 1976), pp. 164-5.
- 21 Georg Lukács, *History and Class Consciousness: Studies in Marxist Dialectics*, Rodney Livingstone, trans. (Cambridge, Mass.: MIT Press, 1971), p. 88; further citations are given in the text.
- 22 *Id.*
- 23 *Id.*, at 90.
- 24 *Id.*, at 92.
- 25 *Id.*, at 91.
- 26 *Id.*, at 86.
- 27 Cf., Wolfgang Haug's account of a historical process tending from the materiality and sensuality of the use value to the abstraction of symbolic value: "The degree of reality, and the essence of the commodity-body as a use-value, is shifting away from being simply 'an external object, a thing which through its [physical] qualities satisfies human

- needs of whatever kind' [Marx, *Capital*, Vol. I], towards an increasing emphasis on representation and symbolism in the commodity. The balance will shift from an unmediated, materially purposeful use-value to thoughts, feelings, and associations, which one links to the commodity or assumes that others must associate with it." Wolfgang F. Haug, *Critique of Commodity Aesthetics: Appearance, Sexuality and Advertising in Capitalist Society*, Robert Bock, trans. (Minneapolis: University of Minnesota Press, 1986), p. 97. For a critique of this logic, cf., Jean Baudrillard, *For a Critique of the Political Economy of the Sign*, Charles Levin, trans. (St Louis: Telos Press, 1981).
- 28 Arjun Appadurai, "Introduction: Commodities and the Politics of Value," *The Social Life of Things: Commodities in Cultural Perspective*, Arjun Appadurai, ed. (Cambridge: Cambridge University Press, 1986), p. 13.
- 29 I do not, however, accept this conception in its totality. Appadurai takes over from Simmel a definition of economic value as a particular and variable effect of "the commensuration of two intensities of demand" which takes the form of "the exchange of sacrifice and gain" (p. 4). It is thus the moment of exchange rather than that of production (or of the totality of moments in the cycle of production, exchange, and consumption) that governs the formation of value and "sets the parameters of utility and scarcity, rather than the other way round" (id.). This subjectivization of value leads Appadurai to refuse the qualitative distinction made by Marx between use value and exchange value: commodities are a "use value for others" (p. 9; original emphasis). In this respect of course his definition of value approximates that of neoclassical economics, and involves, I think, a failure to accept the *complex* and *systemic* nature of value formation (value is rather an aggregation of a series of simple transactions).
- 30 Igor Kopytoff, "The Cultural Biography of Things: Commoditization as Process," *The Social Life of Things*, Appadurai, ed., pp. 74-76.
- 31 *Id.*, at 76.
- 32 See Appadurai, *supra* note 28 at 23, 17.
- 33 Cf., Nicky James, "Emotional Labor: Skill and Work in the Social Regulation of Feelings," 37 *The Sociological Review* 15 (1989).
- 34 Cf., Carole Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).
- 35 See Kopytoff, *supra* note 30 at 84.
- 36 *Id.*, at 79-80.
- 37 Cf., Sharon Zukin, *Loft Living: Culture and Capital in Urban Change* (1982; rpt. New Brunswick: Rutgers University Press, 1989); Neil Smith and Peter Williams, ed., *Gentrification of the City* (Boston: Allen and Unwin, 1986); D. Rose, "Rethinking Gentrification: Beyond the Uneven Development of Marxist Urban Theory," *Environment and Planning D: Society and Space*, Vol. 1 (1984), pp. 47-74; Patrick Wright, *On Living in an Old Country: The National Past in Contemporary Britain* (London: Verso, 1985).
- 38 See Appadurai, *supra* note 28 at 26.
- 39 *Id.*, at 28.
- 40 Cf., John Frow, "Repetition and Limitation: Computer Software and Copyright Law," 29 *Screen* 4 (1988).

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- 41 Cf., Nicholas Thomas, *Entangled Objects: Exchange, Material Culture, and Colonialism in the Pacific* (Cambridge, Mass.: Harvard University Press, 1991), p. 28: "Insistence upon the fact that objects pass through social transformations effects a deconstruction of the essentialist notion that the identity of material things is fixed in their structure and form."
- 42 But not of Marx's, since he frequently argues that capitalist production and the commodity form are historically necessary and "progressive" moments of the evolution of human society; the same distinction can be made between Adorno (who in this respect stands close to Lukács) and Brecht and Benjamin.
- 43 Jane Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), p. 347.
- 44 Cf., Annette Weiner, *Inalienable Possessions: The Paradox of Keeping-While-Giving* (Berkeley: University of California Press, 1992).
- 45 Margaret Radin, "Market-Inalienability," p. 1856.
- 46 *Id.*, at 1851.
- 47 *Id.*, at 1861.
- 48 Richard Posner, "An Economic Theory of the Criminal Law," 85 *Columbia Law Review* 1193, 1199 (1985); cited in Radin, *supra* note 45 at 1862-3.
- 49 *Id.*, at 1875.
- 50 The example she gives is Richard Abel's proposal to decommodify tort law so as not to put a monetary value on personal qualities or on personal emotions, since to award damages for pain and suffering or for injuries to relationships has the effect of commodifying these qualities and emotions; Radin argues, however, that "to deny money damages, inadequate though they may be, seems to compound the injury to tort victims under the present social structure, in which we have not put into practice other measures that would take care of them in better ways or prevent their injuries in the first place." See Richard Abel, "A Critique of American Tort Law," 8 *British Journal of Law and Society* 199 (1981); cited in Radin, *supra* note 45 at 1876, 1877.
- 51 For a more detailed exposition, cf., Margaret Radin, "Property and Personhood," 34 *Stanford Law Review* 957 (1982).
- 52 *Id.*, at 1880-81.
- 53 *Id.*, at 1884.
- 54 *Id.*
- 55 *Id.*, at 1885.
- 56 *Id.*, at 1902.
- 57 *Id.*, at 1907-08.
- 58 *Id.*, at 1913.
- 59 *Id.*, at 1918.
- 60 *Id.*, at 1921-36.
- 61 Marilyn Strathern, *The Gender of the Gift: Problems with Women and Problems with Society in Melanesia* (Berkeley: University of California Press, 1988), p. 159.
- 62 Cf., L. Roberts, "How to Sample the World's Genetic Diversity," 257 *Science* 1204-1205

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- (1992); Richard Lewontin, "The Dream of the Human Genome," *New York Review of Books* (May 28, 1992).
- 63 Margaret Lock, "Editorial: Interrogating the Human Diversity Genome Project," 39:5 *Social Science and Medicine* 604 (1994).
- 64 *Id.*
- 65 L. Roberts, "Anthropologists climb (gingerly) on board," 258 *Science* 1300-1301 (1992).
- 66 RAFI Communiqué, *Patents, Indigenous Peoples, and Human Genetic Diversity*, Rural Advancement Foundation International (May 1993), cited in Lock, *supra* note 63 at 605.
- 67 "The Gene Hunters," ZEF Productions, Channel 4 (UK, 1994).
- 68 *Moore v. Regents of the University of California*, 793 P.2d 479, 482 (Cal. 1990), hereafter cited as *Moore* (Supreme Court).
- 69 According to his lawyer, "Moore became suspicious of his physician's motives only after he was offered free flights to California and paid hotel accommodations". Rorie Sherman, "The Selling of Body Parts", *The National Law Journal*, 12/7/87, p. 33.
- 70 James Boyle, "A Theory of Law and Information: Copyright, Spleens, Blackmail, and Insider Trading," 80 *California Law Review* 1413, 1519 (1992).
- 71 *Cf.*, Pat Mooney, "John Moore's Body," *New Internationalist*, March 1991, p.9.
- 72 *Moore* (Supreme Court), p. 497.
- 73 *Moore v. Regents of the University of California* 249 Cal. Rptr. 494, 538 (Cal. App. 2 Dist. 1988), hereafter cited as *Moore* (Appeals Court).
- 74 *Moore* (Appeals Court), p. 507. The point had earlier been made in an article by Hardiman: acknowledging the moral problem of putting a price on the human body, he nevertheless argued that "the fact remains that in the context of biotechnology, the human body is extremely valuable and has an ascertainable price. While moral aversion to pricing the human body may argue against biotechnology as a whole, as long as commercial exploitation of the body continues, the argument should not deny profit participation to the patient alone." Roy Hardiman, "Toward the Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue," 34 *UCLA Law Review* 240 (1986). *Cf.*, Justice Broussard's statement (Supreme Court, p. 506) that "the majority rejection of plaintiff's conversion cause of action does *not* mean that body parts may not be bought or sold for research or commercial purposes or that *no* private individual or entity may benefit economically from the fortuitous value of plaintiff's diseased cells. Far from elevating these biological materials above the marketplace, the majority's holding simply bars *plaintiff*, the source of the cells, from obtaining the benefit of the cells' value, but permits *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."
- 75 *Moore* (Supreme Court), p. 489.
- 76 *Moore* (Appeals Court), p. 534.
- 77 *Venner v. Maryland*, 30 Md. App. 599, 354 A.2d 483 (Md. Ct. Spec. App. 1976), *aff'd* 279 Md. 47, 367 A.2d 949, *cert. denied*, 431 U.S. 932 (1977).
- 78 *Cf.*, Stephen Ashley Mortinger, "Comment: Spleen for Sale: *Moore v. Regents of the*

University of California and the Right to Sell Parts of Your Body," 51 *Ohio State Law Journal* 502-03 (1990); Erik S. Jaffe, "She's Got Bette Davis' Eyes: Assessing the Nonconsensual Removal of Cadaver Organs Under the Takings and Due Process Clauses," 90 *Columbia Law Review* 528, 543-44 (1990).

- 79 See Jaffe, *supra* note 78 at 550.
- 80 Bernard Edelman, "L'Homme aux cellules d'or," 116 *L'Hôpital à Paris* 40 (1990).
- 81 Moore (Appeals Court), p. 504.
- 82 Moore (Supreme Court), p. 515; *cf.*, Hardiman, *supra* note 74 at 225: "If an analogy to slavery is to be drawn in the context of human biologics, slavery actually argues *for* recognizing a property right in one's own body: the slave-owner profiting from ownership of the slave is analogous to the research institution profiting from the derivatives of the donor's body to the exclusion of the donor. The moral arguments raised by slavery actually favour, rather than oppose, recognition of the right of commerciality."
- 83 Moore (Appeals Court), p. 504; Hardiman, *supra* note 74 at 229.
- 84 Genetic uniqueness was the basis of an analogy made by Moore's lawyers, and supported by the Appeals Court, to right-of-publicity doctrine; the two courts differed, however, on the question of whether the genetic material coding Moore's cells was in fact unique to him. Of the analogy to the right of publicity Mortinger writes (p. 514): "A court should not view a cause of action for appropriation of the commercial value of a person's genetic structure as too far removed from the court's current recognition of the right of a person to claim appropriation of his unique likeness or persona."
- 85 Moore (Appeals Court), p. 537.
- 86 Moore (Supreme Court), pp. 492-3.
- 87 See Boyle, *supra* note 70 at 1518-9.
- 88 John Locke, "An Essay Concerning the True Original, Extent, and End of Civil Government," *Two Treatises of Government*, Peter Laslett, ed. (Cambridge: Cambridge University Press, 1960), p. 305.
- 89 This free ownership of oneself (which contrasts with the slave's inability to dispose of him- or herself on the market) is the foundation of the freedom of ownership in general. Pashukanis thus accords the category of the subject logical priority over that of property, because "property becomes the basis of the legal form only when it becomes something which can be freely disposed of in the market. The category of the subject serves precisely as the most general expression of this freedom." Evgeny B. Pashukanis, *Law and Marxism: A General Theory*, Chris Arthur, ed., B. Einhorn, trans. (1978; rpt. London: Pluto Press, 1983), p.110.
- 90 Quoted in Radin, "Market-Inalienability," *supra* note 45 at 1902.
- 91 *Memphis Development Foundation v. Factors, Etc., Inc.*, 616 F.2d 956 (6th Cir.), *cert. denied*, 449 U.S. 953 (1980). For a commentary, *cf.*, Barbara Singer, "The Right of Publicity: Star Vehicle or Shooting Star?," 10 *Cardozo Arts and Entertainment Law Journal* 1 (1992).
- 92 *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp. 279 (S.D.N.Y. 1977); *Factors, Etc., Inc. v. Pro Arts, Inc.*, 444 F.Supp. 288 (S.D.N.Y., 1977, *aff'd & remanded*, 579 F.2d 215 (2d Cir. 1978), *cert. denied* 440 U.S.908 (1979), *on remand*, 496 F.Supp. 1090 (S.D.N.Y.

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- 1980), *rev'd* 652 F.2d 278 (2d Cir. 1981).
- 93 *Factors, Etc., Inc. v. Pro Arts, Inc.*, 440 U.S. at 959.
- 94 *Id.*, at 960.
- 95 *Factors, Etc., Inc. v. Creative Card Co.*, 444 F. Supp at 283.
- 96 Samuel Warren and Louis Brandeis, "The Right to Privacy," 4 *Harvard Law Review* 193 (1890).
- 97 *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).
- 98 Oliver R. Goodenough, "The Price of Fame: The Development of the Right of Publicity in the United States," Part I, 14:2 *European Intellectual Property Review* 58-59(1992).
- 99 *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 US 816, 74 S.Ct. 26, 98 L.Ed.343 (1953).
- 100 Melville B. Nimmer, "The Right of Publicity," 19 *Law and Contemporary Problems* 203 (1954).
- 101 *Zacchini v. Scripps-Howard Broadcasting Co.*, 43 U.S. 562, 97 S. Ct. 2849, 53 L. Ed. 2d. 265 (1977).
- 102 *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 160 Cal. Rptr. 323, 603 P. 2d 425 (1979); the court found in this case that Bela Lugosi's right of publicity in the image of Dracula could not be inherited by his family because it had not been commercially exploited in his lifetime. Justice Rose Bird's dissent, however, which prefigured later legislation, argued for a recognition that the merchandising of identity is a business in which the celebrity acts as an investor in their own image.
- 103 J. Thomas McCarthy, *The Rights of Privacy and Publicity* (New York: Clark Boardman Co., 1991), section 1.11(c).
- 104 Boyle, *supra* note 70 at 1514-5.
- 105 Jane M. Gaines, *Contested Culture: The Image, the Voice, and the Law* (Chapel Hill: University of North Carolina Press, 1991), Chapter 5.
- 106 Celia Lury, *Cultural Rights: Technology, Legality and Personality* (London: Routledge, 1993), p. 58.
- 107 *Maritote v. Desilu Prods.*, 345 F.2d 418 (7th Cir.), *cert. denied*, 382 U.S. 883 (1965).
- 108 *Martin Luther King, Jr. Center for Social Change v. American Heritage Prods.*, 250 Ga. 135, 296 S.E. 2d 697 (1982); *cf.*, Timothy P. Terrell and Jane S. Smith, "Publicity, Liberty, and Intellectual Property: A Conceptual and Economic Analysis of the Inheritability Issue," 34 *Emory Law Journal* 1, 12 (1985).
- 109 *See* Gaines, *supra* note 105 at 94.
- 110 *Id.*, at 206.
- 111 *Id.*, at 207.
- 112 *Cf.*, Lury, *supra* note 106 at 30: "The institutions and discourses that collectively functioned to construct the object 'art' were not distinct from but allied to the determinations of the marketplace which themselves established and confirmed the commodity status of the work of art."
- 113 A still closer analogy is perhaps to be found in French *droit moral*, which is grounded in

- the notion "that a work of art is, and remains, the embodiment of its creator's personality. Theoretically, any modification of the work... is a violation of the author's right to shape his own individuality. Not only does the modified work misrepresent the author's personality to the world, but it also detracts from his personality by frustrating his self-revelation." Edward J. Damich, "The Right of Personality: A Common-law Basis for the Protection of the Moral Rights of Authors," 22 *Intellectual Property Law Review* 547 (1990).
- 114 *Cohen v Herbal Concepts, Inc.*, 63 N.Y.2d 379, 482 N.Y.S.2d 457, 472 N.E.2d 307 (1984).
 - 115 *Motschenbacher v R.J. Reynolds Tobacco Company*, 498 F.2d 821 (9th Cir. 1974).
 - 116 *Onassis v Christian Dior-New York, Inc.*, 122 Misc.2d 603, 472 N.Y.S.2d 254 (S.Ct.N.Y. Co. 1984), *aff'd* 110 A.D.2d 1095, 488 N.Y.S.2d 943 (1st Dept. 1985).
 - 117 See Gaines, *supra* note 105 at 86.
 - 118 *Carson v Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).
 - 119 *Midler v Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).
 - 120 *Sinatra v Goodyear Tire and Rubber Co.*, 435 F.2d 711 (1970).
 - 121 Cf. W. Van Caenegem, "Different Approaches to the Protection of Celebrities against Unauthorized Use of their Image in Advertising in Australia, the United States and the Federal Republic of Germany," 12:2 *EIPR* 452-458 (1990); Stephen C.G. Burley, "Passing Off and Character Merchandising: Should England Lean Towards Australia?," 13:7 *EIPR* 227-230 (1991).
 - 122 *Hogan and Others v Pacific Dunlop Ltd*, 83 A.L.R. 403; *Hogan and Other v Koala Dundee Pty Ltd and Others*, 83 A.L.R. 187.