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JCLS

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Volume 1 2008

Civil Law Workshop
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Revisiting the Distinction Between Persons and Things

- *Avant-Propos* .... Olivier Moréteau
- *The Distinction Between Persons & Things: An Historical Perspective* .... J.-R. Trahan
- *Is the Name Property? Comparing the English and the French Evolution* ...... Audrey Guinchard
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- *Robert Anthony Pascal: Writings About Law, 1937-2008*

PAUL M. HEBERT LAW CENTER
LSU LAW
LOUISIANA STATE UNIVERSITY

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Volume 1 – 2008

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Editorial offices:

Paul M. Hebert Law Center
Center of Civil Law Studies
W326A Law Center
Baton Rouge, LA 70803-1000

jcls@law.lsu.edu
www.law.lsu.edu/jcls

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AVANT-PROPOS

Olivier Moréteau*

This publication is part of the revival of the Center of Civil Law Studies (CCLS) at the Louisiana State University Paul M. Hebert Law Center. Two projects, started in the year 2006, the year of the Centennial of the Law Center, are coming to fruition with this Number One volume of the newly created Journal of Civil Law Studies, coming out at the close of 2008, the year of the Bicentennial of the Louisiana Civil Code.

The first project was the creation of a new Journal, devoted to comparative studies, with a focus on the civil law and the common law traditions, bijuralism being what makes LSU so special and unique in the United States academic world. This Journal is intended to promote a multidisciplinary and pluralistic approach, and to focus on the following themes:

- The evolution of the law in mixed jurisdictions, chiefly Louisiana;
- The evolution of the civil law in an English speaking environment;
- The impact of globalization on the evolution of the civil law and the common law;
- The impact of the civil law and the common law outside the western world and their interrelation with other legal traditions;
- Bridging the divide between civil law and common law in the American hemisphere and in the European area; and
- The combination of the civil law and common law traditions in the harmonization and unification processes, with a focus on linguistic issues.

First named Journal of Bijural Studies, the project has been renamed Journal of Civil Law Studies (JCLS), to mark its close connection with the CCLS and also the universal character of the

* Professor of Law, Russell B. Long Eminent Scholars Academic Chair, Director of the Center of Civil Law Studies, Paul M. Hebert Law Center, Louisiana State University; formerly Professor of Law, Université Jean Moulin Lyon 3 and Director of the Edouard Lambert Institute of Comparative Law.

civil law, which never grew in an insulated way but in constant relationship with other legal traditions.

The JCLS is published electronically, and yet it is laid out and referenced exactly like a traditional hard-copy journal. English is the main language, but articles may be submitted and published in French or in Spanish with an abstract in English. The JCLS is peer-reviewed. The Board of Editors is composed of distinguished comparatists from all over the world, mostly civilians with a strong knowledge of the common law systems but also common law jurists with civil law experience, and in any case, scholars with a strong expertise and interest in mixed jurisdictions. Room is made for student participation. Volume One was carefully edited by a group of Graduate Editors, selected among LSU talented and devoted LL.M. students.

Every year, there will be at least two volumes. One of them will function like a regular journal, with articles, review of normative documents and cases, and book reviews. Another volume will publish the papers of the annual Civil Law Workshop.

The second major project inaugurated in 2006 is the creation at the CCLS of an annual Civil Law Workshop Series, focusing every year on a broad topic, based on the civil law but to be treated with large comparative and interdisciplinary perspectives. At every session, the contributor is invited to make a presentation, followed by an open discussion. All this takes place in a relaxed, congenial atmosphere, with drinks being served. The Civil Law Workshop is open not only to the legal community, but also to attendees that are interested in interdisciplinary studies. It is hoped that in the years to come, the Civil Law Workshop will attract a broader and more diverse audience.

Credit must be given to my friend and former LSU colleague Michael McAuley, who introduced me to the workshop experience conducted at McGill University Faculty of Law, under the leadership of a great supporter of the CCLS revival, Professor, now Dean, Nicholas Kasirer. Nothing would have been possible without the trusting support of former Chancellor John Costonis and present Chancellor Jack Weiss, and the active participation of the LSU law faculty. The daily work of a most dedicated staff must also be praised: Agustín Parise, Research Associate, also a contributor to the present volume, Jennifer Lane, CCLS Coordinator and more than occasionally Megan Lawrence,

Coordinator for European Studies. And last but not least, credit must be given to my friend and accomplice in the Civil Law Workshop First Series, Professor John Randal Trahan, who accepted to embark with us in this new adventure. He is the co-editor of the present publication.

The contributions assembled in the present volume are dedicated to a very unique scholar whose life covered most of the 20th century and who is still active in the 21st. Professor Emeritus Robert A. Pascal started his academic career at the time of Roscoe Pound, whom he witnessed inaugurating the LSU Law Building in 1938.[1] He then was a law student at the Loyola Law School in New Orleans and served during the summer as a Research Assistant at LSU. He published his first article in the first issue of the *Louisiana Law Review*, also seventy years ago,[2] and his most recent piece this year,[3] leaving us with almost uninterrupted scholarship on a span of seventy years. Robert A. Pascal conversed with some of the great pioneers of comparative legal studies, such as Ernst Rabel, John P. Dawson, and Hessel Yntema in Ann Arbor, Max Rheinstein in Chicago, Gino Gorla in Rome, and René David in Paris. He is far too modest to accept being portrayed as a living legend but may accept being referred to as a living memory: few law schools having reached their centennial, like LSU in 2006, can claim to have within their walls a faculty member who has been on Earth nearly as long as the law school. My *Foreword* to his latest article on legal education gives a short account of his career and academic achievements.[4] He is a man whose unique ambition was, and still is, to serve others; he educated his students to become Priests of the Legal Order. He does not like to be praised and calls every compliment flattery. He attended all but one session of our Civil Law Workshop inaugural series, and enriched all discussions.

This Civil Law Workshop First Series will be referred to in the future as the Robert A. Pascal Series. A list of Professor Pascal's *Writings About Law, 1937-2008*, is published at the end of this

1. Roscoe Pound, *The Influence of the Civil Law in America*, 1 LA. L. REV. 1 (1938).

2. Robert A. Pascal, Comment, *Duration and Revocability of an Offer*, 1 LA. L. REV. 182 (1938).

3. Robert A. Pascal, *A Summary Reflection on Legal Education (with Foreword by Olivier Moréteau),* 69 LA. L. REV. 125 (2008).

4. *Id.* at 125-128.

volume. The editors thought there was no better tribute than an invitation to discover or rediscover the writings of our great Louisiana civilian.

* * *

The Robert A. Pascal Civil Law Workshop Series focused on *Revisiting the Distinction between Persons and Things*. This is a fundamental distinction in the civil law, going back to early Roman law and presented, together with actions (better named obligations), as the *summa divisio* in Gaius' Institutes. The distinction between persons and things may seem a mundane distinction, an easy one to work out. And yet, in the past, western societies were challenged with the following problems:

- Were the natives (then called savages) found in the Americas human beings?
- May slaves be traded as other commodities?
- May animals be tried for their wrongdoings?

Today, the following issues do come up:

- May animals share some human rights?
- Are frozen human embryos persons or things?
- What is the legal status of body parts?
- May ownership be an absolute right in a world where many resources are becoming scarce for a large part of mankind?

This turns out to be a huge topic, the literature showing a contemporary tendency towards commodification.[5] There was no ambition to cover all possible facets. Our speakers were set free to address any topic of their choice, in relation with the general theme, which is far from being exhausted.

The present publication follows the sequence of the Workshop presentations, with the addition of Professor Trahan's Introductory Remarks *in limine*, giving a historical perspective to the project. This may give the reader a feeling of the intellectual path and experience of those having the privilege of attending all sessions.

Dr. Audrey Guinchard, a French trained scholar now in England (University of Essex), opened the series with a fundamental question about name. Is the name property? She compares the evolution of English law and French law, and

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5. *See* RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman & Joan C. Williams eds., 2005).

concludes that "[t]he debate about the nature of the name is not on whether the name is property or not, but on what the relationship should be between a person and his name,"[6] with responses that may borrow to property and personality.

Professor Jacques Vanderlinden (Université libre de Bruxelles and Université de Moncton) then analyzes property in different societies, taking us to the less familiar shores of "black" Africa. From field-studies and with an anthropological outlook or a pluralistic approach, Professor Vanderlinden tells us that the Zande do not own land, since there is nothing corresponding to *abusus* or way of disposing of land in their relationship with the land they cultivate. They use it and derive the fruit of it, and follow their chief, the *ira*, to a better *sende* when the resources of the occupied land can no longer sustain the people. This is indicative of a system where "man does not own the land, the latter owns him."[7] There is much data to be observed in Africa, and as Professor Vanderlinden explains, words are missing in our western languages: we are still short of a legal science to help us do anything with these facts.

Professor David Gruning, of the Loyola University College of Law in New Orleans, contributed on *Heirs of the Body: Cadavers, Claims and Kin*. His cadavers and body parts were not resurrected in time for publication in the present volume.

Much was said about embryos, first by two Paris scholars, Ms. Laurence Brunet and Dr. Sonia Desmoulin. Considering French law applicable to human and animal embryos, they reflect on the status of chimerical embryos. This may be the most troubling paper in this series, taking us to the boundaries of the human species. French law is silent on chimerical embryos, combining human and animal genetic material. The authors go beyond the taboos to explore possible solutions offered by intellectual property. They make reference to the civilian rules concerning "principal and accessories" or composite things. They venture into considering animal and human embryos as legal persons, or making animal embryos and human embryos *in vitro* things. As the authors say, "[t]he range of genomic mixtures leads to infinite

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6. Audrey Guinchard, *Is the Name Property? Comparing the English and the French Evolution,* 1 JCLS 21, 58 (2008).

7. Jacques Vanderlinden, *Analyzing Property in Different Societies,* 1 JCLS 61, 71 (2008).

questions,"[8] all too often ignored by the lawyers. Their paper is fertile in possible answers.

Agustín Parise, of the LSU Center of Civil Law Studies, also reflects on human embryos, this time with an interdisciplinary perspective, focusing on the 16th century debate regarding the legal status of Native Americans. He tells us of these 400,000 *in vitro* embryos cryopreserved in the United States alone, and of their possible use to produce stem cells. The moral debate comes close to the Valladolid Controversy. Should human embryos *in vitro* be regarded as persons or as things? Do they fall in an intermediate category? The in-depth exploration of the opposing arguments of Bartolomé de las Casas and Juan Ginés de Sepúlveda on the status of Native Americans reveal the richess of the Spanish Scholastic movement, proving that "[t]imes of great discoveries are also times of great interrogations."[9]

Dr. Laura Franciosi and Professor Attilio Guarneri, both of Bocconi University in Milan, raise the delicate question of the protection of genetic identity, at a time where so much information can be found in human DNA. Huge benefits may be derived for human society, yet at the expense of individual interests. The paper explores ways of protecting individual interests, using privacy (a technic that pertains to the person) as well as property paradigms. Though primarily based on American materials, this paper shows that taxonomy alone does not solve complex issues.

This leads us to the final presentation in the series, by Professor Eric Reiter, of Concordia University in Montreal. Based on Domat's monster, a taxonomic puzzle to which the author adds the case of a human leg found in a barbeque smoker, Eric Reiter gives the key to the mystery. Why keep it hidden till the end rather than publishing the paper at the head of the series? Because scholars, like readers of detective stories, all too often peek in to see the final pages before reading the whole volume. Gaius' division into persons, things and actions (obligations) provides the basic architecture of the civil law, the French Civil Code and the many civil codes following the French model. It is static however, and may only be useful for problem solving if one moves away from

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8. Laurence Brunet & Sonia Desmoulin, *Human Embryo, Animal Embryo, Chimerical Embryo: What Legal Status in French Law?,* 1 JCLS 79, 104 (2008).

9. Agustín Parise, *The Valladolid Controversy Revisited: Looking Back at the Sixteenth-Century Debate on Native Americans While Facing the Current Status of Human Embryos,* 1 JCLS 107, 138 (2008).

the idea of categories as boxes in order to focus on the boundaries. Professor Reiter recommends a triangle model with all three categories mingling in the middle: "all three of the categories play a role in virtually any classificatory decision,"[10] problem solving becoming easier with fluid categories. This may imply a shift from ontological status to relativism. May the two be reconciled? This question is for the reader.

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10. Eric H. Reiter, *Rethinking Civil-Law Taxonomy: Persons, Things, and the Problem of Domat's Monster*, 1 JCLS 189, 202 (2008).

THE DISTINCTION BETWEEN PERSONS & THINGS: AN HISTORICAL PERSPECTIVE

J.-R. Trahan*

> *Of all the juridical distinctions, the most important opposes persons and goods. More than a distinction, it is a hierarchy: the person is the grandest of riches, for he has an infinite value. The riches of the world are given to man so that he may be the master of them; sometimes, they become the master of him.*
>
> Philippe Malaurie & Laurent Aynès[1]

If the *summa divisio* of the civil law–the distinction between "persons" and "things"–can be traced back through the pages of history to a single source, then that source may well be the following line of the *Institutes* of the second century Roman jurisconsult Gaius:[2] "Now, all the law that we make use of pertains either to persons or to things or to actions."[3] This is not to say that the concepts "person" and "thing" were unknown to Gaius' predecessors and contemporaries; they were not. But Gaius seems to have been the first to have set these concepts in an apparent binary opposition to each other and almost certainly was the first to have attached great significance to that opposition,[4] making of it

* James Carville Alumni Professor of Law. I wish to thank Agustín Parise, Research Associate at the Center of Civil Law Studies, for his invaluable contributions to the research on which this preface is based.

1. PHILIPPE MALAURIE & LAURENT AYNES, DROIT CIVIL: LES BIENS (2d ed. 2005) (J.-R. Trahan trans., 2008).

2. On Gaius and his INSTITUTES, *see generally* PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 19-20 (Cambridge Univ. Press 1999); and BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 34-36 (1984).

3. GAI. INST. bk. I, tit. II, n° 8 (J.-R. Trahan trans., 2006).

4. 1 FREDERICK CARL VON SAVIGNY, TRAITÉ DE DROIT ROMAIN § LIX, 389-90 (Charles Guenoux trans., Firmin Didot Frères 1840) ("[I]t has often been claimed, or at least tacitly acknowledged, that among the Romans there had been had a very ancient custom of relating the rules of law to three classes of objects: *persona*, *res*, *actio*, and that the Roman jurisconsults had all, or nearly all, followed these division in their treatises . . . Now, not a single historical fact serves to support it [this claim], and diverse circumstances seem to contradict it.

part of the very organizational backbone of his *Institutes*.[5]

Though Gaius considered "persons" and "things" to be fundamentally different from each other, it is less than entirely clear of what he considered this difference to consist. Absent from his *Institutes*–the only writing of his that has survived–is any definition of either term, any explanation of the supposedly distinctive "nature" or "essence" of one or the other, on the one hand, or "things," on the other, or any account of the criterion(a) that must de used in determining whether a given "something" is one or the other. The basis for the distinction, like the distinction itself, Gaius appears to have taken to be so "self-evident" as to require no explanation.

Despite Gaius' silence regarding the basis for the distinction, it may be possible to get some idea of his understanding of it by looking at the various "somethings" that Gaius and, in addition, his predecessors and contemporaries treated under the rubrics "person" and "thing," respectively. Many Romanists have, in fact, attempted to do precisely that.[6] And they have arrived at something of a consensus. Let us consider, first, the concept "person." The Roman jurisconsults seem to have taken the concept to include, first and most fundamentally, a "human being" or, better yet, *every* human being properly so called,[7] even including "slaves."[8] To this extent, the term "person" was given

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. . . Thus, we have no reasons to regard the division of Gaius as generally accepted; rather, we must regard it as a particular idea of this jurisconsult . . . .")

5. Gaius' *Institutes* are divided into three parts, called "books," which bear the captions of "persons," "things," and "actions," respectively.

6. *See*, e.g., 1 SAVIGNY, *supra* note 4, § LIX, at 391-401; 1 JOHN AUSTIN, LECTURES ON JURISPRUDENCE (OR THE PHILOSOPHY OF POSITIVE LAW) lect. XII, at 348-55, & lect. XIII, at 337 & 360-64 (Robert Campbell ed., 5th ed. 1885); NICHOLAS, *supra* note 2, at 60-61 & 98-99 (8th ed. 1982).

7. 1 AUSTIN, *supra* note 6, lect. XII, at 346, 350, 352; NICHOLAS, *supra* note 2, at 60-61.

8. 1 AUSTIN, *supra* note 6, lect. XII, at 348-49; NICHOLAS, *supra* note 2, at 60-61.

The temporal span of this "human being" stretched from the moment of "live birth" (or, for certain limited purposes, such as successions, from the moment of conception) until the moment of natural death. JUST. DIG. bk. 1, tit.5, n° 7 & bk. 50,tit. 16, n° 231 "Live birth" required, among other things, that the child be born with "human form" (as opposed to that of a "monster"). TWELVE TABLES tab. IV, law III.

its common sense. But for the Roman jurisconsults the concept did not stop there. To the contrary, it was also extended, at least for some purposes, to certain groups or collectivities of human beings (e.g. the *collegia*)[9] and, in at least one case, to an aggregate of rights and duties, namely, those of an hereditary estate (*haereitas jacens*).[10] As applied to such "somethings," the term "person" was used in an analogical or fictitious sense.[11] Next, let us consider the concept of "thing." For the Roman jurisconsults, this concept encompassed, first and foremost, physical objects external to the human body that can be detected by means of the senses (*res corporales*).[12] The term "thing," to this extent, had its common sense. But the Roman jurisconsults went further, extending the concept to cover (1) what we moderns would call "rights" and "duties" (so called *res incorporales*)[13] and (2) even, in one instance and for limited purposes, a certain class of "person," namely, the slave to the extent that he (or should one now say "it"?) might constitute the object of a revindicatory action brought by his master.[14] Evaluated according to the standards of modern legal science, this schema, obviously enough, leaves much to be desired.[15]

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9. 1 AUSTIN, *supra* note 6, lect. XII, at 354.

10. *Id.* at lect. XII, at 354 & 355.

11. There is yet another wrinkle in the fabric of the Romans' understanding of "person" that complicates any attempt at explicating that understanding. This wrinkle is the Romans' failure to differentiate sharply between–indeed, even to confuse–"personality," on the one hand, and "status," on the other. *See,* e.g., G.W.F. HEGEL, PHILOSOPHY OF RIGHT n° 40, at 39 (T.M. Knox trans., 1962); 1 AUSTIN, *supra* note 6, lect. XII, at 352-53, & lect. XIII, at 363-64; NICHOLAS, *supra* note 2, at 61; *see also* 1 SAVIGNY, *supra* note 4, § LIX, at 391-95; *see generally* Jeanne Louise Carriere, *From Status to Persons in Book I, Title 1 of the Civil Code*, 73 TUL. L. REV. 1263, 1268-69 (1999).

12. 1 AUSTIN, *supra* note 6, lect. XIII, at 360.

13. *Id.* at lect. XIII, at 360 & 361.

14. *Id.* at lect. XIII, at 361 & 362-63.

15. HEGEL, *supra* note 11, n° 40, at 39 (decrying the "perversity and lack of speculative thought" in the schema); NICHOLAS, *supra* note 2, at 60-61 (characterizing the schema as "rough and ready" and as lacking a "coherent theory"); *see also* 1 AUSTIN, *supra* note 6, lect. XIII, at 361 (complaining that the inclusion of "incorporeals" in the category of things creates "perplexing ambiguity") & 2 AUSTIN, *supra* note 6, lect. XLVI, at 777 (denouncing the Roman distinction between corporeal and incorporeal things as "utterly useless"); 2 Charles Aubry & Charles Rau, *Droit Civil Français* § 162 (Paul Esmein rev., 7th ed. 1961), *in* 2 CIVIL LAW TRANSLATIONS 6 (La. St. L. Inst.

For over a millennium after Gaius, the development of a more scientific understanding of the distinction between persons and things remained elusive. In his *Institutes*, Justinian simply reproduced Gaius' statement of the distinction[16] word for word and without change. So things remained when, several centuries later, first the Glossators[17] and then the Commentators[18] set to work explicating the then recently "rediscovered" works of Justinian. For example, Bracton's *Of the Legislation and the Customs of the English*, a work apparently influenced by the Glossator Azo of Bologna,[19] we find yet another reproduction, without further elaboration, of Gaius'original statement on persons, things, and actions.[20] Then there are the *Las Siete Partidas*, a 13th century Spanish law compilation that drew on the works of the Glossators and early Commentators.[21] Though this work speaks of "persons"and of "things," it never defines either term and–this is what is really surprising–it never sets the two over in opposition to each other.

Not until the emergence of the new school of "natural law" theory in the 16th century, of whom the earliest representative is the Dutch Romanist Hugo Grotius, did anyone do much to improve on the old Roman schema. Regarding "persons," Grotius added little to the stock of existing ideas, but what little he did add proved to be important: "persons," he wrote, are those who "have rights to things."[22] Though Grotius himself did not say as much, this attribute of persons clearly implies–indeed, presupposes–another, namely, that persons "can" have such rights, in other words, have the "capacity" to receive of acquire them. (Re-) conceptualizing

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trans. 1966) (characterizing the Roman distinction between corporeals and incorporeal things as "arbitrary").

16. JUST. INST. bk. I, tit. III (J.-R. Trahan trans., 2006).

17. On the Glossators, *see generally* STEIN, *supra* note 2, at 45-49; NICHOLAS, *supra* note 2, at 46-47.

18. On the Commentators, *see generally* STEIN, *supra* note 2, at 71-74; NICHOLAS, *supra* note 2, at 46-47.

19. *See* FREDERIC MAITLAND, BRACTON AND AZO (1895); CARL GUTERBOCK, BRACTON (Brinton Coxe trans., 1866); STEIN, *supra* note 2, at 64.

20. *See* HENRICI DE BRACTON, DE LEGIBUS ET CONSEUTUDINIBUS ANGLIÆ bk. I, ch. VI, at 29 (Travers Twiss ed., 1878).

21 . *See* STEIN, *supra* note 2, at 65-66.

22. 1 HUGO GROTIUS, THE JURISPRUDENCE OF HOLLAND bk. I, ch. II, n° 28, at 15 (R.W. Lee trans., 1926).

"persons" in this way, Grotius effectively made it possible to uncouple "personality" from "humanity," a development that was to have lasting significance. So (re-) understood, the category of person could easily embrace collectivities of human beings, though Grotius himself seems not to drawn this inference. Regarding "things," Grotius broke new ground by providing a definition: "that which is external to man and in any way useful to man."[23] For Grotius, "man" evidently meant "mind" or "spirit," for Grotius included among that which is "external to man" not only natural objects (such as trees) and man-made objects (such as houses), but also the human body, human life itself (understood as physical existence), and even certain attributes of human life, such as "honor" and "reputation."[24] Perhaps recognizing the potentially dangerous implications of this reification of the body, life, honor, and reputation, and the like, Grotius introduced a new subcategorization of things, the point of which seems to have been to foreclose those very implications. According to Grotius, things can be subdivided into "alienable" and "inalienable," and things such as the body, life, honor, and reputation fall into the latter subcategory.[25]

To find still further innovations in thinking about the distinction between persons and things, one must "fast forward" the tape of history to the early 19th century.[26] At that time a

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23. *Id.* at bk. II, ch. I, n° 3, at 65.

24. This definition of "thing" anticipates that of Hegel two hundred years later. *See* HEGEL, *supra* note 11, n° 42, at 40 ("What is immediately different from free mind is that which, both for mind and in itself, is the external pure and simple, a thing, something not free, not personal, without rights . . . [W]hen 'thing' is contrasted with 'person' . . . it means the opposite of what is substantive, i.e. that whose determinate character lies in its pure externality. From the point of view of free mind . . . the external is external absolutely, and it is for this reason that the determinate character assigned to nature by the concept is inherent externality.").

25. In drawing this new distinction, Grotius at the very least anticipated, if he did not in fact lay the groundwork for, the development years later of the distinction between "patrimonial" and "extra-patrimonial" rights. On this distinction, *see generally* FRANÇOIS TERRÉ & PHILIPPE SIMLER, DROIT CIVIL: LES BIENS n°18, at24-25, & nos 23-26, at 29-32 (7th ed. 2006); JEAN CARBONNIER, DROIT CIVIL: INTRODUCTION n° 166, at 321; Aubry & Rau, *supra* note 15, § 162, at 5-6.

26. One familiar with the history of the civil law tradition will recognize that, in passing from the 16th century to the 18th century, I have skipped over a number of "big names" within that tradition, including Jean Domat and Robert

number of scholars, most of them in Germany,[27] provided something of a new "take" on "persons," "things," or both and, in so doing, developed what many now call the "modern" understanding of persons and things.[28]

Regarding "persons," the modern theory breaks new ground at two points. First, the modern theory (re-) defines "person" as the "*subject* of rights and duties," in the sense of that which is "capable" of being "subjected" to duties and/or of being "invested" with rights.[29] The following passage from the work of the German Romanist Anton Thibaut is fairly typical:

Pothier. This is not an oversight. Though both of these great civilists recognized the distinction between persons and things, neither of them did much to clarify either concept or to fix with greater precision the boundaries between the two. Their theoretical interests clearly lay elsewhere.

27. Austin attributes this development to "modern civilians." 1 AUSTIN, *supra* note 6, lect. XII, at 348, 350, & 351. Given Austin's background, the scholars he had in mind were probably the early German Pandectists, such as Hugo, Thibaut, Puchta, and Savigny.

28. *See* NICHOLAS, *supra* note 2, at 60; *see also* 1 AUSTIN, *supra* note 6, lect. XII, at 348, 350, & 351.

29. *See* ANTON THIBAUT, AN INTRODUCTION TO THE STUDY OF JURISPRUDENCE § 101, at 88 (Nathaniel Lindley trans., 1855); G.F. Puchta, *Outlines of Jurisprudence as the Science of Right* § 28, *in* WILLIAM HASTIE, OUTLINES OF THE SCIENCE OF JURISPRUDENCE 100 (1887); 2 SAVIGNY, *supra* note 4, § LX, at 1; *also* 1 AUSTIN, *supra* note 6, lect. XII, at 348, 350-51, 352, 353 & lect. XIII, at 358. Austin considered the (re-) conceptualization of "person" in terms of "subject of rights and duties" to be the result of an error. 1 AUSTIN, *supra* note 6, lect. XII, at 348, 350-54. Is it not possible, however, that it is, on the contrary, the result of an attempt to "re-think" the traditional Roman distinction between person and thing so as to put it on a sounder scientific footing? *See* 1 SAVIGNY, *supra* note 4, § at 400 ("[N]o reason obliges us to imitate servilely what are acknowledged defects, and we can, without being presumptuous and without being prideful, try to put the historical materials of the Roman law into operation in a rational manner and to present them under another form than that adopted by Gaius.").

This new notion of the "subject" of rights and duties formed one of the conceptual cornerstones of the distinction, elaborated sometime later, between the two senses of "law" or "right," namely, "subjective" law or right (in French, *droit subjectif*) and "objective" law or right (in French *droit objectif*). On this distinction, *see generally* MALAURIE & AYNES, *supra* note 1, n° 41, at 40; CARBONNIER, *supra* note 25, n° 104, at 191; n° 105, at 193; & n° 163, at 315 (26th ed. 1999); Aubry & Rau, *supra* note 15, § 162, at 1; HANS KELSEN, PURE THEORY OF LAW 169-70 (Max Knight trans., 2d ed. 1978); JEAN DABIN, LE DROIT SUBJECTIF (1952).

> We have next to consider the *subjects* of rights and duties, that is to say, the persons to whom something is possible or necessary. In the first place we must examine who or what, either from its very nature or by the precepts of positive law, can be considered as capable of rights and duties. By *Person* is meant whatever in any respect is regarded as the subject of a right: by *Thing*, on the other hand, is denoted whatever is opposed to person.[30]

This manner of (re-) defining person marks an important shift–indeed, a reversal–in thinking about "personality." Whereas in earlier times "being a person" was thought to be logically prior to and to be the cause of "having legal capacity," hereafter "having legal capacity" will be thought to be logically prior to and to be the cause of "being a person."[31] Second, the modern theory establishes a new "umbrella" category into which the various non-natural persons (*collegia*, corporations, etc.) can be conveniently placed, namely, "moral" (in the sense of "psychological") or "juridical" person.[32] This passage from the work of the German Romanist Savigny is representative:

> [Up to this point] I have dealt with the capacity of law as something that corresponds to the idea of the individual; here, I will envision it as something that is extended artificially to fictitious beings. One calls them "juridical persons," that is to say, persons who exist only for juridical ends, and these persons appear to us alongside the individual, as subjects of relations of law.[33]

Attempts at specifiying the "true nature" of such "juridical persons," though often made, have usually ended in failure or, at the very least, confusion.[34]

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30. THIBAUT, *supra* note 29, § 101, at 88.

31. *See* Carriere, *supra* note 11, at 1266-67 (1999) (". . . Aubry and Rau in the late nineteenth century, and Planiol and Ripert in the early twentieth, regarded juridical capacity as definitional of personality, rather than as a consequence of it: Persons are '[t]hose beings capable of having rights and obligations.' Nicholas characterizes this view as that of 'the modern lawyer'.").

32. *See* THIBAUT, *supra* note 29, § 113, at 93; 2 SAVIGNY, *supra* note 4, § LX, at 1.

33. 2 SAVIGNY, *supra* note 4, § LXXXV, at 234.

34. *See generally* Puchta, *supra* note 29, § 28, at 101-02; 2 SAVIGNY, *supra* note 4, § LXXXV, at 237-39; KELSEN, *supra* note 29, at 172; HANS KELSEN,

Regarding "things," the thinking of the modern theorists seems to have headed off in two rather different, if not opposing, directions. On the one hand, at least some theorists provided an even more expansive definition of "thing" than did Grotius, namely, "all that which is not a 'subject'." To this non-subject, these theorists gave the new term "object." As Thibaut put it, "By thing (*res*) is meant whatever neither is nor can be the *subject* of a legal relation, but yet may be the *object* of a legal transaction and so mediately the object of a right . . ."[35] Other theorists, however, provided a restrictive definition of "thing," one that limited that category to what the Romans called *res corporales* that is, natural and man-made objects that exist in time and in space and that can be sensed.[36] A good example of this restrictive definition is provided by the German Romanist Puchta:

> The jural relationships in which man stands as an individual relate to the external goods which he needs for his existence. These goods–the earth, with what it produces and that man makes thereof–are primariy destined for the supply of the wants which he has . . .
> The principle of right does not deal with these external goods in all their natural multiplicity, but it brings into prominence their univeral character as destined for man and his wants. This common characteristic is expressed by the word "thing". . . [37]

The true point of restricting the category of "things" in this way was to expel from that category a class of "somethings" that, in the minds of these theorists, had never properly belonged there, namely, so-called "incorporeal" things. For these theorists, that class of "somethings," scientifically understood, belonged in a different category altogether, namely, that of "rights" or "obligations."[38] The effect of this reclassification, obviously

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GENERAL THEORY OF LAW AND THE STATE 97-98 (Anders Wedberg trans., 1945).

35. THIBAUT, *supra* note 29, § 146, at 116. This seems to be the definition Nicholas has in mind when he states that, for a modern lawyer, "things" refers to "rights and duties themselves." NICHOLAS, *supra* note 2, at 60.

36. Puchta, *supra* note 29, § 23, at 69-70.

37. *Id.*

38. *See, e.g.,* 1 AUSTIN, *supra* note 6, lect. XIII, at 361-62, & 2 AUSTIN,

enough, is a re-"materialization" of the concept of "thing."

During the 20th century a number of thinkers within the civil law tradition took yet another look at one or another of the aspects of the distinction between persons and things. Perhaps the most famous of these thinkers was the German civilist and positivist legal philosopher Kelsen. As was his wont, when he came to the traditional concept of "person," he set about attempting to demythologize[39] it. Because his point of view is so distinctive and because it became so influential, at least in some quarters, his remarks merit being reproduced at length:

> The concept of the legal person–who, by definition, is the subject of legal duties and legal rights–answers the need of imagining a bearer of rights and duties. Juristic thinking is not satisfied with the insight that a certain human action or omission forms the contents of a duty or a right. There must exist something that "has" the duty or the right. In this idea a general trend of human thought is manifested. Empirically observable qualities, too, are interpreted as qualities of an object or a substance, and grammatically they are represented as predicates of a subject. This substance is not an additional entity. The grammatical subject denoting it is only a symbol of the fact that the qualities form a unity. . .[40]
>
> . . . What, now, does the statement of traditional theory mean that the legal order invests the human being, or a group of human beings, with the quality of legal personality–with the qualify of being a "person"? It means that the legal order imposes obligations upon, or confers rights to, human beings, that is, that the legal order makes human behavior to content of obligations and rights. "To be a person" or "to have a legal personality" is identical with having legal obligations and subjective

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supra note 6, lect. XLVI, at 777; *see generally* NICHOLAS, *supra* note 2, at 98-99. The German Civil Code (*Bürgerliches Gesetzbuch*) reflects this sharp distinction between "things," on the one hand, and "rights," on the other, together with this restrictive definition of the former. *See* BGB § 90 ("Only corporeal objects are things as defined by law").

39. *See* KELSEN, *supra* note 34, at 93.

40. *Id.*

> rights. The person as a holder of obligations and rights is not something that is different from the obligations and rights, as whose holder the person is presented–just as a tree which is said to have a trunk, branches, and blossoms, is not a substance different from trunk, branches, and blossoms, but merely the totality of these elements. The physical or juristic person who "has" obligations and rights as their holder, *is* these obligations and rights–a complex of legal obligations and rights whose totality is expressed figuratively in the concept of "person." "Person" is merely the personification of this totality.[41]
> . . . The statement that a person has duties and rights . . . is meaningless or an empty tautology. It means that a set of duties and rights, the unity of which is personified, "has" duties and rights. . . . But it is nonsense to say that law imposes duties and rights upon persons such a statements means that law imposes duties upon duties and confers rights upon rights . . .[42]

So (re-) conceived, the "person" dematerializes completely; he ceases to be even the disembodied "mind" of Grotius. The person is not something that, existing somehow apart from legal rules, constitutes rights and duties on the basis of those rules; rather, he is created by those rules and is constituted by those rights and duties! In this way the person becomes a mere "ghost in the machine" of the legal order.[43]

Influential though it may have been, Kelsen's reconceptualization of legal personhood failed to gain the allegiance of everyone. Take, for example, the Belgian civilist and natural law philosopher Jean Dabin. In his view, talk of a subject of rights presupposes some "being" that exists prior to its becoming a subject of rights.[44] The argument runs as follows:

> But if subjective right is, in fact, in a certain manner a

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41. KELSEN, *supra* note 29, at 172-73.
42. KELSEN, *supra* note 34, at 95.
43. Law brings us back to the etymological meaning. The Latin word *persona* first meant "theatrical mask." The word was borrowed to the Etruscan *phersu*, designating a mask, before moving to the Greek and the Latin: DICTIONNAIRE HISTORIQUE DE LA LANGUE FRANÇAISE (Alain Rey ed., Robert, 2006), v. *Personne*.
44. DABIN, *supra* note 29, at 107.

> relation, insofar as it is opposable to another . . . every relation presupposes, by definition, that there be *beings* in relation. Now, one of the beings in relation is precisely the legal subject, the others being the persons who are obliged to respect the right of the subject . . .[45]

This is not to say that Dabin advocates a return to some earlier conception of "person," such as that of the German Pandectists or Grotius. He does not. In fact, Dabin raises the question whether it might not be better to dispense with the notion of "person" altogether, retaining, in its stead, that of "subject."[46] According to Dabin, the concepts "person" and "subject" are not, as has so often been assumed, equivalent. In contrast to the relatively more malleable and contentless concept of "subject," that of "person," he contends,

> is introduced into scientific and philosophical language in order to signify a notion that, though it no doubt is related to the notion of legal subjects, nevertheless is different: that of a being endowed with a reasonable nature and, as such, having an end (purpose) of its own . . .[47]

As Dabin sees it, this concept, though apt for describing human beings, fails as a description of collectivities of human beings.[48] "Human beings is a reasonable 'substance,' but groups are only 'accidents:' is not reasonable substance a necessary condition for personality?" he asks rhetorically.[49] The answer, of course, is "yes."

Between the time of Kelsen and Dabin and the present time, the distinction between persons and things seems to have fallen off the research agendas of most civilian legal scholars.[50] But that may soon be changing. The impetus for this change comes not from within but from without the academy, specifically, from the

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45. *Id.*
46. *Id.* at 107-09.
47. *Id.* at 108.
48. *Id.* at 108-09.
49. *Id.* at 109.
50. There is one notable exception. Between the end of the 1970s and the end of the 1980s, Michel Villey and the others associated with the "Archives of the Philosophy of Law," published two sets of essays on the distinction: *Les biens et les choses*, 24 ARCHIVES DE PHILOSOPHIE DU DROIT (1979), and *Le sujet de droit*, 34 ARCHIVES DE PHILOSOPHIE DU DROIT (1989).

society at large. Thanks to recent social and technological changes, our society now faces a number of new social problems, problems as to which the distinction between persons and things is highly pertinent. One such problem is the characterization of the human fetus. As long as abortion was criminalized, the ancient question of whether a fetus was merely a part of the mother's body (and, therefore, a "thing") or an independent human being (and, therefore, a "person") was no great practical significance. But when, thanks to the women's rights movement and the so-called "sexual revolution," restrictions on abortion began to fall, this question came to the forefront of public attention. Another such problem is the characterization of animals. The rise of the environmental movement has precipitated a reexamination, on the philosophical plane, of the place of human beings within the larger natural world. The traditional view–that the natural order was created for man and that he, as master of it, is free to do with it more or less as he pleases–has been increasingly challenged. As a result, proposals made, but rejected, in times past to establish for animals some kind of status intermediate between that of "things" and "persons" are once again attracting attention. Finally, there is the problem–perhaps one should say problems–that have arisen as a result of the development of new artificial reproductive technologies. Faced with the novel and, in some cases, utterly fantastic products of these technologies–not only "supernumerary embryos," but also "clones" and "chimeras"–, our society grapples with what to make of them (are they persons or things?) and what to do with them (should they be given rights and, if so, what rights?). If the law is to respond to these problems, it will require, among other things, an adequate theory of the distinction between persons and things. Revisiting that distinction, then, could not be more timely.

IS THE NAME PROPERTY? COMPARING THE ENGLISH AND THE FRENCH EVOLUTION

Audrey Guinchard*

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INTRODUCTION

"I will inhabit my name" writes the poet St John Perse[1] to highlight how the name can make a person and symbolise his/her

* Doctor in Law; Lecturer, University of Essex (United Kingdom).

1. ST JOHN PERSE, EXIL, VI (1942). Alexis Saint Léger, French citizen of Guadeloupe, took the pseudonym of Saint John Perse. Some also translate as "I will live my name."

identity. Certainly, a person cannot be reduced to a name as Juliet warns us:

> What's in a name? That which we call a rose
> By any other name would smell as sweet;
> So Romeo would, were he not Romeo call'd,
> Retain that dear perfection which he owes
> Without that title. Romeo, doff thy name,
> And for that name which is no part of thee
> Take all myself.[2]

Nonetheless, "a necessary and usual sign of personality, the name concentrates personality and expresses it."[3] Some cultures even believe that changing names could cure a person of ill-health.[4] Embodiment of a person, the name is protected both in article 24-2 of the International Covenant on Civil and Political Rights and in article 8 of the European Convention for the Protection of Human Rights and Fundamental Liberties.

It thus should not come as a surprise that both England and France declare that the name cannot be object of a property right. Though the name embodies so much of a person, it cannot be considered as a thing or good on which one holds property rights. So to the question "is the name property?" the answer is a straightforward "no." End of the matter then? Not quite. The study of *Du Boulay v. Du Boulay,*[5] where the Privy Council affirms the English law position, reveals that France and England did not have the same approach in 1869. The case revolved around the question of what protection French law, as applied in the Caribbean island of Saint Lucia, offered to the person whose name was used by another.[6] If the Privy Council concluded that French

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2. W. SHAKESPEARE, ROMEO AND JULIET, Act 2, Scene 2, lines 43-48 (1594).

3. R. NERSON, LES DROITS EXTRAPATRIMONIAUX 33 (LGDJ 1939).

4. J. Carbonnier refers to the oriental beliefs that to change a person's name when ill will cure this person. 1 J. CARBONNIER, DROIT CIVIL: LES PERSONNES 190 (PUF 1957).

5. Du Boulay v. Du Boulay, L.R. 2 PC 430 (1869).

6. Because the Treaty of 1815, which marked the end of Napoleon's Empire, conceded to the United Kingdom the Caribbean island Saint Lucia, former French colony alongside Martinique and Guadeloupe, French law was applicable at the time. Martinique, from where the plaintiffs originated from, and Guadeloupe remained French territories. For a history of Saint Lucia, *see*

law offered no protection because the various pertinent legislations in question had not been introduced in Saint Lucia for specific registration, it did not dispute the fact that the said legislation was presented as embodying a "property right" in the name. And indeed, in 1869, the traditional justification in French law courts, a justification which dated back to the 18th century, was that the name is property, albeit a different kind of property than that of other goods or things. Only at the very end of the 19th century was this perception overturned,[7] allowing, in that respect, French law to become identical to English law. But why, then, did France maintain for so long a position so contrary to that of England? Can the name be related to property? Do we have to revise the taken-for-granted distinction between persons and things, at least for the name?

The question is even more puzzling when one compares in detail the French and English laws of surnames. Indeed, despite now the common affirmation that there is no property right on the name, English and French laws differ significantly in their specifics, and that difference appears to challenge their shared agreement on the name not being property. English law considers that a person is at liberty to change name with no limit other than that of not committing fraud; correlatively, a person cannot forbid a stranger to use his/her name: "the mere assumption of a name, which is the patronymic of a family, by a stranger who had never before been called by that name, whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress."[8] Those two attributes of English law reinforce the idea that a person does not seem to "own" his/her name: s/he exercises a liberty which stretches as far as allowing him/her to assume different names, whatever inconvenience such attitude can create, as long as there is no fraud.

By contrast, to an outsider, French law can appear to create a property right or at least a proprietary interest in the name. Indeed,

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H. BREEN, ST LUCIA: HISTORICAL, STATISTICAL AND DESCRIPTIVE (Longman, Brown, Green and Longmans 1844), available also on Google Books.

7. See *Du Boulay*. The doctrine played a major role in this evolution which became accepted "truth," despite sporadic decisions of the courts affirming the contrary until mid-twentieth century, *See* Cass. Civ., March 1st, 1957 BULL. 1957, 2, 129; Cass. Civ., June 11th, 1963, GAZ PAL. 2, 290 (1963).

8. *Du Boulay*.

contrary to what happens in English law, a person cannot change names on his/her own accord and has various rights of action before the courts, notably when someone else uses his/her name without his/her consent, even if there is no fraud. It is as if the plaintiff "owns" his/her name and that "ownership" is sufficient to trigger legal protection against any use of the name "owned."[9] And yet, French law is adamant that there is no property right in the name.

One can only wonder how English and French laws, opposite in their features, can nonetheless reach the same conclusion. Surely, one or the other got it wrong? Could it be French law, as it used to affirm exactly the contrary until the early 20th century? The Privy Council case of *Du Boulay* seems to suggest so. However, the topic deserves a more thorough investigation, especially when one looks at the third feature of the law of surnames, i.e. whether a person can or cannot dispose of his/her name by contract or by will.

In English law a will can be drafted so as to include a "name and arms" clause, which typically transfers the land or any other property to another person on the condition that he (or more rarely, she) takes the name of the testator. This possibility to dispose of one's own name seems to contradict completely the English law's affirmation that a person has no property right to his/her name. This time, is it English law that misunderstood the true nature of the name?

Comparison with French law only increases the confusion. Indeed, in France, a person cannot transfer his/her name by will or even by contract, a prohibition that seems to confirm the claim that there is no property right to the name in French law. But then, how can it be reconciled with the other components of the French law of surnames, which seem to suggest the contrary?

To provide the beginning of an answer to those various questions, we will first have to go back in time, at least for French law. As the work of the French legal historian Anne Lefebvre-Teillard demonstrated, the French law of surnames has changed dramatically since the Middle Ages, whereas English law, as far as we could gather, does not seem to have undergone any profound

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9. *See* R. Munday, *The French Law of Surnames: A Study in Rights of Property, Personality and Privacy*, 6 LEGAL STUDIES 79, 88-90 (1986).

transformation.[10] This evolution of French Law affected not only its features, but also the different theoretical rationales it developed to explain those features.

Compared with English law, this analysis will shed new light on our original question–"is the name property?"–in view of the three elements of the law of surnames: whether a person can or cannot dispose of one's own name (I), protect it (II), and change it (III).

I. TO DISPOSE OF ONE'S NAME: SYMBOL OF A PROPERTY RIGHT?

Roman law recognized that a person could dispose of his name (*gens*) by requiring a beneficiary of a donation or a will to bear his name in exchange for receiving the goods or property.[11] Whether this practice survived the collapse of the Roman Empire in the 5th century is unclear, but it somehow reappeared in the Middle Ages in connection with arms and land possessed by the nobility. In English law, "inserted in a will or settlement by which property is given to a person,"[12] the name and arms clause imposes on him "the condition that he shall assume the surname and arms of the testator or settlor, with a direction that if he neglects to assume or discontinues the use of them, the estate shall devolve on the next person in remainder."[13]

To what extent this ancient practice to dispose of one's own name is used nowadays is difficult to say, for the last legal challenge was in 1962.[14] Yet it remains a feature of modern English law, whereas French law currently ignores it. "Currently" must we emphasize, because until the mid-nineteenth century, the practice was still alive. English and French laws of surnames have not always diverged in their features (A), albeit the theoretical

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10. A. LEFEBVRE-TEILLARD, LE NOM: DROIT ET HISTOIRE (PUF 1990).

11. *See* H. HOULLIER DE VILLEDIEU, DE LA PROPRIETE DES NOMS PATRONYMIQUES EN DROIT ROMAIN ET EN DROIT FRANÇAIS 32-34 (Oudin Poitiers, thèse 1883); and E. PERREAU, LE DROIT AU NOM EN MATIERE CIVILE 153-154 (Sirey 1910). Both authors cite *De Officiis* by Cicero.

12. E. JOWITT, THE DICTIONARY OF ENGLISH LAW (Sweet & Maxwell 1959), v. "Name and arms clause."

13. *Id.*

14. In Re Neeld, Carpenter v. Inigo-Jones and others, CA (1962) All E.R. 335, (1962) Ch. 643.

justification by which French lawyers explained this opportunity to dispose of one's own name promotes a reassessment of whether the name is property or not (B).

A. The Practice: French Variations and English Constancy

The name and arms clause is one of those features English law seems to have always known but whose origins are quite uncertain. According to Lord Evershed, "the existence of clauses of this kind for a hundred years or more in the precedent books and the absence until 1945 of any reported attempt to challenge their validity is, I venture to think, somewhat impressive;"[15] a statement which Lord Upjohn affirmed: "Names and arms clauses have been known for the best part of two hundred years."[16] Certainly, cases attesting of the practice go back up to the 18th century, but it is probably safe to presume that the clause, regarded as "relics of feudalism" by a modern commentator,[17] was introduced around the 12th century when surnames appeared and started to symbolise a noble household, its reputation, and its wealth. Originally used by the nobility, the clause allows for an estate to remain within the family, under its name and arms, in a situation where the latter would have disappeared, if it were not for the clause.

In accordance with custom, for the name and the law of arms, only direct male heirs are entitled to take the name and arms; in their absence, name and arms cease to be transmitted to the next generation and simply disappear. So although the land and the related property would be transmitted to the family through the remaining female line, the connection between land and name, and possibly coat of arms, would be lost. To avoid such possibility, a testator who wishes to maintain his name and arms alive will use a name and arms clause, requiring his daughter, her children and/or her spouse, or even his nephew, to bear his name and arms as a condition to inherit the estate or part of the estate[18] given. Failure to comply with the clause would simply lead to the loss of the

15. *Id.* at 344 (dissent).
16. *Id.* at 354.
17. O. M. Stone, *Name Worship and Statutory Interpretation in the Law of Wills*, 26 MOD. L. REV. 652, 656 (1963).
18. Barlow v Bateman, (1730) 3 P Wms 65.

estate, which would pass in remainder to the next person identified in the will, who also would have to take the name and arms.

The effectiveness of the clause in passing names, in connection to estates, to several generations down the line is best illustrated in *In Re Neeld* [19] decided by the Court of Appeal in 1962. T, the testator, devised a will where two names and arms clauses were at stake: one by which the name Inigo-Jones should be used, and another by which the name and arms of Neeld should be taken. What is interesting is that the first name was the testator's initial surname, before he changed it in 1941 to comply with a name and arms clause, that of Neeld, as settled in Neeld's will in 1855, nearly a century before. In other words, one clause was a way of perpetuating his own name (Inigo-Jones) despite his change of surname; the other clause allowed for the other name (Neeld) to be maintained, by making sure that the original name and arms clause drafted in 1855 would still be complied with by the second and third generations.[20] Obviously, ensuring the diversity of names was not the sole purpose of the second clause: there were property interests at stake that the testator did *not* wish to forfeit. Notwithstanding, the name and arms clause is an effective means to secure the use of a name that would otherwise become extinguished.

Such possibility to transfer one's own name to future generations had not always found approval. In 1766, Lord Mansfield considered the clause as "silly;"[21] and it is true that nowadays the clause appears to be "a relic of a bygone age,"[22] for some, "English law . . . show[ing] far too much tolerance of the mythology which the dead past imposes on the living present."[23] Not surprisingly then, from 1945 onwards, a series of cases threatened the clause's existence. The courts held a number of clauses too uncertain in their requirements, e.g. the testator not specifying when the change of name must be effective.[24] They

19. *In Re Neeld.*

20. *Id.* at 338.

21. Gulliver d. Corris v Ashby, (1766) 4 Burr 1930, 1941 ("so silly a condition as this is").

22. *In Re Neeld,* at 466 (Cross J.).

23. Stone, *supra* note 17, at 657.

24. Re Bouverie, Bouverie v Marshall, (1952) 1 All ER 408, (1952) Ch. 40; Re Woods Will Trusts, Wood v Donnelly, (1952) 1 All ER 740, (1952) Ch. 406; Re Murray, Martins Bank Ltd v Dill, (1955) Ch 69, (1954) 3 All ER 129, CA;

also declared the clauses contrary to public policy "in so far as they affect the names of married women or their husbands"[25] and force either the wives not to adopt their husbands' or husbands to adopt their wives' family name. The courts' eagerness "to control these relics of feudalism"[26] came to a halt in 1962 when the Court of Appeal concluded that the "wind of change developed against these clauses in a number of authorities . . . was but a light, fickle and variable breeze."[27] Even the dissenting Lord Evershed thought that "if clauses of this king, which have been part of the conveyancing system in our country for very many years, ought now to be treated as contrary to public policy, that is a matter for Parliament rather than for the courts."[28] Parliament not having intervened, the name and arms clauses continue to be a feature of English law of surnames, allowing people to transfer their own names, and sometimes their coats of arms, at the same time as their property.

In the 21st century, the contrast with French law could not be more striking. Modern French law ignores such possibility, and the clause is conspicuous by its absence in current law books. Yet, like in English law, the name and arms clause had been a feature of the French law of surnames for hundreds of years. The clause was part of the mechanism of the *saisine*, a concept born in the Middle Ages. Literally, *saisine* means the action of seizing, of taking over and in that sense, there may well be a connection with the English concept of *seisin* which refers to feudal possession.[29] Legally though, the *saisine* is the *use* of a "thing" (*chose*) corporeal or incorporeal which closes, with time passing by, the possibility for others to complain about it.[30]

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and Re Howard's Will Trusts, Levin v Bradley, (1961) Ch 507, (1961) 2 All ER 413.

25. Stone, *supra* note 17, at 656.

26. *Id.* at 656.

27. *In Re Neeld*, at 354 (Lord Upjohn, for the majority).

28. *Id.* at 347.

29. The scope of this article did not allow us to investigate the matter, but it would be an interesting subject for a legal historian. *See for example*, E. LEHR, ELÉMENTS DE DROIT CIVIL ANGLAIS § 368 (Larose-Forsel 1885), who uses the term of "saisine" to translate the "livery of seisin" of English law. Whether the author knew of the Middle Ages concept remains to be investigated, in a future research project.

30. LEFEBVRE-TEILLARD, *supra* note 10, at 44.

Applied to the name,[31] the *saisine* has exactly the same feature as the name and arms clause in English law. It will allow for the use of the name by persons other than those in the direct male line and who are still part of the same household. Indeed, a nobleman who has only daughters or has no heirs at all can transfer, to his son-in-law, grandson, or nephew, his name which would otherwise become extinguished for lack of direct male heirs. The clause would be inserted either in his daughter's wedding contract or in his will, often on the condition that if other collateral male heirs exist they would consent to the transfer.[32]

Like in English law, assumption of the name was sufficient to satisfy the clause. After all, the *saisine* is about the use of the name for a certain period of time–the longer the better. Still, on both sides of the Channel, those who changed their name to comply with a clause may wish to secure their new name (and position) by seeking the Crown's approval, in the form of, in French law, a letter patent,[33] and in English law, a royal licence, an Act of Parliament, or more rarely a letter patent.[34]

With similar origins as its English counterpart, the name and arms clause in old French law served the same purpose: perpetuating a name in connection with arms and an estate, primarily within the nobility. Hence, the French Revolution, with its quest to abolish any sign associated with the nobility, should have seen the disappearance of the clause. However, despite its feudal origins, the practice survived the turmoil of the Revolution. In the first half of the 19th century, the *Cour de cassation* (hereinafter, Court of Cassation) the French supreme court for civil and criminal matters, and even the *Conseil d'Etat* (hereinafter,

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31. The "saisine" has been used in other areas, like inheritance law. *See* P. OURLIAC & J. L. GAZZANIGA, HISTOIRE DU DROIT PRIVE 207-209 (1985).

32. LEFEBVRE-TEILLARD, *supra* note 10, at 46; 2 DENISART, COLLECTION DE DECISIONS NOUVELLES ET DE NOTIONS RELATIVES A LA JURISPRUDENCE ACTUELLE 256 (Desaint 1766); and 12 GUYOT, REPERTOIRE UNIVERSEL ET RAISONNE DE JURISPRUDENCE CIVILE, CRIMINELLE, CANONIQUE ET BENEFICIALE 175 (Visse 1784).

33. LEFEBVRE-TEILLARD, *supra* note 10, at 107-109.

34. One is recorded in 1317 about arms, in DOM PEDRO DE ALCAZAR, LAWS OF ARMS IN MEDIEVAL ENGLAND, *available at* http://www.sca.org/heraldry/laurel/lexarm.html (last visited November 6, 2008).

Council of State),[35] decided a few cases attesting to the use of name and arms clauses either in wedding contracts[36] or in wills.[37]

But that the practice survived was a Pyrrhic victory, and by the second half of the 19th century, English and French laws stopped converging. Indeed, the context in which the clause was born and has developed has fundamentally changed in France, but not in England. Whereas the liberty to change names remained in English law, it was abolished in French law with the law of *6 fructidor an II* (1794). From then on, nobody could assume a new name by reputation as was the practice before the Revolution, or as is still the practice in English law. In order to use a new name, one has to ask for an official change of name *prior* to that use and in accordance with the administrative procedure established by law of *11 germinal an XI* (April, 1803). Copied more or less on the administrative procedure used before the Revolution for the letters patent granted by the King,[38] the procedure means that the person has to establish what would later be called a "legitimate reason" to change his name.[39]

Whether a name and arms clause can constitute such "legitimate reason" after the Revolution is unclear. The procedure is mainly administrative and only extensive research in the French Government's archives would allow for an accurate answer. However, one case of 1831 shows that the French Government, at least in the early 19th century, was not necessarily adverse to the name and arms clause.[40] An *ordonnance* (hereinafter, ordinance) of 1815, taken in accordance with the procedure of 1803, authorised the son-in-law to take the names (and title) of his wife's father,[41] once the latter died. Better, the same case reveals that sixteen years later, the Council of State, the French 'supreme court'[42] for administrative matters, is not hostile *per se* to the clause. Indeed, the court considered that the period of one year to

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35. CE, December 16th, 1831 S. 1832 II 103.

36. Cass. Civ., January 13th, 1813, S. 1812-1814, 1, 259.

37. Cass. Req., November 16th, 1824, S.V. 1822-1824, 1, 561; S. 1825, 1, 148. The case was actually cited by the plaintifs in *Du Boulay*.

38. LEFEBVRE-TEILLARD, *supra* note 10, at 128-130.

39. The requirement is in the French Civil Code, article 60 al.1.

40. CE, December 16th, 1831 S. 1832 II 103.

41. *Id.*

42. Until the law of May 24th, 1872, the Council of State was not fully independent (possibility for its decisions to be overturned).

oppose the ordinance does not start at the time when the ordinance was granted but at the time when the condition realises itself, i.e., here, at the time when the father dies and leaves his name to his son-in-law. In other words, the Council of State adapted the administrative procedure to the specific features of the name and arms clause.

Even the Court of Cassation may not be completely opposed to the name and arms clause in this first half of the 19th century. Indeed, in 1813, the Court rejected the argument that to promise to bear another's name as part of a wedding contract is, in principle, contrary to the law of *6 fructidor an II.*[43] Thus, the lack of liberty to change one's name established by this law does not render the name and arms clause invalid *per se*. However, it does endanger its survival, even though there may not be a direct antagonism to the practice. Indeed, the loss of liberty to change one's name goes hand in hand with the obligation to comply with the procedure set out in the law of *11 germinal an XI*, an obligation that the French courts, whether Council of State or Court of Cassation, enforce strictly.

As a result, as long as the beneficiary of a name and arms clause does not use the procedure, he will be considered as not having complied with the clause. This is so even if he believed he had already been authorised to change his name because the French Government had granted an ordinance stating he could change his name, but obviously without having respected the procedure of law of *11 germinal an XI.*[44]

This loss of liberty to change names renders the name and arms clause a much less attractive tool in French law. Its drafter runs the risk that his wishes may not be respected despite the willingness of those benefiting from the clause to comply with it. If we add the fact that the procedure is costly[45] and involves a risk of the request being rejected by the Government, in the long term the clause would only lose its appeal and by the mid-nineteenth century onwards, there is no case law attesting of the practice.[46]

43. Cass. Civ., January 13th, 1813 S.1812-1814, 2, 259.

44. CE, December 16th, 1831 S. 1832, 2, 103; Cass. Req. April 22nd, 1846 S. 1848 I 417.

45. LEFEBVRE-TEILLARD, *supra* note 10, at 190 and n. 9. The procedure became less costly closer to the 20th century.

46. The last case is of 1846: Cass. Req., April 22nd, 1846 S. 1848 I 417.

Certainly, the clause is still mentioned in books related to donations and wills, but the authors never cite a case less than fifty to sixty years old, and they all affirm the necessity to comply with the procedure of law of *11 germinal an XI.*[47]

In 1910, E. Perreau suggested that the clause was rarely used and he noted indeed that "for more than sixty years, our case law reports do not contain any decision on this question."[48] Thereafter the clause ceased to be mentioned anywhere. Hence, after centuries of similar practice, French law finally departed from English law. The impossibility to assume one's name by reputation without prior authorisation finally got the better of the name and arms clause.[49] This is however only part of the story. If the name and arms clause disappeared in French law, it is also because it faced a new challenge at the end of the 19th and beginning of the 20th century. Associated with the concept of property until then, the name and arms clause could only be affected by the movement among French scholars to condemn the idea that the name could be property, an idea which will be from then on considered as the correct interpretation of what the name is. In that sense, French and English law have never been so far apart, for even if English law does not consider the name property, it still allows for the name and arms clause to be used in contracts and wills.

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47. *See* M. TROPLONG, DES DONATIONS ENTRE VIFS ET TESTAMENTS, OU COMMENTAIRE DU TITRE 2 DU LIVRE 3 DU CODE NAPOLEON 276, §256 (H. Plon 1872): *la condition de prendre le nom du testateur est très légale, et elle met l'héritier dans l'obligation d'y satisfaire," the author however cites no other cases than a 1836 one* (July 4th, 1836, D. 1836, 1, 302); *id.* G. BAUDRY-LACANTINERIE & M. COLIN, TRAITE THEORIQUE ET PRATIQUE DE DROIT CIVIL: DES DONATIONS ENTRE VIFS ET DES TESTAMENTS 77, § 177 (Larose 1895).

48. PERREAU, *supra* note 11, at 156.

49. Nowadays, the Council of State refuses to grant a change of name as a condition to execute a will or to the person wishing to take that of his mother. *See respectively*, D. Pepy, *Les changements de nom dans le droit français, in* ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 1966-67 31, 36; and F. Bernard, *Le Conseil d'Etat et les changements de nom*, ETUDES ET DOCUMENTS DU CONSEIL D'ETAT 1977-1978 67, 78. The law 57-133 of February 8th, 1957 (following a law of July 2nd, 1923) remedied only partly to the loss of names due to lack of a direct male line. *See* I. De Silva, *Le changement de nom devant le Conseil d'Etat: le relèvement du patronyme menacé d'extinction. Conclusion sous CE n. 236470 du 19 mai 2004*, REVUE DE DROIT PUBLIC ET DE SCIENCE POLITIQUE 1153, 1159 (2004); and F. Petit, *La mémoire en droit privé*, RRJ 17, 38-39 (1997).

B. The Theoretical Justification of the Practice: Dispelling Confusion

Confusion stems as much from the evolution French law went through, as from French law contrasted with English law. Until the early 20th century, the name was considered to be property in French law, in contradiction to the English law's understanding that the name is not, as the Privy Council reminded the plaintiffs in the 1869 case of *Du Boulay*. Afterwards, because of the movement among French scholars in the 1900s, French law adopted what is apparently the same position as English law, but on grounds which make one wonder if the two laws of surnames mean the same thing. To dispel this confusion, we must first understand English law's approach to the act of disposing of one's name, for it reflects on French law's original conception of the name. This initial analysis will shed light on the subsequent rationales French law had adopted, highlighting where the confusion lies.

In *Du Boulay* the Privy Council affirmed for the first time the accepted understanding that the name was not property in English law. Strictly speaking, the case does not involve a name and arms clause, but rather raises the issue of whether a person can protect her/his name against use by another in English law. Nonetheless, the judgment's wording is broad enough for the decision to encompass the name and arms clause within its declaration that the name is not property. A comparison between the name and the arms or the title reinforces this conclusion. Indeed, a title is "an incorporeal and impartible hereditament, inalienable and descendible."[50] In other words, it is property,[51] though it cannot be

50. 35 HALSBURY'S LAWS OF ENGLAND § 906, at 568 (4th ed. 1994) v. "Peerages and Dignities." *See notably* Earl Cowley v Countess Cowley, (1901) AC 450, at 457-458.

51. Note that the first meaning of the word "title" is not a dignity, but refers to "a right of property . . . with reference either to the manner in which the right has been acquired or as to its capacity of being effectively transferred," OSBORN'S CONCISE LAW DICTIONARY (Sweet & Maxwell, 10th ed. 2005), v. "Title."

sold.[52] Similarly, arms are considered property,[53] although "the right to bear arms is a dignity conferred by the Crown, and not an incorporeal hereditament."[54]

As a consequence, both title and arms are protected against assumption and use by another without grant,[55] whereas the name can be assumed and used freely without formality.[56] If there is "a personal right to bear arms"[57] and title, there is no right to bear name, just a liberty to do so. Thus, to dispose of one's own name in a will is not a sign of a right of property on the name, but rather the exercise of the liberty to make one's will conjoined to the liberty to assume names by reputation.[58] It is not so much about disposing of or transferring a thing, object of property, than exercising a liberty to assume a name in order to be able to maintain its existence. The fact that English Law insists so much on the name and arms clause being a voluntary assumption of a name rather than a transfer of it can be seen in *Doe d Luscombe v Yates* (1822)[59] where the beneficiary of the will had assumed the testator's name of Luscombe *before* he came into possession of the estate, i.e. before the name and arms clause took effect.[60] If the

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52. A contract for the purchase of a title is contrary to public policy and void. Parkinson v College of Ambulance Ltd and Harrison, (1925) 2 KB 1.

53. Stubs v Stubs, [1862] 1 H & C. 257; In re Croxon, Croxon v. Ferrers, [1904] 1 Ch. 252, 258. Note that the common law courts do not have jurisdiction, see HALSBURY'S, *supra* note *50*, at § 970, p. 599.

54. 42 HALSBURY'S LAWS OF ENGLAND § 749 (4th ed. 1994) v. "Settlements"; and Manchester Corpn v Manchester Palace of Varieties Ltd, (1955) P 133, (1955) 1 All ER 387.

55. Title: Earl Cowley v Countess Cowley, (1901) AC 450, 460; *see* 2 JARMAN ON WILLS 1532, 1533 (8th ed 1951).

Arms: In re Croxon, Croxon v. Ferrers, (1904) 1 Ch. 252, 258; In re Berens, In re Dowdeswell, Berens-Dowdeswell v. Holland-Martin, (1926) 1 Ch. 596, 604-605; and Barlow v Bateman, 3 P. Wms 65, on appeal (1735) 2 Bro Parl Cas 272, HL.

56. Doe d Luscombe v Yates, (1822) 5 B & Ald 544; Davies v Lowndes, (1835) 1 Bing NC 597; Bevan v Mahon-Hagan, (1893) 31 LR Ir 342, CA; and Barlow v Bateman, (1730) 3 P Wms 65.

57. *In re Berens,* at 605.

58. *In re Neeld*, at 353-354; *Re Howard's*, at 523; *In re Berens*, at 604-605; and *Du Boulay*, at 447.

59. *Doe d Luscombe.*

60. John Luscombe Manning was required to assume the name of Luscombe once he had "attained the age of 21 years" and be entitled to the estate. However, during his minority, he assumed the testator's name of

name and arms clause was a transfer of the name-property, the name could not be used before the clause became effective, i.e. before Luscombe inherited the estate. However, Luscombe, like any disposee, did not need the clause to be able to bear the name: he retained the possibility to assume the testator's name, whether or not the latter drafted the clause.

That English law puts the emphasis on the liberty to assume another's name rather than on the transfer of name-property by the testator does not surprise when compared to what we know of the origin of the name and arms clause in French law. The French medieval concept of *saisine* is the prolonged *use* of a "thing" that does not create a right of ownership, but that extinguishes the right of others to complain about the use.[61] Like in English law, what matters is that there is an assumption of a name for a period of time long enough for the person to secure the use of his name, a bit like an adoption, rather than a donation.[62] The emphasis is on the liberty to change name rather than on the testator's supposed right to transfer the name. And because, like in English law, the French *saisine* is neither property nor possession, the name is not property, but rather the object of an exercise of liberty. But whereas English law will retain this approach, French law will progressively drift away from it by superposing the concept of property on the notion of *saisine* and its related feature, the name and arms clause.

The association between name and property results from a combination of factors which taken separately are not conclusive and demonstrate how problematic the assimilation between name and property can be. It all started when, at the end of the Middle Ages, French lawyers ceased to understand the concept of the *saisine*. Trained in Roman law, they turned towards the more familiar concepts of possession and property to explain the features of the *saisine*. In his commentaries of the *Justinian Code*, Balde († 1400) affirmed that the name was *bien hors du commerce* (a thing outside commerce), in order to highlight the fact that the right on the name as known in the *saisine* does not incorporate the right to

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Luscombe and was known thereafter by this surname instead of his own surname.

61. LEFEBVRE-TEILLARD, *supra* note 10, at 44.

62. *Id.* at 46.

sell the name.[63] The link he established between the name and "goods" (*biens*) made it tempting later on to try to qualify the right attached to the name, and what is better suited than the right to property, which concerns goods?[64]

Under that light, the clause mechanism seems to point towards an act of disposition, indicative not of possession, but more of a property right on the name. There is a donation of a name rather than an adoption as it was understood in the Middle Ages. The onus is thus on the transfer from testator to disposee rather than on the disposee's liberty to assume a new name. For French lawyers, this correlation between name and property is comforted by the fact that the surname has become hereditary in the sense that the father gives his name to his children. Again, the emphasis on the person who "transfers" the name rather on the one who "receives" it.

This use of Roman law to reshape rationales underlying existing practices is not surprising. France, like most continental countries, had been deeply influenced by Roman law–much more than England ever had been.[65] So although French and English laws continue to recognise the name and arms clause and the liberty to assume a new name, by the late 18th century, the rationale provided changed dramatically, introducing confusion about what the name is and is not.

The artificial character of the link made between name and property can be seen in the wording used to describe the French law of surnames, just before the 1789 Revolution. In 1780, one of the most important encyclopaedias of French law, the *Repertoire Guyot*, stated that "the name is an *inalienable* property of each family and *household*. It suffices to enjoy this property/ownership to be a *male* descendant of who bears the name."[66] One can immediately see that the features of the original *saisine* remain: the name cannot be *sold*, and the name and arms clause, used mainly by the nobility because the name is a symbol of the

63. *Id.*

64. *Id.* at 83.

65. Even the *seisin*, which we do not know so far whether it is related to the *saisine*, is described as feudal possession, implying a different kind of possession than that of Roman law. OSBORN'S, *supra* note 51, at v. "seisin."

66. Desessarts, *in* GUYOT, *supra* note 32, at 168 (author's translation and emphasis added), also cited in LEFEBVRE-TEILLARD, *supra* note 10, at 84, n. 149.

household, depends on the existence, or rather absence, of a *male* line to which the name can be transferred. Thus, the declaration that the name is property is more a standard clause than the result of a careful analysis of both the name and the concept of property. The forgotten *saisine* which remains in its features has been dressed up with the ill-suited concept of property.

This evolution of French law would not have had such an impact if it were not for the success the new explanation enjoyed in the 19th century. Far from being dispelled, the confusion found a new life, except that it was not perceived as such, but rather as the correct view of what the name is. The case of *Du Boulay* is a testament to this understanding of the law. The plaintiffs whose arguments were based on French law cited the *Dictionnaire du Notariat* (Dictionary of the Notary), affirming that the name is property.[67] One would then think that when the presentation was criticised in the late 19th and early 20th centuries, the confusion would disappear. Certainly, scholars demonstrated that the name could not be disposed of by the father and thus be hereditary like property is.[68] So in that sense, one of the factors that led to the conclusion the name was property has been rejected.

However, concerning the name and arms clause, the link previously made between property right and liberty to dispose of the name is never questioned, even by those maintaining that the name is property,[69] nor by those considering that the name could not be property. Indeed, the reason why the name cannot be property anymore is because it cannot be disposed of . . . by a name and arms clause, for the *disposee* of the clause cannot change his name on his own accord but must ask at the very least the Government's authorisation! In other words, instead of

67. *Du Boulay*, at 440, 443.

68. M. PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL CONFORME AU PROGRAMME OFFICIAL DES FACULTES DE DROIT § 398 at 152 (LGDJ, 4th ed. 1906); and 1 PLANIOL & RIPERT, TRAITE PRATIQUE DE DROIT CIVIL 141 (1952). For Planiol, it is the legislation (*loi*) that obliges the father's name to be adopted as a sign of the father-child relationship. The criticism is not without weaknesses. If it is true that the Civil Code provides for the nomen to be a sign of possessing the status of son or daughter, it is nonetheless notoriously silent concerning the surname to be given at birth. Until the reforms of 2002 and 2003, custom dictated that the legitimate child should have his father's name.

69. SALVETON, LE NOM EN DROIT ROMAIN ET EN DROIT FRANÇAIS 305 (thèse 1887), cited by PH. NERAC, LA PROTECTION DU NOM PATRONYMIQUE EN DROIT CIVIL (ETUDE DE JURISPRUDENCE) 15 (PUF 1979).

disappearing, the emphasis put on the testator disposing of the name, is strengthened by the disappearance of the liberty to assume one's name.

The name and arms clause is not analysed anymore as the conjunction of two liberties, that of making one's will and that of changing names, but as simply the act of writing a will that opposes the principle of immutability of names and that cannot therefore survive. Perreau, at the heart of the movement combating the name presented as property in the 1900s, clearly links the impossibility to dispose of the name with the prohibition to change one's name at will. "What instability, indeed, what difficulties, what confusion and what frauds, in family and business relationships, if anybody could modify his name as freely as the composition of his estate (*patrimoine*)!"[70] Thus, Perreau associates property with both liberty to dispose of the name and liberty to assume another's name: loss of the latter implies loss to dispose of the name and thus loss of property rights.[71] Paradoxically, but easily understandable as the concept of the *saisine* had not yet been rediscovered,[72] Perreau's reasoning perpetuates the original confusion introduced after the 15th century, whereas the original intention of the author is to dispel the confusion between name and property!

The argument definitely loses its apparent logic when compared with English law. To follow Perreau's line of reasoning means that English law should affirm that the name is property as it not only accepts the practice of the name and arms clause but also recognises the liberty to change names. And yet, English law refuses to consider the name to be property, clearly distinguishing it from the title and arms. Hence, although English and modern French laws appear to agree that the name is not property, their understanding rests on an analysis of their respective practices which are contradictory. However, as before, this contradiction

70. E. Perreau, *De l'incessibilité du nom civil*, REVUE CRITIQUE DE LEGISLATION 548, 550 (1900).

71. "It appears to us that the Government's authorisation would be necessary nowadays, otherwise we would be confronted to a true cession of the name", i.e. to the name being a thing object of property, *see* Perreau, *supra* note 70, at 552.

72. The major work of A. Lefebvre-Teillard has not yet been written. In addition, legal history has just been introduced as part of the curriculum in French law schools.

does not rest much on what is property in relation to the name. Rather it builds on an historical misconstruction to which has been added a new twist by the loss of the liberty to change names in French law.

The introduction of the concept of extra-patrimonial right to explain the particularities of the modern French law of surnames only reinforces this evolution. Indeed, at the same time that Perreau demonstrated the name cannot be property, he used a new concept developed by German scholars as explained by Saleilles[73] and which put the emphasis on what is a person in relation to his/her name. The name is the object of an extra-patrimonial right characterised by four elements: not at disposal, not to be seized, not transmittable, and not prescribed by time.[74] Opposed to property rights, the concept puts the emphasis on what is a person intrinsically. The person's identity that the name reveals is confused with the immutability of the person[75] as a human being.

As a result, it made it difficult for French law to conceive that the liberty to dispose one's name is not a liberty to dispose of the person's identity and essence. It's as if to recognise both liberties would be allowing the person to sell him/herself like a vulgar object of trade, of property. This particular conception of a person marks the divergence between French and English laws. Thus, what is at stake behind the liberty to dispose or not of one's name is not so much a reflection of what is property than a vision of what is a person, since the 20th century introduction of the concept of extra-patrimonial right in French law. Whether a similar conclusion could apply to the protection of one's name against the use by another remains to be demonstrated.

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73. R. Saleilles, *Le droit au nom individuel dans le code civil pour l'empire d'Allemagne: Note sous l'article 12 du Code civil allemand*, REVUE CRITIQUE DE LEGISLATION 94 (1900).

74. Among the many studies about extra-patrimonial rights from which is derived the personality right, *see* NERSON, *supra* note 3; and P. Kayser, *Les droits de la personnalité. Aspects théoriques et pratiques*, REV. TRIM. DR. CIV. 45, spec. 492 (1971).

75. Perreau, *supra* note 70, at 559; M. Gobert, "Le nom ou la redécouverte d'un masque", I 2966 JCP § 4, 20 (1980); M. Gobert, *Rapport de synthèse*, *in* LA NOUVELLE LOI SUR LE NOM (ARTICLE 43 DE LA LOI DU 23 DECEMBRE 1985) 185, 197 (LGDJ 1985); Munday, *supra* note 9, at 94. Similarly, to the philosopher Hume, identity coincides with immutability, *Treatise of Human Nature* (1739), Book I, Part IV, section IV; also quoted in S. FERRET, L'IDENTITÉ 20 (GF Flammarion 1998).

II. TO PROTECT ONE'S NAME: THE EXERCISE OF A PROPERTY RIGHT?

Both English and French laws offer protection against the use of a name by another. Indeed, like Roman law before,[76] they recognise that a person cannot use another's name for purposes of fraud.[77] Beyond this specific situation however they diverge significantly. Even if there is no intention to defraud, French law offers to a person legal protection as long as he has not consented to the use, whereas English law refuses to do so. This divergence of practice would not have been of any significance for our debate if French law had not affirmed for a long time that the name was property, implying that the legal action available to protect the name was the exercise of a property right on the name. It is this understanding that the plaintiffs in *Du Boulay* put forward in support of their claim that the Privy Council should prohibit the defendant to bear the name of Du Boulay. Not contesting that French law recognised a property right,[78] the Privy Council affirmed the difference with English law: the "mere assumption of a name by a stranger . . . whatever cause of annoyance it may be to the family, is a grievance for which our Law affords no redress."[79] Thus, the traditional interpretation of the case is that in English law the name is not property. Could it be then that to protect one's name against the use by another is a sign of a property right? An analysis of the argument in French law reveals confusion about the name being property (A), a confusion the doctrine will try to dispel in the early 20th century, offering a specific vision of the name in contrast to the English law's approach (B).

A. The Source of the Confusion

The possibility for a person to oppose the use of her name by another arose in the Middle Ages with our already-encountered

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76. LEFEBVRE-TEILLARD, *supra* note 10, at 43-46; and HOULLIER DE VILLEDIEU, *supra* note 11, at 36-37.

77. *Du Boulay*, at 440-441; Cass. Civ., June 22nd, 1971, D. 1971, somm. 181.

78. French law was applicable at the time in St Lucia, *id.* at § 3.

79. *Id.* at 441.

French law concept of the *saisine*. Indeed, the *saisine* has two-tiers: the first, the name and arms clause, is to be exercised when the name is about to be extinguished for lack of direct male heirs, *on the condition* that if other male heirs exist they have to consent to the transfer; the second, correlative of the first, is for the male heirs to protect their "right" on the name by forbidding anybody, including close relatives, to bear their names *if they have not consented that they do so*.

Like for the name and arms clause, what matters is to ensure that the noble name remains within the family or persons to be trusted, in order to avoid confusion with commoners. This protection of the name as the symbol of a household is particularly important in a world where there is, in principle, liberty to use another's name as long as it is without fraud. If the protection were not available, anybody could exercise his liberty to change names and take a noble name. Thus the nobility needs specific protection and the *saisine* provides it by opening a legal action to all members of a family who do not need to prove damage or fraud. Those features of the civil action will pass the test of time untouched. However, the original context in which they were born will be lost and, like the name and arms clause, by the end of the 18th century until the early 20th century, the legal action will be presented as the exercise of a property right in respect to both the holder of the action (1) and the requirement not to prove damage (2). The confusion could not be greater.

1. The Holder of the Action

Because of the purpose served by the *saisine*, to protect one's name is to protect not simply the name one bears but also the name of the family one belongs to but does not bear. Thus the legal action is opened to a variety of persons who have in common their interest in maintaining the household name intact. Because the concept of the *saisine* was misunderstood, as we have seen with the name and arms clause, French lawyers started to present in 1780 "the name [as] an *inalienable* property of each family and household"[80] in order to explain the specific characteristic of the legal action. The expression survived the turmoil of the French

80. Desessarts, *in* GUYOT, *supra* note 32, at 168, v. "Nom" (author's translation and emphasis added).

Revolution, and during the 19th century the courts did not hesitate to declare that "the family name is their exclusive property,"[81] that "the name is part of the persons' status and belongs exclusively to the members of the family,"[82] or that "the family name is a property . . . to which even the State cannot impair/infringe without the consent of the family."[83]

Until the early 20th century, scholarly works maintained the confusion and alongside the courts, they continued to affirm that the legal action to protect one's family name is the exercise of a property right. Some, however, recognised that a true property right only offers legal protection to the owner of the property, not to the owner's family. In order to provide a more adequate explanation, they developed two lines of arguments. Either they presented the name as a special type of property shared with several people,[84] or they considered the name an example of co-ownership.[85] In any case, they did not question the affirmation of the name being property. To the contrary, they perpetuated an explanation which associated the name with the ill-suited concept of property whereas the origins of the legal action they tried to explain rested on the *saisine,* which resisted any assimilation to property. Understanding that the unchecked affirmation did not and could not rest on solid grounds shed light on English law's understanding in *Du Boulay*. Because analysis of French legal history demonstrates that there is no link between protecting the name and property, *a contrario*, there cannot be a link between lack of protection of the name and lack of property rights in the name. Thus when English law affirms the name is not property, it

81. Paris, March 20th, 1826, S.V. 1825-1827, 2, 214 ; S. 1826 II 214.

82. Paris, March 22nd, 1828 S.V. 1828-1830, 2, 60. Was at stake here the action of a father agains the use of his name by his illegitimate son born out of adultery.

83. Douai, December 26th, 1835 S. 1837 II 188; similarly, Riom, January 2nd, 1865, D. 1865, 2, 17 ; Agen, June 26th, 1860, D. 1860, 2, 141. Overall, *see* E. Agostini, *La protection du nom patronymique et la nature du droit au nom*, DALLOZ chr. 313 (1973).

84. For example, J. A. LALLIER, DE LA PROPRIÉTÉ DES NOMS ET DES TITRES (Giard 1890); it echoes the Court of Appeal of Riom, January 2nd, 1865 D.P. 1865, 2, 17 "a right sui generis."

85. 4 J. BONNECASE, SUPPL. TRAITE DE DROIT CIVIL DE BAUDRY-LACANTINIERE § 290, at 566 (1928); for a summary, see M. Herzog-Evans, *Autonomie de la volonté et nom. Un plaidoyer,* RRJ 48-49 (1997); and NERAC, *supra* note 69, at 15-17.

cannot be because it does not protect the name against use by another (except for fraud).

A similar conclusion applies to the other characteristic of the legal action recognised in French law and related to the conditions in which it operates.

2. The Conditions of the Legal Action

According to the traditional presentation, those entitled to bring a civil law suit to protect their name against use by another are not required to prove the existence of damage (*prejudice*). Assumption of the name suffices to justify their legal action. In the original context of the *saisine*, this condition is not a surprise. The noble name is sufficiently known for its assumption by a third party to create injury to the family members by the association it brings between the stranger and the family. In practice, there is damage, except that it is an implicit but obvious consequence of the assumption. Proving the assumption equals proving the damage, and there is no need to require additional evidence.[86]

However, the original context of the civil action being lost, scholars will be puzzled by the affirmation that there is no proof of damages, especially when compared to the conditions surrounding another legal action available to protect against the use of surnames by another, for the latter apparently requires the opposite, i.e. proof of damage. Indeed, when a person tries to obtain confirmation of his new surname, he has to request a letter patent to the Crown, a procedure which evolved to incorporate a period of time during which people could oppose the change of name.

Originally, this procedure developed as a consequence to the name and arms clause and is thus closely related to the other legal action the male heirs had. It is the nobility that has an interest in opposing the grant of a letter patent, if it has not already engaged in direct legal action before the courts. That interest, in its

86. See the example given by LEFEBVRE-TEILLARD, *supra* note 10, at 48 where the Rochechouart-Mortemart sued their cousin Francois de Pontville-Rochechouart for not bearing the name Rochechouart without their consent, but as a result of a name and arms clause. Centuries later, the family of Rochechouart-Mortemart will be embroiled in another law suit, Cass. Civ. 1ère, January 31st, 1978 JCP 1979 II 19 035.

substance, does not differ from the one at stake in the civil action. Nonetheless, contrary to the civil courts, the Crown will expressly require its proof, probably as a means to retain full discretion on whether or not to grant the letter patent.[87] The administrative procedure being incorporated into the law of *11 germinal an XI*, and now into article 61 of the French Civil Code, proof of damage continues to be required, in contrast to the courts' opposite affirmation.

But like during the *Ancien Régime*, the difference does not really exist and some modern scholars have demonstrated this.[88] Indeed, despite continuing to affirm that no proof of damage was required, the civil courts never went on to accept *any* assumption of name as justifying the plaintiff's legal action. Paul Dupont (the John Smith of England) will never succeed in protecting his surname of Dupont if he restricts himself to prove that another used it. The courts require more than that mere assumption and are in that sense respectful of the original purpose of the legal action.

The protection given to the name was born out of the necessity for the nobility to maintain the prestige of a name and its associated arms and estate. It is this prestige of a name that remains a constant preoccupation for the courts. Assumption of an ordinary name requires proving a specific damage suffered;[89] by contrast, assumption of a prestigious name or a name with originality can be sufficient. In other words, the protection of the name the courts offer still depends on the same rationale that existed at the origin of the protection; the context may have changed for the nobility has been abolished, but the foundational principles remain because they can easily be transferred to non noble names.[90]

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87. LEFEBVRE-TEILLARD, *supra* note 10, at 105, spec. n. 237.

88. CARBONNIER, *supra* note 4, at 192; P. Kayser, *La défense du nom de famille d'après la jurisprudence civile et d'après la jurisprudence administrative*, 10 REV. TRIM. DR. CIV. 21, 27-29 (1959); and NÉRAC, *supra* note 69, at 158-161.

89. Nérac demonstrated this caselaw element, *id.* at 158-159. He even underlines that the civil and administrative courts hold the same line of approach, *id.* at 160.

90. One could even argue that the new nobility of the 19th century are those celebrities and stars a lot of people seem to aspire to be, like in the previous centuries, people aspire to nobility.

This debate would not matter much if it had not been at the centre of a controversy about whether or not the name is property. To explain the (unchecked) affirmation that there is no need to prove damage before the civil courts, scholars consider that the condition of the legal action is a sure sign of a property right being exercised. Indeed, not to require proof of damages is, in French law, a particularity of property law where assumption of the object of property suffices to create the damage. Thus, the existence of legal action born out of the *saisine* seems to confirm that the name is property, and in the 19th century, the civil courts appeared to be justified in affirming that the right to the name embodied by the protection is a property right. Obviously, to declare that the name is property completely ignores the reality of the case law. For if the name was property, any name, whether common or rare, would deserve protection, because any thing, object of property, deserves protection, whether an old battered book or the priceless edition of an author's work. And yet, the courts adopt a different approach.

It raises the question of how the debate about whether or not the name is property could have been so sidetracked and confused. That the old concept of the *saisine,* from which was born the first legal action, was lost, cannot be overstated as the cause of the problem. Even lawyers who in the early 20th century challenged the concept of the name being property took for granted the courts' affirmation that there was no need to prove damage. Planiol, for example, acknowledged that "if the name is a property, it is possible for a person who bears it to ask others to respect it, without the need to prove that the assumption causes damage."[91] But having demonstrated that the name cannot be property, he concluded that the civil courts erred in not requiring proof of damage and that the opposite stand taken by the Council of State should prevail in the other legal action available to protect one's name.[92] In other words, Planiol challenged what constitutes the original feature of the legal claim born out of the *saisine*. The irony is that historically, the *saisine*, and therefore the name, never was property; thus, to affirm, like Planiol did, that the name is not property, should not cause the very characteristic of the legal action derived from the *saisine* to be disputed.

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91. PLANIOL, *supra* note 68, at 152, § 400.
92. *Id.* at 153, § 400.

Interestingly enough, Planiol sensed the original context of the legal action, albeit he reached the wrong conclusions. For him, the confusion between property and the name rests on the association between the surname and the name of the land acquired by the nobility.[93] He is not too far from the truth when noticing the link between the French law of surnames and the nobility: the *saisine* served the nobility's interests which were often linked at the time with interests in the land. However, the relationship between the two never implied for the name to be property. It is the French lawyers of the *Ancien Régime* who joined the two together in imitation of Roman law, rather than by identification of the name to the land or to a title (i.e. to property). The same lack of historical knowledge and analysis about what the name really is led them and others to infer that the supposed absence to prove damages was a sure sign of property. To understand how this interpretation spread dispels any doubt that comparison with English law could create confusion as to the nature of the name. The affirmation in English law that the name is not property should not be associated with the quasi-absence, in English law, of a civil action to protect one's name. Analysis of French law shows that there is no link between the two.

In the French civil action to protect the name, the absence of proof of damage, said to be a sign of property, is more a rhetorical affirmation than a conclusion having any sound substantial basis. Certainly, that it remained unquestioned[94] and unchecked until the middle of the 20th century[95] contributed to the confusion between name and property in French law.[96] Nonetheless, and strangely enough, it is not the analysis of the courts' practice that will lead to the affirmation that the name is not property.

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93. *Id.* at 152; and PLANIOL & RIPERT, *supra* note 68, at 141.

94. Carbonnier wondered if the divergence between the civil and administrative courts was not exaggerated, CARBONNIER, *supra* note 4, at 192.

95. *Id.* at n. 79.

96. Even after those studies, confusion reappears from time to time, *see* R. LINDON, LES DROITS DE LA PERSONNALITÉ 177 (1983), who considers that the protection of the name can be explained as much by the theory of property right as by the concept of personality right.

B. The Rejection of the Confusion

The doctrinal reaction against the property nature of the name arose at the end of the 19th and beginning of the 20th century, in two stages. The confusion between name and property proved to be easy to dispel with regard to civil actions. If the name were property, it would mean that several persons possess the name and exercise the same rights on this thing.[97] However, in French law, a property right implies an exclusive ownership on an object, on a thing; there cannot be two owners of one thing with the same rights. Thus, the name could not be property.

In relation to the conditions of the legal action, the doctrine did not directly criticise the link made between a civil action in property law and one related to the protection of names, because in both cases, according to the courts, there is no need to prove damage.[98] Rather, they tried to demonstrate that the alleged practice reflected other concepts than property rights. They were helped in that by recent developments in case law.

By the late 19th century, the courts extended the protection of the name against personal use to use for literature purposes. They did so on the basis of property rights in the name,[99] although they required the plaintiff to prove damage and an interest to claim. As scholars observed, such requirement was adverse to the concept of property rights; more importantly, what was defended was not the name as property/good, but the name as the embodiment of a person and his/her personality or civil status. Linking this analysis of the protection against artistic use to that of the protection against personal use, the doctrine proposed a renewed interpretation of the French law of surnames that radically breaks with the concept of property rights.

At the turn of the 20th century, to protect one's name against use by another is no longer viewed as a sign of a property right, but

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97. PLANIOL, *supra* note 68, at 151; PLANIOL & RIPERT, *supra* note 68, at 141; and 1 RIPERT & BOULANGER, TRAITE DE DROIT CIVIL D'APRES LE TRAITE DE PLANIOL 377 (LGDJ 1956).

98. To the exception of Planiol, *id.*

99. Trib. Seine, February 15th, 1882, S. 1882, 2, 21; *see* LEFEBVRE-TEILLARD, *supra* note 10, at 183-184.

the consequence of the name being an element of civil status[100] and the object of an extra-patrimonial right.[101] As we have seen regarding the disposal of a person's name, the emphasis is put on the intrinsic values a person carries with him, without looking at their monetary/economic worth.[102] It is the person who is at stake; because the name embodies a person both in its individual and family dimensions, it deserves protection whenever another person uses it, even if there is no fraud. Thus to the name is attached an extra-patrimonial right, not a property right.

The new rationale did not lead to challenge the traditional presentation that the civil courts do not require proof of damage when the personal use of another's name is at stake. Nothing is said about the contradiction of using the same rationale for the two actions but differentiating on their conditions. And if the link with the administrative procedure available to protect one's name is not made anymore, again the latter procedure is said to rest on proof of damage and is still in contrast with the civil action for personal use–even though nowadays, some scholars argue that there is no difference.

Nonetheless, the concept of extra-patrimonial right definitely excludes any reference to property right. In that sense, French law finally reached the same conclusion as English law: the name is not property. Yet, behind this common perception of what the name is not, lies a different conception of the person. English law does not know the concept of extra-patrimonial rights and presents its own limited protection of the name as part of the law of torts,[103] notably the protection of the name against its use for artistic purposes when that use falls within the remits of the tort of defamation. Certainly, French law does not ignore this link with torts as the legal actions are predicated on articles 1382 and 1383 of the Civil Code.[104] However, the related case law does not fall under those articles but under article 57 of the Civil Code, which is related to the registration of birth. And none of the torts textbooks

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100. A. Colin, D. 1904 II 1, commentary under Paris January 21st, 1903. A. COLIN & H. CAPITANT, COURS ELEMENTAIRE DE DROIT CIVIL FRANÇAIS 360 (Dalloz 1923).

101. PERREAU, *supra* note 11.

102. There are other extra-patrimonial rights: right to life, right to honour, right to one's own image, right to privacy.

103. *Du Boulay,* at 446-447; and *Cowley*, at 460.

104. Influence of Planiol, PLANIOL, *supra* note 68, at 153, § 401.

analyse the case law, leaving this aspect of the law to the books dealing with Introduction to French Law or Law of Persons (*droit des personnes*). It is as if French law's vision of the person and his/her name supersedes any other approach. It is not simply that the name is not property; it is that the name cannot be property because it incarnates the person. It is this vision that will ultimately maintain the difference that arose, in the early 19th century, between English and French laws in relation to another feature of the law of surname: the liberty to change names. How this liberty figured in the debate about the name being property needs now to be investigated.

III. To Change One's Name: An Indication of a Property Right?

The liberty to change one's name was never argued as the exercise of a property right. In English law it still exists, and in French law it existed despite the name being associated at the time with property. Paradoxically, it is the loss of liberty to change names in French law which reinforced the claim that the name was property; a claim made, as we have seen, in relation to both the name and arms clause and the protection against use by another. The origin of the issue is indeed the establishment of the immutability principle (A), the stringent effects of which the courts set to counteract by maintaining the rhetorical but convenient affirmation that the name was property (B) before the doctrine moved away from such confusion.

A. The Origin of the Issue: Establishing Immutability of Names in French Law

The liberty to change names was a basic feature of the French law of surnames until the Revolution, as much as it was, and still is, in English law. However, during the three centuries preceeding the Revolution, the French monarchy conducted a policy to restrict the liberty to change names in order to control the nobility, which was seen as a threat to the Monarch's power, as well as with a view to strengthen the civil registry applicable to all subjects. The Crown used two tools: the procedure of letters patent and the ordinance of 1667 on civil procedure. With the first, which gave

discretion to the Crown to refuse or accept the request, the Crown tried to control the change of names and arms the nobility undertook. However, despite the progressive increase of letters patent since the 16th century, their numbers remained low.[105]

With the ordinance of 1667, the Crown found a more efficient way to restrict the liberty to change names. Indeed, the ordinance of 1667, by requiring proof of age, marriage and death by the civil register rather than by witnesses' testimony,[106] progressively obliged ordinary people to keep the name they had been registered under at birth and later at marriage. Establishing an efficient civil status registry enabled the monarchy to create more obstacles for people to change their names.

Hence, compared with England, France took a rather different path. Where France strengthened the monarch's power, the English monarchy abandoned the inclination to impose absolutism. As a consequence, the relationship between the State and its citizens or subjects was that of fierce non-interference. For matters concerning only the individual, like the name–and as long it was not linked with claiming a title–the English Crown could not intervene without being perceived as an arbitrary power infringing on civil liberties.[107] As a result, the civil status registry would not be imposed before the middle of the 19th century, but it would never be associated with control of the name. In addition, a person's actual and official names can be different from what has been written on the birth certificate.[108]

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105. It is inferior to the number of letters patent to secure legitimacy, LEFEBVRE-TEILLARD, *supra* note 10, at 106, notably n. 241.

106. LEFEBVRE-TEILLARD, *supra* note 10, at 94-95; G. Sicard, *L'identité historique*, *in* L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE 115, 133-137 (Pousson-Petit dir., Bruylant 2002).

107. J. Pousson-Petit, *L'identité de la personne humaine au Royaume-Uni, in* L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE 343, 345-351 (Pousson-Petit dir., Bruylant 2002); and J. Pousson-Petit, *Conclusion, in* L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE 979, 982 (Pousson-Petit dir., Bruylant 2002).

108. The Birth Registration Act 1953 does not allow for a change of surname to be registered on the birth certificate. Thus a change of surname will be recorded most of the time by deed poll, 35 HALSBURY'S LAWS OF ENGLAND § 1276, at 770 (4th ed. 1994) v. "Personal Property;" and J. F. JOSLING, CHANGE OF NAME 23-46 (Oyez Pub. Ltd 1980).

Nonetheless, the difference between England and France *until* the Revolution should not be overstated. In France, the King's attempts to curb the liberty to change name never led to the adoption of a general ordinance to prohibit changes of the name without his authorisation. However absolute the power of the King was, it was never so absolute as to override Roman law and custom, on both of which the liberty to change names rests.[109] It is thus not surprising that most lawyers up to the middle of the 18th century agreed that people were at liberty to change name,[110] and the practice reflected this liberty. In the rare cases where letters patent were sought to secure a change of name, they would sometimes be granted 50 years after the change occurred.[111]

Therefore, the lack of liberty to change names is a "recent invention"[112] in the French law of surnames. It is with the Revolution in 1789 that the monarchy's aspiration to control mutability of names became a reality. The Revolution not only confirmed the civil status registry, with its emphasis on the name as a means of identification, but it also took the step in 1794 to affirm the immutability of names; this was extended to all citizens with the abolition of the nobility on August 4th, 1789. The breach with the past was consumed, and the French law of surnames ceased to be similar to its English counterpart. The various governments following the Revolution never questioned the revolutionary legislation, but rather reinforced it in 1803 by creating a procedure to change names–inspired by the previous system of letters patent–and in 1858, by criminalising the assumption of names when it included an assumption of titles.

This importance of the principle of immutability of names cannot be over emphasised, not only because it introduced a major shift between the English and French laws of surnames, but because it led to a misunderstanding about the origins of the

109. LEFEBVRE-TEILLARD, *supra* note 10, at 109.

110. *Id.* at 103-104

111. *Id.* at 109. In this example, the will was drafted in 1662, the name and arms taken in 1692, but the change of name secured only in 1747 by letters patent, the claimant wishing "to prevent any matter of trouble and to secure better the right that the ascendant and father transmitted to him" (author's translation).

112. Herzog-Evans, *supra* note 85, at 56; F. Thibaut, *Le nom patronymique et l'attitude de l'Etat français à l'égard des changements de nom*, RRJ 17, 21 (1989).

French law of surnames, which fuelled in return a propensity in the 19th century to declare the name to be property, up to the point that the created story found its way to the Privy Council in the 1869 case of *Du Boulay*.

At the end of the Revolution, doctrine and the courts asserted that the former monarchy forbade all changes of names that it did not authorise. Although a myth, this historical perspective resulted from a series of works, notably that of La Roque, in his treatises on nobility (1678) and on the name (1681).[113] He not only falsified an ordinance of 1555, where the King indeed forbade the change of names (though not in the terms the author mentioned), but he also conveniently forgot to mention that the ordinance was actually never registered, and thus never applied.[114] This presentation echoed the monarchy's need, and later the Revolution's wishes, to ascertain control on the name as an element of civil status. Such an opportunity to find an "old" text ascertaining the principle of immutability of names was too good to be discarded and the fabricated historical justification of the principle found its way in to one of the main legal dictionaries[115] just before the Revolution broke. Given that the author of the 1785 text, Henrion de Pansey, became President of the Court of Cassation after the Revolution, it is hardly surprising that nobody questioned the source. Certainly Merlin,[116] who was not necessarily on good terms with De Pansey, tried to research the matter, but was only able to find that the

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113. GILLES-ANDRE DE LA ROQUE, TRAITE DE LA NOBLESSE ET DE TOUTES SES DIFFERENTES ESPECES (1678), *availalbe at* http://gallica.bnf.fr (last visited November 6, 2008); and GILLES-ANDRE DE LA ROQUE, TRAITE DE L'ORIGINE DES NOMS ET DES SURNOMS, DE LEUR DIVERSITE, DE LEURS PROPRIETES, DE LEURS CHANGEMENS, TANT CHEZ LES ANCIENS PEUPLES QUE CHEZ LES FRANÇAIS, LES ESPAGNOLS, LES ANGLAIS, LES ALLEMANS, LES POLONAIS, LES SUEDOIS, LES ITALIENS AUTRES NATIONS (1681).

114. The deception was uncovered by A. Lefebvre-Teillard to which this paragraph is indebted, see LEFEBVRE-TEILLARD, *supra* note 10, at 96-101.

115. GUYOT, *supra* note 32.

116. Merlin (1754-1838), said Merlin de Douai (of Douai–a French town), was a solicitor before one of the highest courts in France before the French Revolution, *le Parlement de Paris*; and he edited the original edition of the *Repertoire Guyot* in 1784-1785. During the Revolution, he proposed to abolish feudality and to establish one single supreme court, the future Court of Cassation. A very active supporter of the Revolution throughout the ten years it lasted, he managed to escape the onslaught of the Terror and, with Napoleon in power, became in 1801 the *Procureur Imperial* to the Court of Cassation.

ordinance of 1555 was probably not registered; he was unable to undo completely the Ariane's thread that the story represented. Hence, the ordinance of 1555 found its way into the nineteenth-century French law of surnames as a text that supposed to support the idea that the immutability of names had always been an essential feature of the French law of surnames, long before the Revolution chose to enact the law of *6 fructidor an II*. Lawyers forgot that the French law of surnames was actually different, although the cases between 1800 and 1850 reveal that citizens needed a bit more persuasion and time to become accustomed to the new prohibition on the change of names without the prior authorisation of the government.[117]

The deception about what the actual French law of surnames was prior to the Revolution could have remained of no consequence for the purpose of this study, but it found its way in to the very case where English law affirms its divergence with French law, at least as understood at the time by French lawyers. Indeed, in *Du Boulay*, the Privy Council had to examine what the French law of surnames was prior to and after the French Revolution. According to the treaty of 1815, French law applied to the Caribbean island of Saint Lucia. Not surprisingly, the discussion turned to whether the ordinance of 1555 had ever been applied.[118] The plaintiffs argued it had, and in support of their argument referred to the 1823 case of *Les Heritiers de Preaux de Longchamps*.[119] The French Court of Cassation concluded that the ordinance of 1555 "although might not have been registered, was however the manifestation of the royal prerogative"[120] according to which "to the King only belongs the authorisation to change names."[121] Furthermore, the Court of Cassation considered that as

117. See for example CE May 24th, 1851 S. 1851 II 665. In a decision about the validity of a change granted in accordance with the correct procedure of the law of *germinal an XI*, the Council of State notes that "the investigation reveals that, for a long time, Eugene and Jacques-Jules had been in possession of the name Gaubert," being known in their locality (i.e. the island of Martinique) by that name.

118. With the added difficulty that Saint Lucia was a colony and as such must have had its laws specially registered.

119. Cass. Req., November 16th 1824, S.V. 1822-1824, 1, 561; S. 1825, 1, 148.

120. Cass. Req., November 16th 1824, S.V. 1822-1824, 1, 561, 563.

121. *Id.*

such, the ordinance of 1555 applied to the French Caribbean island of Guadeloupe, an island which had the same legal status as Saint Lucia while both were under French dominion. Clearly the decision supports the plaintiffs' arguments. However, Lord Phillimore, for the Privy Council, never addressed the case; at least not in his written opinion transcribed in the Law Reports. In addition, he adopted the opposite conclusion to that of the Court of Cassation: "at all events, it is not shown that this unregistered ordinance ever formed part of the law of Saint Lucia."[122] How one can then explain such divergence of understanding?

Certainly, Lord Phillimore gave an accurate description of the French law of surnames prior to the Revolution, noting that "Merlin, in his *Repertoire* . . . says that the ordinance not having been registered, never became law in France."[123] Yet, he also added that according to the Dalloz dictionary, "the courts hold a contrary opinion,"[124] a quote which the 1823 French case illustrated. So why was there such a departure from the Court of Cassation's own interpretation? Several explanations can be put forward: the difficulty to know French law precisely (the 1823 case does not seem to have been discussed before the courts, and one wonders if it ever has been); or the social background of the defendant (the illegitimate son of a former slave of the plaintiffs' family–upholding French law as interpreted by the Court of Cassation may have served to maintain the social division). It may also be the Privy Council was reluctant to condone an interpretation it probably sensed as being inaccurate. Indeed, analysing the 1823 case cited by the plaintiffs reveals a hidden agenda for the French Court: affirming at all costs the immutability of names.

If the Court of Cassation relied so heavily on the ordinance of 1555 as enouncing a principle that has always been recognised, it is because it needed a legal basis to refuse the change of name undertook by one of the parties. The Court of Cassation could not rely on the ordinance of 1803, which prohibits changes without Governmental approval, as it had been registered in Guadeloupe only in 1823, a few years after the facts took place. The Court of Cassation also knew that the validity of the ordinance of 1555 was

122. *Du Boulay*, at 446.
123. *Id.*
124. *Id.*

an issue, but to be faithful to historical truth would then have forced the Court to validate the change of name done without authorisation. At a time when the French Government was painstakingly enforcing the opposite principle, such course of action would have opened the door to much trouble and lawsuits. The Court of Cassation was not ready to take the risk, and preferred enforcing a supposedly ever-existing principle of immutability embodied in the ordinance of 1555. One can see here the driving force that modelled the French law of surnames during the 19th century. Immutability of names had to be maintained at all costs.

This emphasis on immutability of names in French law clearly contrasts with the English law perception of allowing complete freedom to choose and change names. Again, it may explain why the Privy Council was reluctant to follow the Court of Cassation. But for our debate about whether the name is or is not property, this emphasis only matters because of what it created. To insist so much on immutability meant that the French courts were sometimes placed in a difficult position when plaintiffs asked for a rectification of the civil status registry in situations where clearly at stake was a change of name rather than a modification of a clerical error on the registry books. The only way out was to resort to the traditional view that the name was property, as the plaintiffs in *Du Boulay* reminded the Privy Council.

B. Solving the Issue: Promoting Property Rights vs Promoting Extra-Patrimonial Rights

Rectification of civil status registry could only be granted if there had been a mistake in the transcription of the name in the registry. But what constituted a mistake? Some people argued that they used to bear a name with *de* for example, and that by mistake the particle (*particule*) was dropped, or that they bore another name in addition to the one on the registry or in substitution to the one registered, and that by mistake the other name was dropped on the birth certificate. Except that the so-called mistake was often a deliberate move rather than the result of a civil officer's absentmindedness. During the Revolution, to register the *de*–often but not always a sign of nobility–was a sure sign of trouble, if not a death sentence in some circumstances in the middle of the Reign of

Terror in France. Some people had to go as far as changing their entire name such as "leroy" (literally "the king") to survive those difficult times. So to drop part of one's name to avoid being suspected of being a counter-revolutionary was a deliberate move for survival. In that sense, there was no error and the principle of immutability of names should have meant that the courts had to refuse the request for rectification of the civil register. On the other hand, the courts could not be insensitive to the plight of the plaintiffs, who acted more by constraint than by choice; they were tempted to accede to the request, but they could only do so if they found a legal basis that would weight enough to counteract the effect of the principle of immutability that they paradoxically promoted. If they found it, they would then just need to ensure that the claim was genuine and not an indirect way to gain a name that the plaintiffs never had or abandoned long before the Revolution.

The French law of surnames, at the time, offered them the perfect reason: the name was property and thus the claimants just had to prove they "owned" the name, "possessed" it, i.e. used it for a long time before the crucial years of the Revolution. In other words, in order to resolve the dilemma they felt they faced, the courts used the old features of what was historically the *saisine,* and used the theoretical background which superseded the medieval concept, i.e. property rights. With the old features of the *saisine*, they found a way to establish a criterion to assess whether or not the claim was genuine. It sufficed to ask if there was a "use of long tempo" as the old French law of surnames defined it (use which is public, quiet, not contested, and for a long time–a notion broad enough to give them flexibility in analysing the facts of a particular case). With the theoretical background created by lawyers at the end of the Middle Ages, they had a principle as strong as the principle of immutability, so strong in fact, that the courts could use it to downplay the stringent effects of the principle of immutability without appearing to neglect the principle of immutability. After all, property was a right engraved in the French Declaration of Human Rights and with liberty, it was a key foundation of the Civil Code. How could the Government oppose a property right without being accused, at least implicitly, of undermining the very foundational elements of France? Therefore, the concept of property conveniently found a new life. Originally

a way to integrate the medieval law of the *saisine* to the prestigious Roman law, without questioning the freedom to change names as recognised by custom and supported by Roman law, it became a tool to instil more liberty into what became a very rigid system governed by the principle of immutability of surnames and of civil registry.

As a consequence, the more emphasis there was on immutability, the more emphasis there was on property rights. Yet, the association between name and property rights did not result from a logical analysis of the concept of property in relation to the features of the French law of surnames. Rather, it was based on policy matters estranged to the concept of property. When the concept of property was at last dropped–in the beginning of the 20th century, after scholars demonstrated it was inappropriate and illogical–the issue remained: how to find a balance between affirming immutability of names and allowing for some changes that take place over time? To resolve it, the courts simply went on applying the same criteria without referring anymore to the original explanation put forward in the 19th century. Hence, this last debate confirms how the interrogatory about whether or not the name is property has been tainted in French law by factors independent from the concept of property, factors like the immutability of surnames. The contrast with English law could not be greater.

Even now, that both English and French law agree that the name is not property, they still differ in what this affirmation reveals about their conception of the person in relation to his name. English law sees the name as part of the one's personal privacy, free from interference from the State; French law, despite recognising to the person an extra-patrimonial right to protect his name, does not consider the person to be at liberty to choose and change surnames.[125] Therefore, the real philosophical and legal

125. The evolution of French law is towards more autonomy granted to the person in choosing names (see Acts 2002-2003), *see* Herzog-Evans, *supra* note 85, at 65; S. Shindler-Viguie, *La liberté de choix du nom des personnes physiques*, art. 35942 DEFRESNOIS 1409, 1410, 1425 (1994); J.-J. Lemouland, *Le choix du prénom et du nom en droit français, in in* L'IDENTITE DE LA PERSONNE HUMAINE. ETUDE DE DROIT FRANÇAIS ET DE DROIT COMPARE 631, 669 (Pousson-Petit dir., Bruylant 2002); and H. Lécuyer, *L'identité de la personne (Pour l'abrogation des lois des 4 mars 2002 et 18 juin 2003 sur le nom de famille)*,

divergence between modern English and French law is thus not on whether or not the name is property, but on what the relationship is between a person and her/his name.

CONCLUSION

To our original question, "is the name property?", the answer is certainly "no" with regards to three elements of the law of surnames: whether a person can or cannot dispose of one's own name, protect it, and change it. Although until the beginning of the 20th century French law used to affirm the name was inalienable property, it did so more for lack of a better suited concept to explain the features of its law of surnames, or to serve other purposes, than out of a flawless analysis of the concept of property. It is because the medieval concept of the *saisine*, which was neither property nor possession, had been lost that French lawyers integrated other notions, like property, to provide a theoretical justification of the law of surnames.

Amid the confused history of the French law of surnames, English law appears to act as a focal point, especially concerning two of the features French law used to have before the 1789 Revolution, i.e. the liberty to dispose of one's name by contract or will and the liberty to change one's name without prior authorisation of the Government. Its affirmation that the name is not property appears to match the historical sources of the French law of surnames, although it remains to be proved whether the two have identical origins. The latter, contrasted with the dramatic changes French law underwent from the 1789 Revolution onwards, highlights how its vision of the person and his/her name, which lies behind the affirmation that the name is not property, is now very different from that of French law. English law opted for freedom, refusing to consider that a person's identity depends on her name; French law opted for control, partly because of the importance attached to the name as part of the civil status, and partly because it identifies the person with his name.

The debate about the nature of the name is not on whether the name is property or not, but on what the relationship should be

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131 LES PETITES AFFICHES 31 (July 1st, 2004). But the contrast with English law remains striking.

between a person and his name. And yet, albeit outside the scope of this article, some issues remain which partly leave open the debate about whether or not the name is property. The concept of "privacy" as developed in U.S. law borrows both from the concepts of property and personality; and in French law, some argue for the name used for artistic purposes to be part of the *patrimoine*, object of property rights, challenging the traditional classification established in the beginning of the 20th century.[126] More sketches to answer our question need to be done . . .

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126. M. Bui-Leturcq, *Patrimonialité, droits de la personnalité et protection de la personne, une association cohérente,* DROIT PROSPECTIF–RRJ 767, 781 (2006).

ANALYZING PROPERTY IN DIFFERENT SOCIETIES*

Jacques Vanderlinden†

INTRODUCTION

The distinction between persons and things is, for sure, one which needs to be revisited; the diversity and quality of the contributions to this workshop are ample evidence of it. Furthermore, most of them, inspired by the reflections of their authors and the eight questions so adequately proposed by the initiators of this joint venture, are, quite naturally centered on law systems which are familiar to teachers and students in European and North American law schools. The ambit and purpose of this paper is however quite different, as they leave the familiar shores of the Roman-inspired legal traditions (I am exlusively referring here to the distinction between persons and things) for those of the continent celebrated by Joseph Conrad in *Heart of Darkness*.[1]

The reference to Conrad's work is particularly appropriate as the following considerations deal with pre-colonial African laws, as applied in societies which are indeed quite different from that in which Gaius[2] established the *summa division,* which still rules a good part of the formal apparent structure of many civil codes throughout the world. But let us be quite clear: there is no such thing as pre-colonial "African law." The laws of Africa, even if one limits oneself to so-called " black" Africa–the one spreading from the southern limit of the Sahara Desert to the Cape of Good Hope–reveal

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* This written version differs substantially from my oral contribution to the workshop; this is due to the fact–for which I apologize to the reader–that I am unable to write a text before I speak on a specific topic. In a sense, to be true to the title of the workshops, this is a "revisited" version of what I said.

† Professor of Law Emeritus (Free University of Brussels, Belgium; and University of Moncton, N.-B., Canada).

1. JOSEPH CONRAD, HEART OF DARKNESS, *available at* http://etext.virginia.edu/toc/modeng/public/ConDark.html (last visited November 6, 2008).

2. Who taught law, by the way, in Africa, where the classical structure of the *digesta* was less evident than in Rome.

huge differences between the laws of people practicing agriculture, commerce, fishing, gathering, hunting, and pasturing (if one looks only at their mode of economic production) or having adopted various types of socio-political systems (from the extended family to one form or another of pre-state political regime) as their mode of government. Such diversity precludes any serious generalization, even on a regional or sub-regional basis. It is often said that most lawyers (or legal anthropologists) who present the legal system of an African ethnic group necessarily limit themselves to one group (or possibly two) in the course of their academic career. There must accordingly be no surprise if I shall essentially limit myself to one African society, that of the Zande of North-Eastern Congo, even if what I say or write could possibly apply to the members of the same group who live in the the neighbouring Central African Republic or the Sudan; this is a classical example of the splitting of African pre-colonial societies as a result of colonialism. What is essential is that I do not pretend that my case study is valid for the whole of the continent.

Nearly fifty years ago, when I arrived in the Zande country, I had just completed my first year of teaching as a part-time "assistant" (tutor) in the Faculty of Law at Brussels Free University from which I had graduated in 1956 before serving for eighteen months as a candidate reserve officer in the Belgian Air Force ground units that specialized in the defense of airfields against possible paratroopers from Eastern Europe! The people of whom I was instructed to study the system of land tenure were as unknown to me as the heart of Africa was to Joseph Conrad seventy years before, when he landed on the shores of the Congo river. The only advantage I had on the famous novelist was that there was some literature about Zande land tenure. But I was clearly paid to go beyond it, as it appeared unsatisfactory both quantitatively and qualitatively. I accordingly spent six months in the field talking through an interpreter with many Zande chiefs or simple peasants about what their legal connection to land could be.

When doing this, I clearly was a foreigner approaching an African society from the outside-in on the basis of what he had learned, some years before, in a classical positivist law school about " things" or rather, more generally, about property (*les biens*) in the Belgian (which is the French) Civil Code. At that stage of my career, no need to say I had few (if any) qualms about what "law"

was. I also knew that African laws were essentially "customary," as they were, *mutatis mutandis*, in the Northern part of France in the Middle Ages, before the writing down of the customs as of the 15th century onwards; this topic was precisely the one I was currently discussing with my students during my tutorials.[3] Beyond that sketchy and inapropriate background, I had read some contemporary classics on structuralism by Claude Lévi-Strauss and bought a copy of the *Notes and Queries in Anthropology* published by the Royal Anthropological Institute in London.[4] All this does not plead very much in favour of those who were sending me in the context of an interdisciplinary mission entrusted with the task of advising the Belgian governement about the economic and social development of the Zande country.

In so far as I am concerned it nevertheless was a shattering experience on two counts: at first, it deeply transformed me from a legal point of view; second, it made me aware of the importance of linguistics in the study of laws. Both had to deal with what I had decided, many years before, my professional life would be: that of a teacher. Until then, the law was to me an abstraction with a universal value of which I had tried to master the intricacies in order to pass examinations and get a piece of paper which would open doors to a comfortable future. I had been exposed to some limited aspects of its relativity through an introductory three credits course devoted to the common law, but that was all. Furthermore that course was taught in French with an occasional mention of English terminology whenever it was indispensable to distinguish concepts. But that was all. No fundamentals as to what a legal system or the limits of translation were ever challenged. My first contact with a single African legal system on a very narrow point–the law of immovable property– irremediably changed all that.

I. IS THERE A NAME FOR PROPERTY?

My contribution to a better knowledge of the Zande world was to present a clear view of the local land tenure system. These last three

3. *See* Jacques Vanderlinden, *The Recording of Customary Law in France during the XVth and XVIth Centuries and the Recording of African Customary Law*, JOURNAL OF AFRICAN LAW 165-175 (1959).

4. NOTES AND QUERIES ON ANTHROPOLOGY (Royal Anthropological Institute of Great Britain and Ireland, 6th ed. 1951).

words obviously sound more anthropological than legal, the latter adjective referring normally to something quite familiar to lawyers in systems where the law has a well-defined meaning. As the Zande apparently had no distinct word in their vocabulary to identify law, there was no use to ask them what their law about immovable property was.

Yet they had courts and, interestingly enough, I met a case where a distinction was made between two ways of solving conflicts between individuals. The problem involved a husband and his wife. She was the plaintiff and she was denied any remedy. The problem she brought in front of the court was not considered because, the judges said, it was not one of those within their jurisdiction.[5] It rather fell within the jurisdiction of the parents of both parties who had to sort it out between themselves. Would that provide us with a distinction between what is legal and what is anthropological? Or would it be only be an aspect of the legal pluralism existing within Zande society? According to a positivist lawyer's view, perhaps, but certainly not for the Zande people involved. In fact, the American or European lawyer is irresistibly tempted to project onto African society his own conception of law. By doing so, he looks at local society from the outside-in and the validity of such approach is quite debatable.

Whatever the result of a possible debate may be, I chose to adopt that approach and to have a good look at local cases as reported in the native courts archives. I perused 2,000 of them in the course on long evenings next to an oil-lamp roaring beside me, found out that some 500 had to deal with private law and, finally, that there was not a single case dealing with land tenure (not to speak of anything like immovable property). At that stage, I could either give up and go back to Europe or decide to take the anthropological path and inquire through field work and interviews with inhabitants of the Zande country. I chose the second possibility. Thus while carrying on with the analysis of my 2,000 cases which allowed me to publish my book, the *Coutumier, jurisprudence et doctrine du droit zande,*[6] I turned myself into a legal anthropologist during daytime, visiting

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5. A lawyer trained in Roman law–but many others too–would immediately think of the maxim *de minimis non curat prator.* But beware of such too easy comparison!

6. JACQUES VANDERLINDEN, COUTUMIER, JURISPRUDENCE ET DOCTRINE DU DROIT ZANDE 350 (Editions de l'Institut de Sociologie 1969).

farmers day after day, walking with them through their fields, sitting in their habitat and trying to find what their answer was when questioned on the basis of the *Notes and Queries in Anthropology*, and also of some supplementary questions of my own.

Some conclusions resulted from that fieldwork. Here they are:

1. Each Zande socio-political unit–let us give it the name the Belgian colonial authorities gave it, that is, chiefdom–occupied a specific area of land. This area had a specific name in paZande (the language of the Zande): *sende*. Anyone could settle on a *sende*, provided he got the authorization to do so from the local authority–let us again give him the name the Belgian colonial authorities gave it, that is, chief. Normally, no chief would ever refuse a candidate, as the more people that lived within his jurisdiction the more powerful he was and was considered a "big" chief. Once he had admitted someone on the *sende*, the chief would help him to find a suitable place where he could settle down and establish his *kporo*; there was no question of the chief imposing a place on his new subject.

2. Land in the Zande country was plentiful, of an average-poor quality, agricultural techniques were rudimentary, and manuring practically non-existant as cattle could not resist the tse-tse fly. Everyone could find a plot on which to establish his *kporo*. This was the place where he would build his house, open up a garden of various plants, organize his kitchen area, rest during daytime between his activities, meet whith his family and visitors, etc. Not too far from the *kporo*, he would clear, within the limits of his physical strength, the *öti* or cleared land on which he would start further work in order to open a *bino* on which he would grow the main crop providing him with the basis of his subsistence and that of his family. The products of that subsistence agricultural economy were supplemented by the produce of the family garden and hunting (often practised with some neighbours in order to facilitate it). Part of these products went to the chief who would redistribute it on specific occasions, such as holding a court to solve litigation between his subjects. Finally, as this subsistence economy may be considered to be a fairly rudimentary one, land had to be left resting regularly between crops and, accordingly, the *bino* regularly lied fallow for some time.

3. Such a factual description leads to one conclusion: as everyone lives in that way, including the chief, who has his own

kporo as a center of his personal life, land, as far as one could judge, never was an object of any special interest, and accordingly an object for any litigation, being altogether admitted that there could always be exceptions justifying the rule, but also that I did not meet any sample of it, either during my fieldwork or in the existing literature. A second conclusion is that the social intercourse between persons about land appears, until now, practically (but for the necessity for anyone wishing to settle on the *sende* to be authorized to do so by the chief) void of any element a lawyer would call property law, or an anthropologist, land tenure. In order to bring legal notions into the picture, one needs to look at what are the powers (or privileges) related to the different categories of land and exercised by the people described in the previous paragraphs. Hence, the interviews brought me into the system as perceived by those living in it and not anymore by the outsider.

4. In that perspective, let's consider first the *sende*. Its limits are determined by the chief and the chief alone. He is also the only one able to decide that the *sende* will be abandoned by the group (thereby relinquishing all powers on it) if there is a need for the group to migrate. As long as the group is established on the *sende*, the chief has, besides his exclusive power to admit newcomers on it (see par. **1**), full control over its parts where his subjects have not established their *kporo*, *öti* or *bino*. But they, in turn, have on that part of the *sende* the complete power to freely circulate on it, to modify the place of their *kporo*, their *öti* or their *bino*, to collect the wood they need to build their houses or to make fire, to hunt; in short, take advantage of the *sende* as they please for their own use and that of their family as long as it does not infringe on another person's situation. In a sense, the parties involved try constantly to achieve equilibrium between whatever the chief wishes to do with some parts of the *sende* and the limits of whatever his subjects want to use it for. This is the reflection of a wish for consensus between rulers and the people they rule. Being a "good" chief requires the preservation of such reciprocal harmonious behaviour. The powers of the chief *vis-à-vis* the *sende* is expressed in a word, *ira*, which qualifies the chief. And the same word applies to his powers over the people living on the *sende*. He is accordingly *ira sende* and *ira Azande*.

5. If the chief has theoretically extensive powers on the *sende*, the same is true of the individual established on it for any part he

considers to be his. He alone begins with the determination of the limits of his *kporo*, his *öti* or his *bino*, decides who is allowed to circulate on them, what he is going to build or plant on his *öti*, and ultimaltely, possibly, will make up his mind to abandon them and let them turn back to the *sende* from which they had been taken through his actions. Powers as to land in the Zande country are indeed acquired by the individual through the incoporation of his work on a part of the *sende*. The latter could be considered, when looked at from the outside, as "virgin" land; that is, land which has not yet been transformed by man's actions; the three elements (*kporo*, *bino* and *öti*)[7] we have been referring to could be called "transformed" land, and, apparently, in order to qualify collectively these various species of transformation of the *sende*, there is no generic word in the local language which could be opposed to the latter. Furthermore–and this is where the real rub appears, as in Hamlet's perception of sleep–we quickly realize that the individual is also called *ira kporo*, *ira bino* or *ira öti*, the same word used for the chief *vis-à-vis* the *sende* and the Zande. But this is a problem for part two of this paper. Finally, the fruits which any Zande may hope to extract from the land through the incorporation of his work on it will definitely be his, to share with a possible family.

6. Looking at what has just been described in the anthropologist's way with a lawyer's eye, one immediately enters slippery ground. One indeed quickly tends to recognize, even if a more detailed approach could lead to distinctions, two of the classical components of the classical Roman concept of ownership: the usage (*usus*) and the fruits (*fructus*), being absolutely clear that the Zande language has no special general term regrouping the components of the two notions. So far, so good. But then immediately arises one of the most debatable, if not challengeable, assumptions about pre-colonial African land tenure: the absence in African systems of land tenure of an individual power of disposing of land, the latter being necessarily common to the group and not within reach of the individual. Let us try to have a look at the various aspects of what the Roman concept of *abusus* may encompass, and distinguish between different ways of disposing from one's land.

Abusus involves three coupled distinctions:

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7. These three are but examples of a wide variety of specific lands coming out of the *sende* through work.

a) Alienation *inter vivos* or *mortis causa*;
b) Gratuitous alienation or alienation against compensation;
c) Alienation for the benefit of a member of the social group or for a stranger.

7. Let's consider the three above-mentioned distinctions:
a) Alienation *inter vivos* is the only one which can be contemplated as, in the case where a head of family dies, his death is generally attributed to bad fortune, the latter being necessarily associated to the place where he lived. There is thus no question that someone would stay (this is the case for whoever we would be tempted to consider as his heirs) or come and settle down in such place as he would be likely to be the victim of the same malediction. This, of course, is the matter as seen by the Zande, and it would be preposterous to try and invoke the absence of a "rational" link between the fact of the death and that of the place where the *kporo* is established. *Exit* alienation *mortis causa*. When talking to Zande peasants of the idea of disposing of their land *inter vivos*, it simply does not seem to ever have come to their mind. Why? This question brings us to the two ways through which alienation can take place.
b) Gratuitous alienation or alienation against compensation? Alienation of land against compensation is unimaginable, as who would have a piece of cultivated land available to dispose of when it constitutes the very basis of its subsistence and that of his family? And who would be in a position to dispose of extra land in a system where basic conditions–as described previously–for an extra investment are not met? There simply is no market for land in the Zande country. As for gratuitous alienation, it is even less likely–and for the same reasons–than onerous alienation. And there is no reason to necessarily include a power of *abusus* other than the one–which we have already met–of disposing of the land by abandoning it and letting the *kporo*, the *bino* or th *ötis* return to the *sende* from which they originated as distinctive sorts of land through the incorporation of man's labour. But is any man roaming through the Zande country free to settle down and transform the *sende* into a *kporo*, *bino* or *öti*? This last question opens up a last problem.
c) Alienation for the benefit of a member of the social group or for a stranger? The matter of alienation of land is already settled through the previous paragraphs; it only exists when the *ira* of a *kporo*, a *bino* or an *öti* decides to abandon a piece of land and lets it return to the *sende*. Could then any Zande (or non member of that ethnic

group) incorporate his work into the *sende*? By doing so, would he become an *ira* of whatever piece of it he has so transformed? This is a last point which is fundamental in trying to understand African land tenure. And the answer of the Zande system on that point is without ambiguity: as the careful reader has certainly already noticed, when going through paragraph **1**, only members of the social group, i.e. persons allowed to do so by the chief who accepts them as members of the group–and consequently disvest them of their quality of stranger–are legally able to incorporate their work into the *sende* and become (as the chief is in relation to the *sende* and the Zande) an *ira* of their *kporo*, *bino* or *öti*. The affiliation to the group living on a specific *sende* is, in the Zande case, purely "political," if one adopts a foreign classification which distinguishes between, for example, cultural, economic, political, or social affiliations; such a classification, there is no need to say, does not exist in the Zande way of thinking about such affiliation. In other African societies, the required affiliation will be, quite often, of a so-called "social" nature when the link results from consanguinity, even if one considers the quite extensive one uniting members of the same clan; in such case, the possibility of acquiring rights to land is limited to members of the clan, which includes even those who, being originally strangers, enter it by a ceremony of adoption. From this importance of a necessary existing link between people holding rights to land results the idea that African land tenure is "collective" or, better, "communal."

8. On the basis of what has been shown in the Zande example–of which I am willing to admit that it could be atypical, but not that it does not lead to a reassessment of our thinking about African land tenure–the outside non-African observer is often led to a double conclusion. When he adds the fact that there rarely is a factual interest in disposing of the land, even for the benefit of a member of the group, his inescapable twofold conclusion is a) that there is nothing like ownership in Africa because of the lack of *abusus,* and b) African land tenure is necessarily communal (collective has been abandoned because of the confusion arising easily with the collective conception of land tenure existing in socialist legal systems).

9. My personal point of view–which, I insist, is highly debatable–is that as long as *abusus* exists and people can individually divest themselves of their powers in connecton to land under some form–in the Zande case by abandoning the land on

which they have all the powers recognized to an *ira*–there is no justification not to speak of an ownership of land in the Roman way, provided–but this is never challenged–*usus* and *fructus* also exist. No one has ever said that alienation **must** be either *inter vivos* or *mortis causa* or gratuitous or onerous, in fact for the benefit of a third party, which is not the case when a Zande abandons the land in which he undoubtedly has well defined interests.

10. As for the communal character, no one seems to have ever expressed the opinion that individual ownership disappeared when the transfer of ownership to strangers was either curtailed or excluded. The example–for many years–of Finland and Switzerland are very clear on that point. During a long period of my life, I spent my summer vacations in a sauna on a peninsula at the end of an island fifty or so miles from Helsinki. I owned the cabin in which we found shelter during these memorable weeks, but, as a Belgian citizen, I could not constitutionally own the land around it. Would I or anyone, including local lawyers, have said that the friend–a Finn of course–who owned it, was not the owner of that land or that the cluster of rights and duties he had in relation to it were not ownership in the full sense of the word? Certainly not from the Finnish point of view. And when, in winter, I once contemplated–but, unfortunately never got the means to do so–buying a small chalet in the Swiss Alps and was told that, as a foreigner, I could not own that piece of immovable property, could I conclude that the Swiss owner of the chalet was not an owner according to the relevant provisions of the Swiss Civil Code? Of course not. Like his Finn counterpart (but in a more specific way as such limitation in Switzerland was essentially local and not general as in Finland), he was an owner. Perhaps a slightly different one than his counterpart in Belgium or Louisana, but still an owner. This being admitted, would one dare to say that the Zande *ira* is an "owner"?

II. IS TRANSLATION POSSIBLE?

The last word of the previous section brings me to my second section. But before considering some problems involved in the linguistic transfer of African legal concepts in Western European languages and the amount of doubts and dissatisfaction the exercise leaves in the mind, there seems to be one point on which most people interested in the matter seem to agree. What is more, it is

directly relevant to the thread which unites the contributions to this workshop, even if it is quite different from the ones usually considered. It is, of course, a creation of American or European minds observing African reality and creating abstract categories which do not necessarily exist in African minds or languages. It is the concept of the person-thing entity or unit.

Many anthropologists observing African land tenure have come to the conclusion that land tenure does not deal so much with relations between persons about land, but concerns rather the analysis of the single entity that man has with earth or–why not?–the latter has with the former. The one does not exist without the other and, in that respect, one might say that African legal geography (etymologically writing about the earth) is necessarily physio-human geography and not purely physical geography. Or, as some are inclined to say, "man does not own the land, the latter owns him."[8]

If we now look at the components of that entity or unit, the person is not considered as an abstraction but as a diversity of human beings occupying in society a specific position because of their age, their sex or their cultural, economic, political or social function. The same is true–as it was underscored in the previous paragraphs–for what we call "land," which is never considered in such abstract way, but always linked to a specific function.[9] Thus a correct analysis of land tenure necessarily goes through a previous careful analysis of both components of it. And ends up with a presentation of a cluster of person-thing unit which is not necessarily systematically organized in societies where the need for abastract systematization is not as felt as in ours. Quite obviously, my own analysis of Zande land tenure was, from that point of view, totally unsatisfactory.

The immediate temptation, as the sudent of African law I was nearly fifty years ago in the Zande country and the teacher I also was (by the way, both I still believe I am) as soon as I came back from Africa to my class in Brussels, was to communicate. Studying in order to teach was already the fundamental activity of my craft. I had not too many problems with the factual realities represented by

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8. Quoted, without reference, in Daniel Biebuyck, *Introduction, in* AFRICAN AGRARIAN SYSTEMS 2 (Daniel Biebuyck ed., International African Institute 1963).

9. One of the most interesting analysis from that point of view is that of G. WAGNER, THE BANTU OF NORTH KAVIRONDO (Oxford University Press for the International African Institute 1956) where he distinguishes 24 sorts of land with reference to its use, 5 with reference to the rights of control upon them and 7 with reference to its quality in Logoli vocabulary, but no term for "land" in the abstract.

the paZande words *öti*, *kporo*, *bino* or *sende*. I rather easily decided that the first one would be "cleared land," i.e., the part of land of which all obstacles had been removed in order to possibly sow and cultivate some vegetation on it; the second one, "habitat," i.e. the part of land upon which a house and his separated and aerated kitchen would be built, plus whatever land was freed and prepared for circulation around the house and the kitchen to receive guests, or for any other use; the third one, "field" as it had to be sown and tended on the *bino* in order to produce some crop; and, last but not least, *sende*. With the latter, things appeared more difficult indeed. I did not favour territory, as the latter has, in French legal language, a specific technical meaning "linked with public law" (a non-existent notion in Zande thought), which, if used to sum up the Zande reality, was conducive to serious potential confusions.

In that respect, it was true that "*territoire*" had a less specific and technical meaning in French when speaking of the territory of animals. But, for obscure reasons, that reference when speaking of people discouraged me from using the word. Re-reading my text of 1960 (the year of its publication), it appears that I did not venture in a translation and satisfied myself with a description of approximately twenty lines of what the *sende* was. Would I dare to propose today the "physical support of social life," which is far from short and elegant? And also quite abstract, when compared to the formulation of Wagner, "bush land that has never been cultivated"[10] for *ovulimu* in the Logoli language, which seems to be the nearest to the Zande *sende*.

But this was not the end of my qualms. The real test came with the three letters of *ira*, either when we apply it to the individual or when it concerns the chief. In fact, at a first stage, the problem was not so much with the *ira kporo*, *bino* or *öti*. In accordance with the conclusions I came to in paragraph **10** above, "owner" could seem provisionally acceptable to me, provided one admitted (this still does not fully satisfy me, as we shall see later) that ownership never is as absolute as one likes it to be and that the Finns or the Swiss may–with some approximation–be called owners as much as the Belgians or the Louisianians. We would then have no problem in calling the Zande commoner an owner, something of which Allott would totally disapprove when he writes that "the words 'own' and 'ownership' are . . . misleading, for the description of African property

10. *Id.* at 76.

systems."[11] And he is indeed quite right. But then–in order to carry his logic on a wider geographical space–I would consider that ownership is as much misleading when comparing Finnish or Swiss law with either English or French law, as both of the latter have no restriction whatsoever linked to the nationality of the buyer of a piece of land in England or France. Good enough. But, then, how do I translate *ira* when referring to the individual? May I beg the reader to be patient and keep the question unanswered for a while?

Turning now to the chief, the matter seems–*prima facie*–simpler than in the previous case. Certainly he is not, in any sense, the owner of either the *sende* or the Zande as the local language indicates. This was clear to my mind. But then, which French word to use? I finally decided in favour of "master" (*maître*).

Such choice was motivated by a fundamental wish, i.e. to find a single word in French (as in paZande where one finds *ira*) which could apply to both the chief and his subject. If I had accepted not to take that wish of linguistic homogeneity into consideration, the problem would have been easily solved, by using "lord" for the chief and "owner" for the commoner. But I had the feeling that by doing so I was introducing in my description the distinction between public and private law, so familar to me through my legal education, but totally absent from the Zande mind. The thing would perhaps have been easier if I had been trained in the common law where that fundamental distinction has long been absent from the doctrinal sphere. But I was communicating with continental lawyers educated differently and for which the split between public and private was fundamental in the legal discourse. *"Maître"* had the advantage that it was still used (yet only once) in the French or Belgian Civil Code when speaking of the liability of masters for the wrongful acts of their servants (art. 1384, al. 5) and (this time, twice) when referring to property which is vacant or "without master" (art. 539 and 713). *Maître* could thus apply to both persons and things, as did *ira* when concerning either the *sende*–a thing–or the Zande–a person. This for the public law side. As for the private law one, didn't popular wisdom say that "*charbonnier est maître chez soi"* (literally "a coalman is the master in his own house," or, in accordance with the English idiom "a man's house is his castle")?

11. A.N. Allott, *Language and Property: A Universal Vocabulary for the Analysis and Description of Proprietary Relationships*, 11 AFRICAN LANGUAGE STUDIES 12, 20 (1970).

Fifty years later, I admit that all this seems (or should I write is?) amateurish. Had I been better informed of the existing anthropological literature about what I had to study, I would also have realized that in many African societies–as in the case of the Zande with *ira*–a single word is used to characterize the most extensive powers of a person on land.[12] But, the reader knows, from the introduction to this paper, in which circumstances and with which kind of training (or should I write non-training?) I marched into the heart of darkness; my total ignorance of methodology, substance and form insofar as what I had to study is obvious. What is perhaps funnier is that the publication of the results of my research led to an invitation to the Second International African Seminar organized by the International African Institute in Kinshasa (then Léopoldville), where I spoke about the problems resulting from the introduction of new ways of using land among the Zande and that two years later, on the basis of these two papers, I was asked to open and occupy the chair of African customary law at the Lovanium University also in Kinshasa. From then on, an incredible number of persons strongly believed (and still do) that I was a legal anthropologist. How strange!

All along that long road into the kingdom of academe which is still mine nearly half a century later, I have met many brethren–sometimes close friends–who were treading along the same path. But, be it K. Bentsi-Enchill in 1965,[13] A. Allott in 1970,[14] H.W.O. Okoth-Ogendo in 1974,[15]

12. Daniel Biebuyck, *supra* note 8, at 3-5. He provides examples borrowed from the Barotse in Zambia, the Lo Wiili, the Nsaw in Cameroon, and the Nyanga in the Congo. Be it the word *mung'a*, *so*, *KEr*, or *mine*–and one cannot but be struck by the likeness with the *ira* of the Zande–one single word indicates the most extensive powers a person with a specific status may have on a specific sort of land.

13. K. Bentsi-Enchill, *Do African Systems of Land Tenure Require a Special Terminology?, in* AFRICAN LAW AND LEGAL THEORY 265-290 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

14. Allott, *supra* note 11.

15. H.W.O. Okoth-Ogendo, *Property Theory and Land Use Analysis, in* AFRICAN LAW AND LEGAL THEORY 291-305 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

G. McCormack in 1983[16] and T.W. Bennett in 1985[17]–only to mention a few—none of them were of much help insofar as I was and still am concerned about the extraordinary (from an American or European point of view) concept of a man-earth or person-thing entity. But the most influential and seminal for me was P. Bohannan, whom I met at length in the International African Institute Seminar on land tenure that I was invited to in Kinshasa, as I mentioned earlier in this paper. In his presentation, Bohannan wrote:

> It is . . . probable that no single topic concerning Africa has produced so large a poor literature . . . The ignorance derives less from want of 'facts' than what we do not know what to do with these 'facts' or how to interpret them.[18]

His words were echoed after a week of discussions at the International African Institute Seminar when its organizer, Daniel Biebuyck wrote, under the title *Problems of Analysis and Terminology*:

> The comparative study of the innumerable works devoted to these problems [those of land tenure] reveals, as it was underscored in the Seminar, the big disparity of approaches and the inadequacy of the corresponding terminology, the existence of a serie of untrue statements and the absence of a true theory in that field.[19]

Twenty-five years later, Bennett considered–a judgment to which I still subscribe today–that it was "disheartening to find that little progress seems to have been made"[20] on that topic.

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16. G. McCormack, *Problems in the Description of African Systems of Landholding, in* AFRICAN LAW AND LEGAL THEORY 321-334 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

17. T.W. Bennett, *Terminology and Land Tenure in Customary Law: An Exercicse in Linguistic Theory, in* AFRICAN LAW AND LEGAL THEORY 335-349 (Gordon R. Woodman & A. O. Obilade eds., Dartmouth 1995).

18. P. Bohannan, *'Land', 'Tenure' and Land-Tenure, in* AFRICAN AGRARIAN SYSTEMS 101 (Daniel Biebuyck ed., International African Institute 1963).

19. Author's translation from the French. Daniel Biebuyck, *Problems of Analysis and Terminology, in* AFRICAN AGRARIAN SYSTEMS 1-19, n. 2 (Daniel Biebuyck ed., International African Institute 1963).

20. Bennett, *supra* note 17, at 335.

CONCLUSION (IF I AM STILL ABLE TO ESCAPE SELF-DERISION)

In the course of the fifty years which followed my escapade in the Zande country, the deeper and wider I went into comparing laws, the more I was inclined to realize how true Karl Llewellyn was when he wrote:

> Legal usage of technical words has sinned, and does still, in two respects; it is involved in ambiguity of two kinds: multiple senses of the same term, and terms too broad to be precise in application to the details of single disputes. First, it does not use terms in single senses, but uses the same term in several senses; and in everal senses, indiscriminately, without awareness. This invites confusion, it makes bad logic almost inevitable, it makes clear statement of clear thought difficult, it makes clear thought itself improbable. No logician worth his salt would stand for it; no scientist would stand for it.[21]

I do not claim, in any way, to be considered as a logician or a scientist, but being forced into communication by my craft, I cannot but be struck by the fundamental truth emanating from these words first uttered when I had still two years to go before being conceived.

In this instance, when the Zande speak of *ira* or we speak of ownership, we all use abstract terms reflecting concepts built in our minds, and probably more clearly formulated in the Zande country where people live the law as a constant communal process than in our countries where they are the product of self-proclaimed sophisticated minds arguing, as in Byzantium, about the sex of angels in a language that even ordinary lawyers are at pains to understand. Lawyers and perhaps more evidently legal scholars–a group to which I belong so that everything I write about it can obviously refer to me–have not yet had the capacity or the courage to develop a language which would at least try to be understandable by all lawyers of good will. Also, no one has decided to take the time and courage needed for a possible systematic and rigorous application of the fundamental concepts defined by W.N. Hohfeld to African land tenure, in spite of the eloquent plea made in favour of it

21. K.N. LLEWELLYN, THE BRAMBLE BUSH 84 (Oceana 1978).

by E.A. Hoebel in his *Law of Primitive Man*,[22] which he concludes by another quotation of his accomplice in the study of the Cheyenne, Karl Llewellyn: "And thinking thus, in nicer terms, with nicer tools of thought, you pull the issue in clarity . . . unambiguously, because your terms are not ambiguous."[23] But these voices of scholars of first magnitude in legal anthropology were *clamantes in deserto*. Everything went on as if there was a definite advantage to keep the law ambiguous and the comparison between laws foggy.

And yet on the rich material we currently have, from the factual point of view through more numerous and elaborate legal anthropological fieldwork, through fundmental theoretical legal research and also, in some instances, through a combination of both, it should have been possible to go beyond–and even, if one looks at my limited and shaky contribution on Zande law, far beyond–what has been common knowledge among africanists for more than a quarter of a century.

I have had some occasions to plead in favour of such joint efforts involving scholars in the field of law and linguistics. To no avail, the most reluctant being the lawyers. For sure, their theoretical contribution seems more advanced than the development of research in African concepts about what "order" may mean in society. Social anthropology has made tremendous progresses in the analysis of African ways of thinking; but they seem to have focused on the background, both factual and intellectual, which subsumes what we could possibly call "order" or "law." The task is complicated by the fact that many among us–including myself–have serious doubts as to the existence in pre-colonial African minds of a distinct mental category isolating what we consider as "legal" from the rest of the seamless web which holds those societies together. But, at least, the challenge ought to be met. And do not ask me why I did not take it up. The accused can't be forced into admitting his own guilt.

Being currently, in the twilight of my life, I am still in the Heart of Darkness about what I consider to be a possible science of laws at large.[24]

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22. E.A. HOEBEL, LAW OF PRIMITIVE MAN 46-53 (Harvard University Press 1954).

23. LLEWELLYN, *supra* note 21, at 88.

24. I come back to this issue of a general formulation of legal concepts in *Les nouvelles ambitions de la science du juriste: Une langue générale de spécialisation en droit est-elle une utopie ?,* forthcoming, in a volume edited by R. Sacco, to be published by the Accademia nazionale dei Lincei in Rome.

HUMAN EMBRYO, ANIMAL EMBRYO, CHIMERICAL EMBRYO: WHAT LEGAL STATUS IN FRENCH LAW?

Laurence Brunet[*] & Sonia Desmoulin[†]

INTRODUCTION

In 1998, the scientific review *Science* published an experiment studying the development of human cell nuclei introduced into bovine enucleated cells. In an article entitled *The Minotaur in Gestation in a Laboratory of Massachusetts,* the French newspaper *Le Monde* questioned the legality of such research in France, as well as the status of the life which may arise from this experimentation.[1] Surprisingly, the article provoked little reaction. Less than ten years later, in 2007, *Le Figaro*–another French newspaper–caused a stir with an article announcing, *Soon Embryos Half-Man Half-Animal*.[2] Between these two dates, some important changes had taken place in France and in other countries.

In France, the law pertaining to the use of human embryos for scientific research has been modified. Indeed, the law of August 6th, 2004 authorized by exception, and for a limited period of five years, experimentation on human embryos.[3]

At the same time, outside France, the issue concerning the creation of chimeras or hybrid embryos (composed of human and animal elements) raised some public concerns. In Canada, the Assisted Human Reproduction Act (AHRA) of 2004 defined a

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* Centre de Recherche "Droit, Sciences et Techniques," Université Paris I Panthéon-Sorbonne (UMR 8103). Ms. Brunet wrote section 1.

† Centre de Recherche "Droit, Sciences et Techniques," Université Paris I Panthéon-Sorbonne (UMR 8103). Ms. Desmoulin wrote sections 2 and 3.

1. LE MONDE, November 14th, 1998.

2. Martine Perez, *Bientôt des embryons mi-homme mi-animal*, LE FIGARO, September 9th, 2007. *See* also, Jean-Yves Nau, *Chimères humaines et démocratie,* LE MONDE, February 23rd, 2007.

3. Act n° 2004-800, August 6th, 2004, *JORF* August 7th, 2004. *See* also, H. Gaumont-Prat, *La révision des lois de bioéthique et la recherche sur les cellules souches embryonnaires*, 12 REVUE LAMY DROIT CIVIL 27(2005) ; and also, Ph. Pédrot & B. Pauvert, *La législation applicable aux cellules souches embryonnaires*, 35 PETITES AFFICHES 77 (2005).

"hybrid," as "an ovum of a non-human life form into which the nucleus of a human cell has been introduced,"[4] and stated that "no person shall knowingly . . . create a hybrid for the purpose of reproduction, or transplant a hybrid into either a human being or a non-human life form."[5] Furthermore, three of the main Canadian federal granting agencies in Human Health and research[6] adopted guidelines which set down, first, that "it is not ethically acceptable to create, or intend to create, hybrid individuals by such means as mixing human and animal gametes, or transferring somatic or germ cell nuclei between cells of humans and other species;" and second, that "it is not ethically acceptable to undertake research that involves ectogenesis, cloning human beings by any means including somatic cell nuclear transfer, formation of animal/human hybrids, or the transfer of embryos between humans and other species."[7]

The United Kingdom also had to face this issue: the Human Fertility and Embryology Authority (HFEA) received two applications from scientific teams to carry out research using human cells and animal eggs to produce stem cells. The explanation for such applications can be found in the lack of available human oocytes for scientific research on embryo development. The regulatory body decided that, under current British law, it was not in a position to authorize such an experiment, and considered it necessary for British citizens to pass on the social acceptability of such experiments. Therefore, a public consultation was launched in 2007[8] and the Science and Technology Select Committee released, in April 2007, a report on "Government Proposals for the Regulation of Hybrid and Chimera

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4. Canadian Assisted Human Reproduction Act (AHRA), 2004, Section 3 (d).

5. AHRA, Section 5 (1) (j).

6. Canadian Institutes of Health Research, Natural Sciences and Engineering Research Council of Canada, Social Sciences and Humanities Research Council of Canada.

7. Article 9.5 Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans 1998 ("TCPS" with 2000, 2002, and 2005 amendments), *available at* http://www.pre.ethics.gc.ca/english/policystatement/policystatement.cfm (last visited November 6, 2008).

8. *See*, Public Dialogue, http://www.hfea.gov.uk/en/1517.html#dialogue (last visited November 6, 2008).

Embryos."[9] The Committee opined "that the creation of human-animal chimera or hybrid embryos, and specifically cytoplasmic hybrid embryos, is necessary for research" but "that development of human-animal chimera or hybrid embryos past the 14-day stage should be prohibited and that a prohibition should be put in place on the implantation of human-animal chimera or hybrid embryos in a woman." Since then, the HFEA decided to give limited approval, on a case-by-case basis, for certain scientific research projects involving the creation of hybrids or chimerical embryos *in vitro*. In November 2007, a proposal to update the Human Fertilization and Embryology Act of 1990, concerning assisted conception and the use of embryos in research and therapy, was introduced before Parliament. The new Bill became an Act of the Parliament on November 13th, 2008. It supports a pragmatic legal framework by prohibiting placing "in a woman an embryo other than a human embryo, an inter-species embryo, or any gametes other than human gametes." Mixing human gametes with animal gametes, bringing about the creation of an inter-species embryo, or keeping or using an inter-species embryo is prohibited without a license issued by the HEFA. This inter-species embryo cannot be kept after either "the appearance of the primitive streak," or "the end of the period of 14 days beginning with the day on which the process of creating the inter-species embryo."[10]

Such a legal framework still does not exist in France. Nevertheless, as with their foreign colleagues, French scientists specializing in cloning, genetics engineering and embryology begin to express interest in this field. Therefore, French lawyers, already facing the tricky issue of defining the legal status of human embryos, now have to determine the legal status of chimerical or hybrid embryos, resulting from the mixing of human and animal cells.

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9. House of Commons Science and Technology Committee, Government Proposals for the Regulation of Hybrid and Chimera Embryos, Fifth report of Session 2006-07, *available at* http://www.publications.parliament.uk/pa/cm200607/cmselect/cmsctech/272/272i.pdf (last visited November 6, 2008).

10. Human Fertilisation and Embryology Bill [HL], Amending the Human Fertilisation and Embryology Act 1990, Section 4A, *available at* http://www.publications.parliament.uk/pa/ld200708/ldbills/006/08006.1-7.html#j254 (last visited November 6, 2008).

The question of the legal status of the chimerical embryo reveals other disturbing issues in French law, which appears clearly to anyone familiar with the French legal system.

First, it is structured around a *summa divisio*, distinguishing two fundamental categories and regimes: persons and things, subjects and objects. Traditionally, these fundamental categories defined themselves in reference–and in opposition–to each other. Without precise legal definitions, French authors tried to define these concepts and suggested that the French word *chose*, translated roughly as thing, should apply to anything existing in the human world, whether or not it is likely to be appropriated. As regards *les personnes*–persons–as said by a renowned French Professor of Law, "we are accustomed to institutions; we don't need to define them."[11] In fact, the category of persons is closed, while the category of things is residual. The latter absorbs what the former rejects. Consequently, because of their interdependence, neither of these categories can be simply understood. Nevertheless, the need for such a distinction has always been clear for lawyers.

Several distinguishing criteria have thus been brought out: a person is characterized by the ability to act in the judicial system (by judicial deeds and trials), by the capacity to be the subject of rights and duties, by the capacity to exercise such rights, and also by what is known as "patrimony" in traditional civilian doctrine.[12] In this way, the legal concept of person is a tool to identify actors (subjects) of the legal system by their opposition to objects over which rights are exercised. But the distinction also brings with it a symbolic dimension: the actors are invested with a supreme importance. Here the ancient influence of Christianity and its insistence on the importance of individuality is to be stressed. Catholicism is the first religion to emphasize the importance of terrestrial experience as opposed to a purely extra-terrestrial attitude. The consideration for the autonomy of the individual, and for its self-sufficiency, was further enhanced with the spread of the Protestantism. To be complete, the humanist philosophy has also emphasized the self-sufficiency of the individual as a rational

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11. J. CARBONNIER, DROIT CIVIL, INTRODUCTION n. 23 (PUF, Thémis 1999).

12. Patrimony: the economic unit consisting of the total sum of a person's assets and liabilities.

entity, with or without any connection with God. In short, one can grasp the legal concept of person (and judicial personality), on the one hand, as a functional and instrumental tool, and on the other hand, as a symbolic institution with religious and humanist roots.

Second, despite–or perhaps because of–this symbolic dimension, the legal concept of person could not perfectly correspond to flesh and blood people. We remember, of course, the slavery statute, not abolished until 1848 in France. Slaves in French colonies were governed by the regime of goods and things (*Le Code noir*, 1685).[13] French law also had what was called *mort civile*–civil death–which was not abolished until 1854. It was a sentence passed on persons convicted to hard labor or life imprisonment. The "civilly dead" person lost all his possessions. His legacy was passed on, as if he had died, and his marriage was dissolved. Since then, the progression of the idea of inherent rights and that of equality narrowed the gap between a person in the legal sense of words and an actual human being. The adherence of these two concepts was sought. It could be the reason why the concept of natural person appeared in the Louisiana Civil Code,[14] while the concept of physical persons was acknowledged in the French civil doctrine. At the same time, the legal concept of a person was divided to accommodate the concept of a juridical person, which seems to be more open in the Louisiana Civil Code than in the French law (in which this category covers almost only corporations and associations). With this evolution arose the idea that all individuals must be understood as persons in the legal sense. This movement deepened in Europe after the Second World War with the promotion of human rights and the stigmatization of crimes against humanity. The adoption of the European Convention for Human Rights (ECHR),[15] in the framework of the European Council and the creation of a special court–the European Court for Human Rights–in charge of judging violations of the convention by member states and individuals, were important events. The fact that any individual who claims to be a victim of a violation of

13. CODES NOIRS: DE L'ESCLAVAGE AUX ABOLITIONS, LE CODE NOIR DE MARS 1685, EDIT DU ROI SUR LES ESCLAVES DES ILES DE L'AMERIQUE (Dalloz 2006).

14. LA. CIV. CODE ANN. art 24 (West 2008).

15. COUNCIL OF EUROPE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (Rome, November 4th, 1950).

rights protected by the ECHR can complain to the Court (under the condition that all legal recourses within national Law must have been exhausted) plays a central role in the strengthening of human rights. Furthermore, the Court has significant influence to the effect that most national laws have been modified towards a greater respect for human rights.

There is undoubtedly in Europe, since the middle of the 20th century, a movement of convergence between the different conceptual tools described: human rights, amplified and consolidated by the ECHR, reinforce the idea that the judicial personality, in his dual dimension–instrumental and symbolic–is the person's primary source of protection. But recent advances in biotechnology and the scientific interest in manipulating human genome, cells and embryos, disrupt this progression. In general, the substantial unity and the identity of the person are strikingly challenged in medical investigations and genetic explorations that try to reengineer human components. Scientific applications to experiment on human embryos and mix human and animal components shed a harsh light on the blurred frontiers of humanity. Indeed, the very concept of humanity was philosophically constructed in opposition to that of animalism, and animals belong to the residual category of things in the civil tradition.[16] At the same time, the legal notion of humanity is challenged by a new concept of "human species," as in article 16-4 of the French Civil Code.[17] This concept of "human species" is closer to biology and zoology than to law. In this context, the relations between human beings (and humanity), the legal category of persons (individuals with judicial personality) and legal protection have to be reconsidered. In this paper, we propose to reexamine these problematic relations through the emerging question of the legal status of the chimerical or hybrid embryo resulting from mixing human and animal cells.

As there is no specific French jurisprudence, nor legal text, regarding chimerical embryos mixing human and animal cells, a practical way to anticipate may be to combine solutions dealing with human and animal embryos. Therefore, in order to illuminate the legal status of chimerical embryos, we will proceed in three

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16. *See* F. BURGAT, ANIMAL: MON PROCHAIN (Odile Jacob ed., 1997).

17. French Civil Code, art. 16-4: "nobody can interfere with the integrity of the human species."

steps. First, we will expose the current status of human embryos in French law. We will then clarify the legal status of animal embryos in France. Finally, we will discuss chimerical embryos and will propose some primary hypotheses.

I. Human Embryos

Given the strong protective dimension that has historically been associated with the legal notion of the person (e.g., with general legal capacity), the protections given to the human fetus and embryo are co-extensive with their legal characterization. The question is whether they can be viewed as belonging to the category of the person. To clarify this issue, we first must address the *in utero* embryo and fetus, and second, the *in vitro e*mbryo.

Traditionally the question is connected to the ancient Roman fiction of the anticipated personality of the unborn child for the preservation of its interests. This idea is not formally mentioned in any provision of the French Civil Code. This is a primary difference with the Louisiana Civil Code, in which article 26 states that "an unborn child shall be considered as a natural person for whatever relates to its interests for the moment of conception." Besides in French law this rule has a strictly patrimonial understanding and therefore is does not offer a considerate status to the unborn child, namely, a protection adjusted to the humanity of the fetus.

The question of the fetus's nature, or status, first arose in a socially controversial context, at the time of the vote on the French Law n° 75-17 of January 17th, 1975, authorizing the voluntary interruption of pregnancy.[18] This law operated a compromise. It made it clear in article 1 that "The law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of life. The principle may only be derogated from in the event of necessity and in accordance with the conditions set out by this law." It was a matter of finding a delicate equilibrium between the principal of respect for all human beings from the moment of conception, and the exception or justification admitted in the case of distress of a pregnant woman. The law therefore did not recognize in 1975 the

18. Until then, intentional abortion had been sanctioned by French law, except in cases where it was necessary in order to save the life of the mother.

right to abortion. It recognized simply that under certain circumstances the criminal sanction could be removed. The law, manipulating the concepts of principle and exception, in this way avoided taking a position on the characterization of the fetus as either person or thing.

The recent reform of the abortion law has slightly modified the former equilibrium.[19] The period in which abortion was permitted was extended to twelve weeks instead of the ten weeks previously provided. In addition, the physician's duty to assess the mother distress was diminished. More importantly, the provisions relating to criminal offence in case of abortion have disappeared in the Criminal Code. All of the law's provisions regulating voluntary abortion have now been enacted in the Public Health Code. This modification reinforces the woman's freedom to abort.

The Constitutional Council acted similarly when it held that the law conforms with the French Constitution.[20] This amounted to a ratification by the Council of this equilibrium and to a refusal to give constitutional value to the idea of respect for all human beings from the moment of conception.

Some time afterward, the National Consultative Ethics Committee (NCEE) issued an opinion on the sampling of dead human embryonic and fetal tissue for therapeutic, diagnostic, and scientific purposes (opinion n° 1, May 22nd, 1984). The NCEE is an independent authority with the mission to give opinions on ethical problems and questions concerning society, revealed by the progress of knowledge in the fields of biology, medicine and health. The Committee opined that the embryo is "a potential human person." This expression is ambivalent: the embryo is not yet a person, but it has the elements of a person, and must be protected as one.

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19. Law n° 2001-588, July 4th, 2001, revising the Public Health Code, arts. L. 2212-1 to 2212-11.

20. Decision n° 74-54, January 15th, 1975, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1975/74-54-dc/decision-n-74-54-dc-du-15-janvier1975.7423.html (last visited November 6, 2008).

Authors[21] have steadily proposed the creation of a new subclass within the category of person to find an adequate protection for embryos. Most of them have suggested splitting the concept of person between, on the one hand, the functional and abstract notion of person and, on the other hand, a more flexible notion of human being. According to the authors, this reasoning was justified by the 1994 bioethics laws.[22] It is thus provided under article 16-1 of the French Civil Code that "the law secures the primacy of the person, prohibits any assault on human dignity and guarantees the respect of every human being from the beginning of its life."[23] It has been noted that this law was intended to add a new feature to the concept of person, its human dimension, and more particularly to add this new feature to the embryo.

An additional justification for this idea of a new sub-class was also found in the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine, also known as the Convention on Human Rights and Biomedicine, which was opened for signature on April 4th, 1997 in Oviedo and came into force on December 1st, 1999. Article 1 provides that the "Parties to this Convention shall protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine." This passage is explained in the Convention's accompanying explanatory report on the Convention, which states that "the Convention also uses the expression 'human being' to state the necessity to protect the dignity and identity of all human beings. It was acknowledged that it was a generally accepted principle that human dignity and the identity of the human being had to be respected as soon as life

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21. S. Joly, *Le passage de la personne, sujet de droit à la personne, être humain,* 22 DROIT DE LA FAMILLE (see the recording of references in n. 51) (1997); and P. Murat, *Réflexions sur la distinction être humain/personne*, 9 DROIT DE LA FAMILLE (1997).

22. Laws n° 94-653 and n° 94-654, July 29th, 1994. New provisions were added in both the French Civil Code and Public Health Code.

23. One can notice that it is nearly the same wording as in the 1975 law (authorizing voluntary abortion), art. 1.

began."[24] However, in 2008, France had not yet ratified the Convention.

Moreover this attempt to give a juridical protection to *in utero* fetus was ruined by criminal court cases applying article 221-6 of the French Criminal Code. Indeed, on three occasions, the *Cour de cassation* (hereafter, Court of Cassation)–the French highest court for private law cases–stated that: "the rule that offences and punishment must be defined by law, which requires that criminal statutes be construed strictly, pleads against a charge of unintentional homicide lying in the case of a child that is not born alive."[25]

In one of the Court of Cassation decisions dated June 30th, 1999, an application against the French Republic was lodged with the European Court of Human Rights. It was a case of mistaken

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24. The Convention does not define the term 'everyone' (in French '*toute personne*'). These two terms are equivalent and found in the English and French versions of the European Convention on Human Rights, which however does not define them. In the absence of a unanimous agreement on the definition of these terms among member States of the Council of Europe, it was decided to allow domestic law to define them for the purposes of the application of the present Convention.

25. D. Vignaud, *Note, Cour de cassation, Chambre criminelle, 30 juin 1999*, RECUEIL DALLOZ 710 (1999); Y. Mayaud, *Entre vie et mort, la protection pénale du foetus*, 4 REVUE DE SCIENCE CRIMINELLE 813 (1999); and M.-L Rassat, *La victime des infractions contre les personnes après l'arrêt de la Chambre criminelle du 30 juin 1999*, 12 DROIT PENAL 4 (2000).

Y. Mayaud, *Note on Cour de cassation, Assemblée plénière, 29 juin 2001*, RECUEIL DALLOZ 2917 (2001); P. Sargos, *Rapport,* J. Sainte-Rose, *Conclusions*, and M.-L. Rassat, *Note,* all at 10569 SEMAINE JURIDIQUE (2001); J. Hauser, *Note*, REVUE TRIMESTRIELLE DE DROIT CIVIL 560 (2001); and J. Pradel, *La seconde mort de l'enfant conçu*, RECUEIL DALLOZ 2907 (2001). In July 1995, a vehicle being driven by Mr. Z, who was intoxicated, collided with a vehicle being driven by Mrs. X, who was six months pregnant. She was injured and as a result of the impact lost the foetus she was carrying.

J. Pradel, *Note, Cour de cassation, Chambre criminelle, 25 juin 2002*, RECUEIL DALLOZ 3099 (2002); M.-L. Rassat, *Note,* 10155 SEMAINE JURIDIQUE (2002); and Y. Mayaud, *Note*, REVUE DE SCIENCE CRIMINELLE 95 (2003). The child's death was a result of the negligence of both the doctor, in failing to place the patient, who was beyond term, under closer observation, and of the midwife in failing to notify an unequivocal anomaly noted when the child's cardiac rhythm was recorded.

For a comprehensive analysis *see* A. Lepage & P. Maistre du Chambon, *Les paradoxes de la protection de la vie humaine*, *in* LES DROITS ET LE DROIT, MELANGES DEDIES A B. BOULOC 613-650 (Dalloz 2007).

identity: two Vietnamese women had nearly similar names. One of them came to the doctor to have her contraceptive coil removed. The other was six months pregnant and came for a regular check up. The doctor caused the death of the child the second woman was carrying by operating on her without performing a prior clinical examination. The woman who lost her child alleged a violation of the Convention on the ground that the doctor's conduct was not classified as unintentional homicide.

The Court concluded, on July 4th, 2004, that there had been no violation of article 2 of the Convention[26] because, "the issue of when the right to life begins comes within the margin of appreciation which the Court generally considers that States should enjoy in this sphere, notwithstanding an evolutive interpretation of the Convention, a living instrument which must be interpreted in the light of present-day conditions."[27]

An author[28] has pointed out the incoherence of this position saying that a person causing unintentional injury is liable to criminal prosecution while a person who unintentionally causes the death of the fetus goes unpunished. He criticized the fact that a

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26. Article 2 of the Convention provides: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

27. ECHR, Grand Chamber §82, Vo v. France case, July 8th, 2004, *available at* http://www.echr.coe.int/eng/Press/2004/July/GrandChamberjudgmentVovFrance080704.htm (last visited November 6, 2008).

M. Levinet, *Note*, 9 LES GRANDS ARRETS DE LA COUR EUROPEENNE DES DROITS DE L'HOMME 97 (F. Sudre et al., PUF, Thémis 2007); J. Sainte-Rose , *L'enfant à naître: un objet destructible sans destinée humaine*, SEMAINE JURIDIQUE 194 (2004); J.-P. Marguénaud, Les *tergiversations de la Cour européenne des droits de l'Homme face au droit à la vie de l'enfant à naître*, REVUE TRIMESTRIELLE DE DROIT CIVIL 799 (2004); and P. Murat, *Les frontières du droit à la vie: l'indécision de la Cour européenne des droits de l'homme,* DROIT DE LA FAMILLE 194 (2004).

28. J. Pradel, *Note sous Cour de cassation, Chambre criminelle, 2 décembre 2003*, RECUEIL DALLOZ 449 (2004). The Criminal Division of the Court of Cassation has held that a Court of Appeal gave valid reasons for a defendant guilty of the unintentional homicide of a child who died an hour after her birth on the day of a road traffic accident in which her mother, who was eight months' pregnant, was seriously injured, when it held that, by failing to control his vehicle, the driver had caused the child's death an hour after birth as a result of irreversible lesions to vital organs sustained at the moment of impact.

child who has lived for a few minutes is recognized as having standing as a victim, whereas a child that dies *in utero* is ignored by the law; and the fact that freedom to procreate is less well protected than freedom to have an abortion. This can be considered as a surprising result because criminal law is normally dedicated to the protection of the human being who is vulnerable and whose life deserves to be protected.

What all these decisions reveal is that criminal law refuses to acknowledge any distinction between a human being and a person having a judicial personality. As a result, no protection is given until a child is born, alive and viable. Louisiana law appears to be very different since the child to be is considered a person for the purposes of a wrongful death action against the person which causes the loss of the fetus.[29]

If we now consider the topic of *in vitro* embryo, we reach the same impasse. The idea of making a distinction between a person having legal capacity and a human being is also defeated. It is therefore difficult to find a relevant protection for embryos in a state of cryopreservation. We are going to see how the status of *in vitro* embryo obliges to set aside all ontological definitions of the embryo to restrict its to a teleological definition:[30] what is important is the use intended for the *in vitro* embryo.

Just before the 1994 bioethics law was enacted, the *Conseil constitutionnel* (Constitutional Council) sharply depreciated the embryo, denying that it can be construed as a sample of humanity. The issue of the abandoned frozen embryos that cannot be transferred into a womb was referred to the Council. The law obliges them to be destroyed after a certain limit of time. The Constitutional Council stated on July 27th, 1994 that "the legislator has taken the view that the principle of respect of every human being from the beginning of life was not applicable to them." The relevant provisions were therefore constitutional.[31] As a

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29. LA. CIV. CODE ANN. art 26 (West 2008).

30. F. BELLIVIER, *Réflexions au sujet de la nature et de l'artifice dans les lois de bioéthique,* 35 PETITES AFFICHES: SPECIAL REVISION DES LOIS BIOETHIQUE 10 (2005).

31. Decision n° 94-343/344 DC, July 27th, 1994, *available at* http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/1994/94-343/344-dc/decision-n-94-343-344-dc-du-27-juillet-1994.10566.html (last visited November 6, 2008); and

consequence, the Council acknowledges the existence of a sub-class of human beings, expelled from humankind, who does not deserve the respect due to every human being from the beginning of life.

Thus, the characterization of the embryo no longer depends upon its inherent nature. Rather, it relies on the willingness of another to give it the status and protections of a person. This is clear from the 1994 bioethics French law, as amended in 2004:[32] "Assisted conception is aimed at responding to parental request of a couple" (in the French law "couple" refers to married or unmarried couple made up by the *in vitro* fertilization patients).[33] The destiny of frozen embryos is closely linked with the existence and pursuit of the "parental project." If, for example, parents are separated or do not want other children, or if one of them dies, then there is no longer a parental project and the status of embryo is rendered uncertain. The embryo is either given to another couple (in accordance with adoption procedures) or used for scientific research or destroyed after five years in a state of cryopreservation, if the couple expresses no other possible choice.[34]

In vitro embryos have a very ambiguous legal status: on the one hand, they benefit from full legal protection when they are part of a parental project. On the other hand, as soon as there is no such project (e.g. no married couple is willing and able to receive the *in vitro* embryo available for adoptive implantation), they count for nothing. This ambiguous legal status has been confirmed by the Court of Appeals of Douai in a judgment dated December 6th, 2005.[35] In this case, several embryos belonging to the same couple had deteriorated because of poor storage conditions (they had been kept by the hospital in containers with fissures). The Court of Appeals acknowledged that the hospital was liable for failing to provide appropriate storage, but reversed the award of damages that had been granted to the couple (10,000 Euros based on "varied

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B. Edelman, *Le Conseil constitutionnel et l'embryon*, RECUEIL DALLOZ 205 (1995).

32. Law n° 2004-800, August 6th, 2004.

33. Public Health Code, art. L. 2141-2.

34. *Id.* at art. L. 2141-4.

35. Cour administrative d'appel de Douai, December 6th, 2005, Juris-Data n° 2005-291858 ; and J.-R Binet, *L'enfant conçu et le projet parental devant le juge administratif*, DROIT DE LA FAMILLE 14 (2006).

troubles in their living conditions") in first instance by the Administrative Tribunal. The Court of Appeals considered that, in view of the specific circumstances of the case, the couple's parental project had ceased when their embryos had been destroyed by accident: after the birth of their two daughters born as a consequence of *in vitro* fertilization, they had not maintained any contact with the medical facility where the nine leftover *in vitro* embryos were stored.

The European Court of Human Rights emphasized the dependence of the embryo destiny to the parental project in the case *Evans v. United Kingdom*, (first judgment on March 7th, 2006, and, after the referral of the case to the Grand Chamber, second judgment on April 10th, 2007 confirming the previous one).[36] The decision can be transposed to French law, which is close, in some respects, to the Human Fertilization and Embryology British Act of 1990.

The applicant, Mrs. Evans, had serious pre-cancerous tumors in both ovaries, requiring their removal. She and her partner were told that because the tumors were growing slowly, it would be possible first to extract some eggs for *in vitro* fertilization ("IVF"). Mrs. Evans and her partner commenced treatment at the Bath Assisted Conception Clinic. In May 2002, the relationship broke down. The future of the embryos was discussed between the parties. On July 4th, 2002 the partner wrote to the clinic to notify it of the separation and to demand that the embryos should be destroyed. The applicant contested some provisions of the Act of 1990, whereby the consent of either party might be withdrawn at any stage up to the point of implantation of an embryo. She argued that this rule, which denies her any chance to have genetically-related offspring in view of her medical history, violated her rights to respect for private and family life under article 8 of the Convention.[37]

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36. ECHR, March 7th, 1986, *available at* http://www.echr.coe.int/Eng/Press/2006/March/ChamberjudgmentEvansvUnitedKingdom070306.htm (last visited November 6, 2008).

ECHR, Grand chamber, April 10th, 2007, *available at* http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Evans&sessionid=16566852&skin=hudoc-en (last visited November 6, 2008); and B. Mathieu, *Note*, 10097 SEMAINE JURIDIQUE (2007).

37. "Everyone has the right to respect for his private and family life." COUNCIL OF EUROPE, *supra* note 15, at art. 8.

On April 10th, 2007, approving the previous judgment, the Court, sitting as a Grand Chamber, stated that:

> Respect for human dignity and free will, as well as a desire to ensure a fair balance between the parties to IVF treatment, underlay the legislature's decision to enact provisions permitting of no exception to ensure that every person donating gametes for the purpose of IVF treatment would know in advance that no use could be made of his or her genetic material without his or her continuing consent. In addition to the principle at stake, the absolute nature of the rule served to promote legal certainty and to avoid the problems of arbitrariness and inconsistency inherent in weighing, on a case by case basis, entirely incommensurable interests.[38]

Therefore the Grand Chamber stated that, "given the lack of European consensus on this point, the fact that the domestic rules were clear and brought to the attention of the applicant and that they struck a fair balance between the competing interests, there has been no violation of article 8 of the Convention."[39]

A review of the French provisions and the European case law on this topic shows that the requirements for recognizing a current and justifiable parental project limit the possibility of protecting the embryo's potential to be born. Indeed, if the *in vitro* embryo ceases to be part of a genuine parental project, it becomes a group of cells that may be used for scientific experiments or disposed by destruction. Without parental desire, the embryo lacks humanity.

Once more, the gap between Louisiana and European law is striking. The characterization of the *in vitro* embryo as "a juridical person" in the Louisiana Revised Statutes,[40] as surprising as it

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38. ECHR, Grand chamber, *supra* note 36, at § 89.

Even if the Court holds that the conflicting interests of the parties are "incommensurable" and could not be "weighed, on a case by case basis," it nevertheless compares them when considering that "the applicant's right to respect for the decision to become a parent in the genetic sense should be accorded greater weight than J.'s right to respect for his decision not to have a genetically-related child with her" *Id.* at § 90. *See* J.-P. Marguénaud, *La triste fin des embryons in vitro du couple séparé: la Cour de Strasbourg, Cour européenne des droits du Mâle*, REVUE TRIMESTRIELLE DE DROIT CIVIL 295 (2007).

39. ECHR, Grand chamber, *supra* note 36, at § 92.

40. LA. REV. STAT. ANN. §9:121 (2008).

could seem from a European perspective, offers effective protection to this embryo, which is entitled to be represented in a law suit. To resolve disputes between the potential parents, the Louisiana law states that "the best interest" of the *in vitro* embryo must be the judicial standard. Moreover it is impossible to destroy it intentionally, without any time limit, even if no parental project sustains it any more.[41] It seems therefore that under Louisiana law, frozen embryos are potentially immortal persons. One can infer from these provisions that *in vitro* embryos could not be destroyed in circumstances close to the situation judged by the European Court of Human Rights in the *Evans* case.

The French teleological definition of embryo has allowed scientific research to take place with both public and private funds. The August 6th, 2004 law enables some research on *in vitro* embryos when they are no longer part of a parental project, if the parents give express consent. As it becomes a scientific material, the embryo is then to be regarded as a thing. These experiments are subject to authorization on a case-by-case basis by the Biomedicine Agency, which controls the interest and the necessity of such experiments. Around 45 research teams have been allowed to work on human embryonic stem cells since 2004.[42] In this legal framework, a testing program on embryo cells aiming at establishing a chimerical model man/mouse to enable the study of HIV infection was authorized in 2006. As adult mice were used in this experiment, the "chimerical model" was not a chimerical embryo. In this context, law concerning animal experimentation could be more useful to provide guardrails.

As regards chimerical embryos, the result of mixing cells from human and animal embryos, the question of their legal statusbe solved by considering either the legal status of a human embryo or the legal status of animals, especially animal embryos. Having discussed the law pertaining to the human embryo, the legal provisions concerning animal embryos should now be explored.

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41. *Id.* at §9:122 - 133 (2008).

42. *Rapport annuel-Bilan des activités*, AGENCE DE LA BIOMEDECINE 56-60 (2006), *available at* www.agence-biomedecine.fr (last visited November 6, 2008).

II. ANIMAL EMBRYOS

To clarify the legal status of animal embryos, it is first necessary to summarize the legal status of animals under French law. That will help us to clarify, in a second step, the peculiar situation of animal embryos, particularly in texts dealing with scientific experiments.

A. Legal Status of Animals

In France, animals traditionally belong to the legal category of things, which includes everything that is not legally a person, a sort of "default category." They are mentioned in the French Civil Code in articles dealing with property, and their legal status apparently remains unchanged since 1804.[43] This remains the leading position among French scholars. The utilitarian theories of Jeremy Bentham[44] or Peter Singer,[45] as well as the theory of animal rights developed by Tom Regan,[46] have few echoes in France.

Nevertheless, some contemporary French scholars hold that animals have rights and should be treated as legal persons.[47] Some of them are lawyers and base this view on a mere technical conception of legal personality. They consider that an animal has such rights because it possesses its "own legally protected interest," which is the criterion of a "subject of rights"–the theoretical *analogon* of the legal person–according to Ihering.[48] These authors stress the fact that the right to freely use a good–a

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43. French Civil Code, art. 522, 524 & 528.

44. J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Adamant Media Corporation 2005) (1789).

45. P. SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS (Random House 1975); P. SINGER, PRACTICAL ETHICS (Cambridge University Press 1979); and THE GREAT APE PROJECT: EQUALITY BEYOND HUMANITY (P. Cavalieri & P. Singer eds., Saint-Martin's Press 1994).

46. T. REGAN, THE CASE FOR ANIMAL RIGHTS, (University of California Press 1983).

47. G. CHAPOUTIER, LES DROITS DE L'ANIMAL, (PUF, collection "Que sais-je?", 1992); J.-P. MARGUENAUD, L'ANIMAL EN DROIT PRIVE (Preface Cl. Lombois, Presses Universitaires de France 1992); and S. ANTOINE, LE DROIT DE L'ANIMAL, (Préface J.-M. Coulon, Légis-France 2007).

48. R. VON IHERING, LAW AS A MEANS TO AN END, (I. Husik trans., The Boston Book Company 1913) (1877).

concept that flows from the strong protection of property developed since the 1789 revolution–cannot be applied as such to animals. Indeed, the right to use is nowadays limited by criminal law: ill-treatments and cruelty towards animals are banned.[49] Similarly, the right to decide freely is limited and affected by the incrimination of abandoning or provoking voluntary death of animals without any necessity.[50] According to this opinion, as animals are protected (through criminal law) even against their owner, they should no longer be characterized as things or as goods.[51]

Some choices made by the French Parliament may support this view. For instance, legally registered associations promoting animal protection have been authorized, since 1976,[52] to sue as victims in certain criminal proceedings concerning animals ill-treatments or cruelty toward animals.[53] Furthermore, in 1999, a technical, but symbolic and legally far-reaching choice was made: the French Parliament decided to move criminal offences against animals from a part of the Penal Code entitled "Infringements on possessions" to another part entitled "Other crimes and offences." At the same time, articles defining goods in the Civil Code have been rewritten to make explicit reference to animals, and no more only to "objects" or "things." From then on, one can read that "animals and things that the owner of a tenement placed thereon for the use and working of the tenement are immovable by destination,"[54] and that "animals and things which can move from one place to another, whether they move by themselves, or whether they can move only as the result of an extraneous power, are movables by their nature."[55] Beyond the vocabulary, this appeared as an important shift for some scholars that were tempted interpret as a clear distinction between animals and "objects" or "things."

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49. French Penal Code, art. R. 654-1 and art. 521-1.

50. *Id.* at art. 521-1 and art. R. 655-1.

51. *See* C. Daigueperse, *L'animal, sujet de droit: réalité de demain*, 1er Sem. GAZ. PAL. 160 (1981); J.-P. Marguénaud, *L'animal dans le nouveau Code pénal*, RECUEIL DALLOZ 187 (1995); and J.-P. Marguénaud, *La personnalité juridique des animaux*, RECUEIL DALLOZ 205 (1998).

52. Act n° 76-629, July 10th, 1976, *JORF* July 13th, 1976.

53. The French system allows victims to bring their civil claim in damages before criminal courts, where they are referred as the *partie civile* (civil party).

54. French Civil Code, art. 524 (redaction Act n° 99-5, January 6th, 1999).

55. *Id.* at art 528.

Nevertheless, one must observe that the new version of the text leaves animals in the legal category of goods, movable or immovable when by destination.

Recently, the Act of March 5th, 2007 concerning the prevention of delinquency also modified several articles of the Penal Code dealing with additional penalties in order to include express references to animals. To be precise, the articles concerning the confiscation of things used or intended to be used for the commission of an offence (or the confiscation of things which are the product of an offence) were rewritten to make explicit reference to animals. In doing so, the Parliament gives the impression that the expression "things which were used or intended for the commission of an offence" does not cover animals, for instance dangerous dogs used to fear a victim. But, before this modification, courts applied these texts without any problems. Obviously, such modifications create more doubts than clarifications about the legal status of animals.

However, the opinion that animals should be considered as legal persons cannot prevail. Indeed, under current French law, animals can still be appropriated and general solutions applicable to goods and things are applied to animals, except when a specific provision rules them out. The existence of specific texts regarding animal protection or animal welfare[56] are not incompatible with the traditional legal status of animals, as long as animals are still legally treated as objects, things or goods. Besides, unlike Swiss or German law which textually states that animals are not things,[57] no French law explicitly extracted animals from the category of goods. On this point, French legislation may appear more coherent, as Swiss and German law on property are still applicable to animals in the absence of a specific legal solution. French jurisprudence is even clearer than the legislation. If a few courts in the 1980s were tempted to adopt some new opinion, for example by applying family law concerning children to animals, the Court of Cassation censured these minority decisions.[58]

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56. Specific texts most of the time collected in the French Penal Code, in the French Rural Code, and in the French Environmental Code.

57. *See* BGB, art. 90, and Swiss Civil Code, art. 641a. *See also* S. ANTOINE, RAPPORT SUR LE REGIME JURIDIQUE DE L'ANIMAL (Ministère de la Justice, May 10th, 2005).

58. *See* A. Couret, *Observation, Cour de cassation, Civ. 1ère, 8 oct. 1980*, RECUEIL DALLOZ 261 (1981).

Therefore, the confusing elements described below, as regards the Penal and the Civil codes, do not really change the situation. Despite the academics debate, and beyond the lexical sliding, animals remain goods, and therefore things, in French law. This must be taken into account to better understand the status of animal embryos.

B. Legal Status of Animal Embryos

The legal status of animal embryos raises less debate. For those who consider that animals are goods, and therefore things, animal embryos shall all the more be defined as things (or objects). For the others, the "own interest" of an animal embryo appears difficult to outline. Law concerning the property of fruits or the "right of accession" reinforces the conclusion that animal embryos are things. Indeed, under the civil law tradition–in French law as in the Louisiana Civil Code–, in the absence of rights of other persons, the owner of a thing acquires the ownership of its natural fruits, and this solution is applicable to animals. The young of animals belong to the owner of the mother.[59] In this legal framework, the animal embryo is legally a fruit, produced by a thing, and therefore belonging to the legal category of things.

However, defining animals as things does not imply absolute freedom of action with animals. Numerous specific texts were adopted to protect animals by prohibiting bad behavior or by requiring the assent of administrative procedures. And it is important to notice that some of these texts are applicable to animal embryos. For instance, in its articles dealing with animals used for scientific purposes, the French Rural Code covers all vertebrates, *including at the embryonic stage*, except embryonic forms of vertebrates oviparous (egg laying).[60] Such an exception shows that French law does not apply the same solution for all the animal embryos: *some* of them are things and objects of free disposal, which is the case for invertebrate embryos and oviparous

59. French Civil Code, arts. 547 and 548 (Natural fruit: increase in stock belong to the owner by right of accession; Fruit produced by a thing belong to the owner only on condition that he repays the costs of ploughing, works and seeds incurred by third parties and whose value must be assessed at the date of repayment); LA. CIV. CODE ANN. arts. 483 & 484 (West 2008).

60. French Rural Code, art. R. 214-87.

embryos; *others* are also things but are protected by special texts limiting the freedom of the owner or the holder in an experimental context, which is the case for vertebrate viviparous embryos.

Beyond the question of the legal status of the animal embryos, this difference influences the conditions in which experiments can take place. When scientists want to use viviparous embryos, they must comply with administrative constraints. The French Rural Code requires a license for institutions where experiments take place and for persons who realize them. Except for the case of simple observations requiring no intervention or suffering, scientists are required to obtain a personal authorization. Licenses and authorizations are delivered by civil servants working for local veterinarian services. Since 2001, controls cover research protocols. If the experimental protocols are not in fact systematically checked one by one, scientists who ask for a personal authorization to experiment with protected animals for five years must explain the aim of their research. They also have to justify the reasons why they need to use a certain sort of animals and to assure that there is no alternative solution. Lastly, they must set measures to limit animal suffering.

Though technical, such data are of great importance for a study on mixing human and animal elements in order to create chimerical embryos. They show that controls exist for scientists and establishments where experiments take place on viviparous embryos. They also show that it is easier to work on oviparous embryos, because in this case scientists do not have to work in a licensed institution or to obtain a personal authorization to experiment, and so avoid controls.

All these information is important to anticipate questions about the legal status of chimerical embryos. What can be the legal status of this puzzling inter-species creature? In view of the relative and uncertain status of human embryos in French law, and taking into account the legal framework regarding animal experimentation, answering this question is likely to be a real challenge.

III. CHIMERICAL EMBRYOS

French law is mute about "chimeras" or "chimerical embryos." No definitions or specific solutions have been adopted. The

question of the legal status of a chimerical embryo, mixing human and animal cells, has no clear answer. Therefore, French lawyers must use basic legal solutions and make conjectures.

Despite this first observation, a close examination of French law reveals a clue. This lies in article L. 611-17 of the French Intellectual Property Code, which holds that "Inventions shall be considered unpatentable where their commercial exploitation would be inconsistent to human dignity, order public or morality; however, such inconsistency may not emanate from a prohibition by law or regulation." This text is the transposition into French law of article 6 of the European Directive of July 6th, 1998 on the legal protection of biotechnological inventions.[61] Article 6 states that:

> 1) inventions shall be considered unpatentable where their commercial exploitation would be contrary to *ordre public* or morality; however, exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation; 2) On the basis of this, the following, in particular, shall be considered unpatentable: (a) processes for cloning human beings; (b) processes for modifying the germ line genetic identity of human beings; (c) uses of human embryos for industrial or commercial purposes; (d) processes for modifying the genetic identity of animals which are likely to cause them suffering without any substantial medical benefit to man or animal, and also animals resulting from such processes.[62]

How to relate this solution to our quest? The answer is in the preamble of the Directive. Indeed, the "whereas" (or "considering") number thirty eight of the preamble of the Directive brings some information about the correct interpretation of article 6. It specifies that "the operative part of this Directive should also include an illustrative list of inventions excluded from patentability so as to provide national courts and patent offices with a general

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61. Directive 98/44/EC of the European Parliament and of the Council of July 6th, 1998 on the legal protection of biotechnological inventions, *OJ* L 213, 30.7.1998, at 13-21, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1998:213:0013:0021:EN:PDF (last visited November 6, 2008).

62. Directive 98/44/EC, article 6.

guide to interpreting the reference to *ordre public* and morality,"[63] that "this list obviously cannot presume to be exhaustive,"[64] and that "processes, the use of which offend against human dignity, such as processes to produce chimeras from germ cells or totipotent cells of humans and animals, are obviously also excluded from patentability." [65]

This late precision provides a precious, but perhaps flimsy, clue. The legal force of a preamble of a European directive is subject to discussion. Nevertheless, this text has been written to help interpreters of the Directive. As article L. 611-17 of the French Intellectual Property Code transposes article 6 of the Directive, it is acceptable to read the French text in the light of the preamble of the Directive. In doing so, one can hold that a process to produce a chimerical embryo created from germ cells or totipotent cells of human and animals would not be patentable. Going one step further in our interpretation, one could consider that a chimerical embryo from germ cells or totipotent cells of human and animals would not be patentable. This supported opinion should convince. But it is a debatable conclusion. French Courts, French and European Patent Offices could find in the Stuart Newman's decision of the United States Patent Trade Office another reason to choose this interpretation.

In 1987, cell biologist Stuart Newman, in collaboration with biotech-activist Jeremy Rifkin, filed a patent application for a "chimera," described as a "mammalian embryo developed from a mixture of embryo cells, embryo cells and embryonic stem cells, or embryonic stem cells exclusively, in which at least one of the cells is derived from a human embryo, a human embryonic stem cell line, or any other type of human cell, and any cell line, developed embryo, or animal derived from such an embryo."[66] Newman and Rifkin hoped through the application either to obtain a patent, and thus to be able to block anyone else from developing a human-

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63. *Id*. at preamble (considering 38).

64. *Id.*

65. *Id*.

66. United States Patent and Trademark Office, Dec. Stuart Newman, Application n° 10/308, 135, Art unit n° 1632. *See* about this decision, M.-A. Hermitte, *Bioéthique et brevets dans le droit du commerce international: la construction d'un nouveau contrat social*, *in* LA COMMUNAUTE INTERNATIONALE ET LES ENJEUX BIOETHIQUES 111 (S. Maljean-Dubois dir., Pédone 2005).

animal chimera for twenty years, or to provoke the denial of the patent, and thus to get the Patent Office to take a clear stand against the patenting of chimeras. The 2003 final decision in the Newman applications is largely based on traditional patent requirements. The decision, for example, notes that the Newman application fails to describe adequately how the applicant intends to produce a chimera; that to the extent that it does describe how to accomplish its ends it merely duplicates already published processes. But, in a more interesting way, the Patent Office asserted its position that human beings are not patentable subject matter. The Patent Office said that "a proportion of non human cells do not negate the human's status as a human, nor does alteration by human intervention. Thus, it is clear from a reading of the claims in view of the specification and in view of the art that the breadth of the claimed invention includes 'humans'."[67] In his report, the examiner also developed that, under United States patent law, only "useful process, machine, manufacture or composition of matter"[68] may obtain a patent, and that "the term useful has been construed to include the connotation that an asserted invention should not be frivolous, or injurious to the well-being, good policy, or good morals of society."[69] In charge of applying a textual exclusion from patentability for inventions inconsistent to human dignity, public order or morality, French and European Patent Offices could adopt a similar position.

Though useful, this information does not answer clearly the question of the status of such an embryo. It is thus necessary to question other existing rules to discover possible answers to this forward-looking issue. For the purpose of our thought, three basic working hypotheses have to be envisaged, depending on the legal status of the elements mixed to create the chimera.

In a *first hypothesis*, one could consider that a human embryo even *in vitro* is a person (or a subject of rights in French legal terminology), unlike an animal embryo. Concerning human embryos, this hypothesis is less relevant according to French law than to other civil legal systems such as Louisiana law. In this context, several options are conceivable. In order to provide a maximal protection to human embryos, a solution consists in

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67. *Id.*
68. *Id.*
69. *Id.*

considering that a chimerical embryo is legally a human embryo, and consequently a legal person, though it is only partially biologically human. On the contrary, one could suggest that the mixture of DNA disqualifies the embryo as a human embryo, and that the new creature is just a new type of genetically modified animal. But others pathways are imaginable. One could, for instance, make reference to the civilian rules concerning "principal and accessories" or composite things. In the civil legal tradition, to characterize a thing as accessory means that the accessory may follow the principal thing. In this view, the embryo essentially constituted by genetically human material (more than 50 percent) would be characterized as human embryo, and thus as "subject of rights." It would be the case, for instance, of the human embryo in the brain of which animal neuronal cells would have been injected. On the contrary, embryos not presenting this characteristic would belong to the category of animal embryos and would be mere things. Another possibility lies in paying attention to the DNA of sex cells. With this solution, for instance, a duck embryo of which brain would have been partially colonized by human neurons would not be protected at all. Last but not least, one could propose to create or recognize a new specific category, but no information is available about what rules would be applicable.

In a *second hypothesis*, one could consider both human and animal embryos as legal persons. This hypothesis is not relevant to current French or Louisiana law. Nevertheless, it is still interesting to notice that the characterization of human embryos and animal embryos as persons does not imply that the same rules would be necessarily applicable to them. In the legal category of persons, different regimes may coexist. For instance, juristic persons and natural persons have a name, a domicile, a nationality and a patrimony, but juristic persons do not need physical protection or matrimony rules. So, it is still necessary to decide if the chimerical embryo would be treated as a human embryo, as an animal embryo, or as a new kind of person subject to new rules.

In a *third hypothesis*, one could consider human embryos *in vitro* and animal embryos as legal things. In such a view, which is more convincing under current French law than the Louisiana Civil Code, the mixture of human and animal embryos would inevitably fall into the category of things. At this point, two reasons would oblige a lawyer or a judge to determine the applicable rules: first,

as already explained, different solutions apply to human embryos and to animal embryos; second, different rules apply to oviparous or viviparous embryos. Undoubtedly, juridical imagination would be tested, and maybe hounded into a corner.

To go further, it would also be necessary to address the problem of a possible development of such a chimerical embryo into the womb of a woman or a female, and the problem of its birth. As a matter of fact, most of the time, the status of children or offspring depends on the status of the mother or the female which gave birth. The final paragraph of article L. 2151-5 of the French Public Health Code states that human "embryos on which research has been carried out may not be transferred for the purpose of gestation." Using the traditional techniques of interpretation, it is easy to conclude that *a fortiori*, a chimerical embryo may not be implanted. However, the fact that this is the only reasonable interpretation cannot prevent that the legal prohibition might be trespassed one day.

Moreover, the possibility of using human somatic cells to create a chimerical embryo complicates the task. Would a chimerical embryo produced from human somatic cells and animal embryonic cells be characterized as a human embryo (which is related to the concept of "potential human person" as seen before)? It seems very problematic. Would it be legally treated as a chimerical embryo created with human embryonic stem cells? Probably not: as it has been previously explained, the use of human embryos for experimental purposes is strictly limited by specific rules only applicable to human embryos. Yet, supervising scientific research under serious regulations appears to be an important matter, even when human embryonic stem cells are not used.

To complete this rapid overview, let us add that a human embryo cannot be characterized as a genetically modified organism under current French law, whereas an animal to which some human genes were added can be a genetically modified organism. Since 1990, France (as other member states of the European Community) submits experiments on genetically modified organisms to special authorizations. It is a whole field of new questions that thus has to be investigated.

The range of genomic mixtures leads to infinite questions. Science moves forward and scientific curiosity is boundless.

Several scientists consider experiments mixing human and animal elements as tools to make advance knowledge on early human development. According to them, this could lead to a better understanding of genetic diseases and to new medical treatments. Consequently, experiments creating chimeras will probably be attempted all around the world. Unaware of the situation or underestimating the consequences, lawyers often ignore these questions. Yet, very few answers are available in our legal system. It is time to become conscious and to face these new questions. The answers to come will be all the more relevant as the questions will have been anticipated and the possible solutions submitted to discussion.

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THE VALLADOLID CONTROVERSY REVISITED: LOOKING BACK AT THE SIXTEENTH-CENTURY DEBATE ON NATIVE AMERICANS WHILE FACING THE CURRENT STATUS OF HUMAN EMBRYOS [*]

Agustín Parise[†]

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[†] Research Associate, Center of Civil Law Studies, Louisiana State University Law Center; LL.B. (Universidad de Buenos Aires 2001); LL.M. (Louisiana State University Law Center 2006).

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I. INTRODUCTION

During the last 20 years, law reviews in the United States have addressed in more than 6,500 articles, notes, and comments on the debate on human embryos, trying to determine if they should be understood as persons or things. In 2006, approximately 470 contributions were published, reflecting that almost every American law review has addressed the topic.[1] The LSU Law Center was no exception to this phenomenon.[2]

This paper will help the readers examine the debate on human embryos through an interdisciplinary perspective, by focusing on a debate regarding Native Americans that took place in the Spanish city of Valladolid during the 16th century.[3] Readers will be provided with a historical viewpoint, which will not provide a perfect and suitable solution or forecast for the current debate on human embryos (that would be the work of oracles or fortune tellers), but which will help them understand and learn from past

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1. Information extracted in May 2007 from the electronic databases of Westlaw.

2. The *Louisiana Law Review* dedicated several pages to the topic. See the following recent papers that addressed some aspects of the debate: Katherine Shaw Spaht, *Who's Your Momma, Who Are Your Daddies - Louisiana's New Law of Filiation,* 67 LA. L. REV. 307 (2006); and J.-R. Trahan, *Glossae on the New Law of Filliation,* 67 LA. L. REV. 387 (2006).

The *George W. & Jean H. Pugh Institute for Justice* organized a conference by Jane Maienschein and Jason Scott Robert which was entitled *Where Biology Meets Society?* (LSU Law Center, February 2nd, 2007).

The Fourth Session of the *Civil Law Workshop Robert A. Pascal Series* broke the ground when speaking of human, animal, and chimerical embryos [*Human Embryo, Animal Embryo, Chimerical Embryo: What Legal Status?* by Laurence Brunet and Sonia Desmoulin (Fourth Session, Civil Law Workshop Robert A. Pascal Series, LSU Law Center, March 20th, 2007). See their paper in 1 JCLS 69].

3. Information (in Spanish) of the history of the city of Valladolid is *available at,* Historia de Valladolid, http://www.ava.es/modules.php?name=Historia&file=Historia (last visited November 6, 2008).

experiences. The main point of the paper is to demonstrate that society has faced many moral and social debates before facing the current debate on human embryos, and society always has been able to find a solution. Among some of those previous debates, and moving backwards in time, are to be found: abortion,[4] "civil death,"[5] and finally, the human "monsters" in Rome at the Tarpeian Rock.[6] At some point in the 16th century, it is possible to

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4. The following recent works on abortion may be mentioned from the abundant literature: ALBIN ESER, ABORTION AND THE LAW: FROM INTERNATIONAL COMPARISON TO LEGAL POLICY (Emily Silverman trans., 2005); and BELINDA BENNETT, ABORTION (2004).

5. Civil death may be defined as "the state of a person who though possessing natural life, has lost all his civil rights, and as to them is considered as dead." Proceso Gonzales Sánchez, The Nature and Consequences of Civil Death 1 (1909) (unpublished LL. M. thesis, Yale Law School). In addition, *see,* William Walton Liles, *Challenges to Felony Disenfranchisement Laws: Past, Present, and Future,* 58 ALA. L. REV. 615, 616 (2007); George Brooks, *Felon Disenfranchisement: Law, History, Policy, and Politics,* 32 FORDHAM URB. L.J. 851, 852 (2005); and Alec C. Ewald, *"Civil Death": The Ideological Paradox of Criminal Disenfranchisement Law in the United States,* 2002 WIS. L. REV. 1045, 1059 (2002).

For further readings in Spanish about civil death (*muerte civil*), *see* 1.3 ALBERTO G. SPOTA, TRATADO DE DERECHO CIVIL 57-75(1961).

For further readings in French about civil death (*mort civil*), *see,* 1 MARCEL PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 152-153 (12th ed. 1939).

6. During the Roman period, the babies born with extreme physical malformations (referred to as "monsters") were killed by throwing them from the top of the Tarpeian Rock in Rome, a few hundred feet from the *Capitolium*. These executions were also done in Sparta, from the Taygetus mountain range, in the Peloponnesus. MIGUEL ANGEL RIZZI, TRATADO DE DERECHO PRIVADO ROMANO (1936).

Digest 1.5.14 reads in Latin:

> *Paulus libro quarto sententiarum*
>
> *Non sunt liberi, qui contra formam humani generis converso more procreantur: veluti si mulier monstrosum aliquid aut prodigiosum enixa sit.*

Y. Lassard & A. Koptev, The Roman Law Library, http://web.upmf-grenoble.fr/Haiti/Cours/Ak/ (last visited May 10, 2008).

Digest 1.5.14 reads in an English translation:

> Paulus, Sentences, Book IV.
>
> Those beings are not children who are born formed in some way which is contrary to the likeness of the human race; as, for instance, where a woman brings forth something monstrous or unnatural.

THE CIVIL LAW (translated by S. P. Scott), *available at* http://www.constitution.org/sps/sps02_j2-01.htm (last visited May 10, 2008).

stop in the city of Valladolid, and analyze the events that occurred during the so-called *controversy*[7] between Bartolomé de las Casas and Juan Ginés de Sepúlveda.

To provide a historical perspective, this paper will first explain what a human embryo is, what a stem cell is, and the applicable legislation and case law in the United States. Secondly, it will explain the legal status of the Native Americans in the Spanish Colonies during the 15th to 17th centuries, focusing on the legislation and the work of Francisco de Vitoria. Thirdly, it will describe the Valladolid Controversy, its main players (i.e. Bartolomé de las Casas and Juan Ginés de Sepúlveda), their arguments, and the outcome. Finally, some conclusions will be provided to the readers.

II. THE CURRENT DEBATE ON HUMAN EMBRYOS AND STEM CELLS[8]

An embryo starts its existence after the spermatozoid fertilizes the ovum.[9] The first embryonic stage is that of zygote, [10] and if the embryo continues with its regular development for a period of

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Eric H. Reiter also addressed "monsters" in his presentation entitled *Rethinking Civil-Law Taxonomy: Persons, Things, and the Problem of Domat's Monster* (Seventh Session, Civil Law Workshop Robert A. Pascal Series, LSU Law Center, November 1st, 2007). See his paper in this same volume of the JCLS, at 189.

7. The following terms have also been used to define the events that took place in Valladolid during the 16th century: Debate, Tournament, Meeting, Sessions, *Junta*, Disputation, and Trial.

8. The section on human embryos, developed during the Fifth Session of the Civil Law Workshop, resulted in publications in Argentina [Agustín Parise, *El status legal de los embriones humanos en la jurisprudencia de los Estados Unidos de América*, (2007-F) LA LEY 1088] and Canada [Olivier Moréteau, Agustín Parise & Aïssatou Sylla, *La vie humaine, de la conception à la mort: Les hésitations de la jurisprudence américaine*, 9 REVUE DE LA COMMON LAW EN FRANÇAIS 287 (2007)]. Thanks are due to the medical doctor Miguel Luis Podestá III.

9. Laura S. Langley & Joseph W. Blackston, *Sperm, Egg, and a Petri Dish Unveiling the Underlying Property Issues Surrounding Cryopreserved Embryos*, 27 J. LEGAL MED. 167, 171 (2006).

10. Patrick Lee, *Embryonic Human Beings*, 22 J. CONTEMP. HEALTH L. & POL'Y 424, 426 (2006).

eight weeks, it will evolve into the fetal stage.[11] Science knows of two different kinds of embryos: animal and human.[12] The first kind is used in important scientific research, which will have impact in human medicine.[13] The second is the result of the fertilization of the ovum of the human female by the spermatozoid of the human male.[14]

Human fertilization may occur in two ways: *in vivo* or coital, and by means of *in vitro* fertilization (IVF).[15] It is by means of human fertilization that the cells that make up the human embryo start to multiply and to create the characteristics of a human being.[16] Since 1978 more than one million humans were born with the assistance of IVF.[17] IVF takes place in laboratories, specifically in Petri dishes.[18] Approximately 15 to 20 ova are fertilized, and kept for the future, in the event that the implantation

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11. 1 ENCYCLOPEDIA OF HUMAN DEVELOPMENT 453 (Neil J. Salkind & Lewis Margolis eds., 2006).

12. Finally, other kinds of embryos exist as a result of chimerism, i.e. a combination or mutation between human and animal embryos. *See* D. Scott Bennett, *Chimera and the Continuum of Humanity: Erasing the Line of Constitutional Personhood*, 55 EMORY L.J. 347, 351 (2006).

There is great expectation in this field of study and early limits are sought to avoid excess by scientists. *See* Catherine Arcabascio, *Chimeras: Double the DNA-Double the Fun for Crime Scene Investigators, Prosecutors, and Defense Attorneys?*, 40 AKRON L. REV. 435, 447 (2007); and Stephen R. Munzer, *Human-Nonhuman Chimeras in Embryonic Stem Cell Research*, 21 HARV. J.L. & TECH. 123 (2007).

See also the work by Laurence Brunet and Sonia Desmoulin in this same volume of the JCLS, at 79.

In May 2008, the UK took an important step towards allowing research with chimerical embryos, *see* Mark Henderson & Francis Elliott, MPs back creation of human-animal embryos, http://www.timesonline.co.uk/tol/news/politics/article3964693.ece (last visited November 6, 2008).

13. Chad West, *Economics and Ethics in the Genetic Engineering of Animals*, 19 HARV. J.L. & TECH. 413, 414 (2006).

14. Langley & Blackston, *supra* note 9, at 171.

15. Langley & Blackston, *supra* note 9, at 171.

16. Patrick Walsh, *Stemming the Tide of Stem Cell Research: The Bush Compromise*, 38 J. MARSHALL L. REV. 1061, 1063 (2005).

17. Amber N. Dina, *Wrongful Death and the Legal Status of the Previable Embryo: Why Illinois is on the Cutting Edge of Determining a Definitive Standard for Embryonic Legal Rights*, 19 REGENT U. L. REV. 251, 252 (2007).

18. Paul Berg, *Brilliant Science, Dark Politics, Uncertain Law*, 46 JURIMETRICS J. 379, 382 (2006).

is not successful and does not result in a birth. Human embryos are therefore cryopreserved in liquid nitrogen and reach a stage known as *suspended biological state*.[19] It is said that embryos could be kept in optimum conditions for an indefinite period of time, although, after five years they are generally discarded by the donors. Currently, in the United States there are at least 400,000 human embryos that are cryopreserved in liquid nitrogen and waiting to be used.[20]

One of the stages that the embryo reaches while evolving in that eight week period is that of blastocyst.[21] Within the blastocyst is the stem cell. These cells are of great importance for medical science,[22] for they can be totipotent or pluripotent, and have the potential to generate a great variety of cells within the human body.[23] These stem cells are called embryonic stem cells (hereinafter, ESC).

Research has shown that the ESC may help replace defective tissue and develop cells that could defeat diseases by means of regenerative research.[24] Such studies have shown that ESC are effective in treating—among others—cardiovascular diseases, diabetes, osteoporosis, Parkinson's disease, and Alzheimer's disease, which affect 128 million people in the United States alone.[25] In addition, research with ESC would be of great value for testing drugs and lessening research on animals. Finally,

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19. Langley & Blackston, *supra* note 9, at 174.

20. Lauren Thuy Nguyen, *The Fate of Stem Cell Research and a Proposal for Future Legislative Regulation,* 46 SANTA CLARA L. REV. 419, 422 (2006).

21. MOSBY'S MEDICAL DICTIONARY 225 (Tamara Myers ed., 7th ed., 2006).

22. The Nobel Prize for Medicine 2007 was given to Mario Capecchi, Martin Evans, and Oliver Smithies due to their research with stem cells. *See* The Nobel Prize in Physiology or Medicine 2007, http://nobelprize.org/nobel_prizes/medicine/laureates/2007/ (last visited November 6, 2007).

23. Charles I. Lugosi, *Conforming to the Rule of Law: When Person and Human Being Finally Mean the Same Thing in Fourteenth Amendment Jurisprudence*, 22 ISSUES L. & MED. 119,123 (2007).

24. Walsh, *supra* note 16, at 1065.

25. Michael S. Mireles, Jr., *States as Innovation System Laboratories: California, Patents, and Stem Cell Technology*, 28 CARDOZO L. REV. 1133, 1134 (2006).

research with ESC would assist medical doctors in understanding birth defects.[26]

In order to extract the ESC from the blastocyst, it is necessary to destroy it, and it is at that point that the debate on the rights of the human embryo takes a significant role.

The United States does not have a federal law that regulates entirely the specific activities with ESC.[27] On August 9th, 2001 President George W. Bush made an announcement regarding the subsidies of the federal government for the research with ESC. He said that at that time, 60 lines of ESC had been extracted from blastocysts and that the decision had already been made in those cases. He rejected the idea of deciding to destroy or not to destroy the blastocysts in the remaining cases of human embryos kept in *suspended biological state.*[28] Currently, there are even fewer ESC in the hands of specific laboratories holding them in a monopolistic way.[29] In absence of Federal legislation, since the early 1980s at least 35 states have enacted legislation in favor of or against research with ESC.[30] The states of Connecticut, Illinois, Maryland, and New Jersey, among others, strongly support this kind of research. For example, in November 2004, the state of California adopted Proposition 71, by which almost three billion dollars will be allocated to research with ESC over a ten-year period.[31] On the other hand, states such as Indiana, South Dakota, and Louisiana oppose investigation with ESC.[32]

The US Supreme Court has not yet faced the opportunity to decide whether human embryos should be considered persons or

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26. James M. Wood et al., *Product Liability Protection for Stem Cell Research and Therapies–A Proposal*, 18 NO. 1 HEALTH LAW 1, 3 (2005).

27. Joanna K. Sax, *The States "Race" with the Federal Government for Stem Cell Research*, 15 ANNALS HEALTH L. 1, 2 (2006).

28. *See* http://www.whitehouse.gov/news/releases/2001/08/20010809-2.html (last visited November 6, 2007).

29. Ryan Fujikawa, *Federal Funding of Human Embryonic Stem Cell Research: An Institutional Examination*, 78 S. CAL. L. REV. 1075, 1089 (2005).

30. Ann A. Kiessling, *What is an Embryo?*, 36 CONN. L. REV. 1051, 1067 (2004).

31. Mireles, *supra* note 25, at 1134.

32. Roger G. Noll, *Designing an Effective Program of State-Sponsored Human Embryonic Stem Cell Research*, 21 BERKELEY TECH. L.J. 1143, 1145 (2006).

things.[33] In 1973, in the case *Roe v. Wade*,[34] and following the opinion of Justice Blackmun, the Court did not resolve the question of when human life begins.[35] Justice Blackmun noticed that the question would stay unanswered for a future occasion, for it is not the duty of judges to decide such a matter, but the duty of experts in medical sciences.[36] Notwithstanding the silence, and while waiting for a decision of the US Supreme Court, several State courts have been filling that gap. Some courts claim that human embryos are persons;[37] other courts believe they are things;[38] and finally, an eclectic group of courts believes they are something in between, which should be subject to special treatment.[39] In late November 2007, the information came out that two teams of scientists had turned human skin cells into stem cells, without having to produce and to destroy embryos. This research development could terminate the debate about the morality of destroying the blastocyte, because no embryo would be jeopardized.[40] This creates no incentive for legislatures to abandon their wait and see attitude. However, courts of justice may still have to decide on the matter.

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33. Ann Marie Noonan, *The Uncertainty of Embryo Disposition Law: How Alterations to Roe Could Change Everything*, 40 SUFFOLK U. L. REV. 485, 491 (2007).

34. Roe v. Wade, 410 U.S. 113 (1973).

35. Leslie Leazer, *"Brother Can You Spare a Cell?" The Ethical and Moral Minefield Surrounding Stem Cell Research on US and International Law*, 13-SUM CURRENTS: INT'L TRADE L.J. 38, 41 (2004).

36. *Roe,* 410 U.S. at 160.

37. *See* Davis v. Davis, Not Reported in S.W.2d, 1989 WL 140495 (Tenn.Cir.Ct.); and Miller v. Am. Infertility Group, No. 02-L-7394, slip op. at 6 (Cir. Ct. Cook County, Ill. Feb. 4, 2005) (order denying motion to dismiss claims brought under Illinois' Wrongful Death Act).

38. *See* Del Zio v. Presbyterian Hospital, No. 74-3588 (S.D.N.Y. Nov. 14, 1978); York v. Jones, 717 F. Supp. 421, 422 (E.D. Va. 1989); Davis v. Davis, Not Reported in S.W.2d, 1990 WL 130807 (Tenn.Ct.App.), 59 USLW 2205; and Kass v. Kass, 696 N.E.2d 174 (N.Y. 1998).

39. *See* Davis v. Davis, 842 S.W.2d 588 (Tenn. 1992), cert. denied, 507 U.S. 911 (1993); and AZ v. BZ, Mass. Law. Wkly. No. 15-008-96, slip op. at 28 (Mass. Prob. & Fam. Ct., Mar. 25, 1996) (order granting preliminary injunction).

40. *See* Gina Kolata, *Scientists Bypass Need for Embryo to Get Stem Cells*, N.Y. TIMES, November 21st, 2007, *available at* http://www.nytimes.com/2007/11/21/science/21stem.html?_r=1&pagewanted=all&oref=slogin (last visited November 6, 2008).

III. BRIDGING THE PRESENT WITH THE PAST

The debate on human embryos currently faced by legal scholars is not the first of its kind in history. Legal scholars have for a long time been encountering the following questions: Should we first seek to settle the moral aspects of potential developments and then face the developments? Or should we first seek to settle developments and then face their moral aspects?

Similar questions were faced by scholars of the 16th century. The European legal community then was facing a strong debate regarding the rights and capacities of the Native Americans in the Spanish possessions in America. Should they first analyze the moral aspects of conquering the Native Americans, and then move forward with the conquering process (e.g. treat them as members of the local society or as extra-societal laborers)? Or should they first conquer the Native Americans, and then face the moral consequences that would derive from such a conquest?

Paolo Grossi, from his chair at the University of Florence (Italy),[41] encouraged scholars to change their spectacles before looking back in time, and to try to answer those questions through a historical perspective.[42] If they do not do so, the outcome of their view could be deformed or out of focus, with the current perspective. In the present case, scholars should remove the spectacles they use for the 21st century, and do their best to put on the ones that would help them see the 16th century. Grossi describes this activity as *consigning the archetype to the history books* (*historificar el arquetipo*).[43] The best way for a legal historian to change spectacles is to work with primary sources (i.e. letters, correspondence, manuscripts, and first editions of books in their original language or good translations). In this process many

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41. *See* Grossi, Paolo, http://www.giuris.unifi.it/index.php?module=PostWrap&page=docenti (last visited November 6, 2007).

42. PAOLO GROSSI, LA PROPIEDAD Y LAS PROPIEDADES: UN ANÁLISIS HISTÓRICO 34 (Ángel López y López trans., 1992) (Original Title: LA PROPRIETÀ E LE PROPRIETÀ NELL'OFFICINA DELLO STORICO).

43. GROSSI, *supra* note 42, at 34. *See* also, Agustín Parise, *Mercedes de Tierras y Solares: Aspectos de la Institución en la América Hispana Meridional Durante los Siglos XVI y XVII,* 43 REV. DER P.R. 181, 181 (2004); and Agustín Parise, *El Asilo Eclesiástico. Consideraciones sobre su Recepción en la América Hispana Colonial*, 15 IURIS TANTUM 125, 126 (2004).

ghosts may appear, but those *ghosts* will help legal historians in their process of discovery.[44]

IV. NATIVE AMERICANS IN THE SPANISH TERRITORIES

In 1492, when Spaniards arrived in America, an estimated 13 million Native Americans lived there.[45] With their arrival, Spaniards started to interact with clans of Native Americans that lived in the Antilles.[46] One year later, on May 4th, due to the papal bull *Inter caetera,*[47] Pope Alexander VI granted exclusive powers to Portugal and Spain to pursue their missionary activities in the new continent.[48] Accordingly to the papal bull, an imaginary north-south line was drawn 100 leagues west of the Azores islands, dividing the possessions between Spain and Portugal. On June 7th, 1494, and according to the provisions of the Treaty of Tordesillas, the imaginary line was relocated 370 leagues west from the Cape Verde islands.[49]

As early as 1493, it was not clear if Native Americans in the Spanish colonies were human beings or beasts. The different Spanish expeditions had been encountering different tribes and

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44. The term *ghosts* was borrowed from Paul R. Baier, who while communicating with his students at LSU, several times reaches into his archives and brings to life some ghosts by means of pictures, video and audio recordings, or even theatrical representations.

45. 1 ALFONSO GARCÍA-GALLO, MANUAL DE HISTORIA DEL DERECHO ESPAÑOL 719 (1984).

46. Among the Native Americans of the Arawakan and Caribe clans, that inhabited the Antilles, it is possible to mention the social groups of *naborias, taínos*, and *nitaínos* which were under the control of a *cacique*. *Id.* at 730.

47. For an English translation of the text of the papal bull visit, Pope Alexander VI—The Bull Inter Caetera—4 May 1493, http://www.catholic-forum.com/saints/pope0214a.htm (last visited November 6, 2007).

48. RICARDO LEVENE, MANUAL DE HISTORIA DEL DERECHO ARGENTINO 55 (4th ed. 1969).

49. *Id.* at 55.

The Spanish crown also tried to document its rights. On November 4th, 1605, a notarial act drafted in Valladolid stated that the King of Spain had bought from the descendents of Moctezuma, represented by Don Juan de Toledo, all the pretentions they had and could have over the Empire of current Mexico. The King granted a pension in consideration, and that amount was paid until the year 1820. SILVIO ZAVALA, LAS INSTITUCIONES JURÍDICAS EN LA CONQUISTA DE AMÉRICA 20 (1935).

settlements, and their reports were sent to the authorities back in Spain.[50] Hence, some scholars affirmed Native Americans were rustic persons with limited knowledge of their rights (vulnerable like widows, the sick, or the miserable);[51] while others argued that Native Americans were beasts or lesser creatures, with humanoid external form but lacking mental and moral capacity.[52]

Even though Spaniards had not decided if Native Americans were persons or things, they had to provide legislation that would regulate the activities concerning Native Americans. Therefore, a legislative framework came together with the conquering expeditions. While the debate waited to be settled, the Spanish Crown created, in 1503, the *encomienda* system, by which the activities of the Native Americans would be regulated.[53]

The *encomienda* was a very important element of the Spanish conquest.[54] The system consisted in the division (*repartimiento*) of the Native Americans into groups, and by assigning each group to a Spanish landlord (*encomendero*) for work in his or her land.[55] The Native Americans were kept in "deposit" by the *encomendero,* and by 1513, it was determined that that deposit would last for two lives (i.e. the life of the Native American and that of his son or daughter).[56] The *encomenderos* were obligated to pay the Native Americans a wage for their day of work and for their maintenance, and starting in 1509, they were obligated to instruct them in the Holy Catholic faith, and to teach them how to read and write. Finally, the *encomenderos* had to pay as taxation one *peso* in gold for every Native American that belonged to the *encomienda*.[57]

The *encomienda* also had a negative impact in society, because of the abuses of the *encomenderos*. On December 14th, 1511, the Dominican Antonio de Montesinos, in a speech at Santo Domingo,

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50. James Muldoon, *Spiritual Freedom--Physical Slavery: The Medieval Church and Slavery*, 3 AVE MARIA L. REV. 69, 88 (2005).

51. 2 ABELARDO LEVAGGI, MANUAL DE HISTORIA DEL DERECHO ARGENTINO 104 (1986).

52. Muldoon, *supra* note 50, at 89.

53. 1 GARCÍA-GALLO, *supra* note 45, at 723.

54. *See generally*, SILVIO A. ZAVALA, LA ENCOMIENDA INDIANA (1935).

55. 1 GARCÍA-GALLO, *supra* note 45, at 723. *See* also, Guillermo Floris Margadant, *Offical Mexican Attitudes Toward the Indians: An Historical Essay*, 54 TUL. L. REV. 964, 967 (1980).

56. 1 GARCÍA-GALLO, *supra* note 45, at 724.

57. *Id.* at 724.

in the island of Hispaniola,[58] raised the following questions: "are these [Native Americans] not men?" "have they not a rational soul?" "are you not bound to love them as you love yourselves?"[59] The result of Montesinos's speech was the annoyance of the *encomenderos,* who were afraid of losing their cheap labor.[60]

Even though the speech of Montesinos had a negative impact among the *encomenderos*, the Spanish Crown was not able to ignore his comments. In 1512, the Laws of Burgos (*Leyes de Burgos*)[61] were enacted, and ordered that some limits should be imposed on the *encomienda* system.[62] The opposition of the *encomenderos* was not long in coming, and the *Leyes de Burgos* were not obeyed.[63]

One year later, and until 1556,[64] the reading of the "requirement" (*requerimiento*) was mandatory whenever new groups of Native Americans were discovered and encountered.[65] The *requerimiento* was a document to be read before the Native Americans, trying to explain the reasons for the presence of the Spaniards and their acts. The initial address read:

> On behalf of the very powerful and very catholic defender of the Church, always winner and never defeated, the great King Ferdinand V of Spain, of the Two Sicilies, of Jerusalem, and of the Islands and Lands of the Ocean Sea, etcetera, tamer of the barbarians, and of the very high and powerful lady the Queen Juana, his very loved and cared daughter, our Masters, Me, Pedrarias Dávila, his servant,

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58. 1 ABELARDO LEVAGGI, MANUAL DE HISTORIA DEL DERECHO ARGENTINO 149 (1986); and 2 ALFONSO GARCÍA-GALLO, MANUAL DE HISTORIA DEL DERECHO ESPAÑOL 654 (1984).

59. LAURENTINO DÍAZ LÓPEZ, EL DERECHO EN AMÉRICA EN EL PERÍODO HISPÁNICO 214 (1989).

60. DÍAZ LÓPEZ, *supra* note 59, at 215.

61. For an English translation of the text of the Laws of Burgos visit, 1512-1513: The Laws of Burgos, http://faculty.smu.edu/bakewell/BAKEWELL/texts/burgoslaws.html (last visited November 6, 2007).

62. DÍAZ LÓPEZ, *supra* note 59, at 108.

63. *Id.* at 109.

64. Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 93 (1983).

65. Muldoon, *supra* note 50, at 88.

> messenger and captain, notify you, and let you know, **to the best of my abilities** . . . [66]

The debate on persons or things apparently was finished by a papal bull of Paul III. In 1537, the pontific made public the papal bull *Sublimis deus sic dilexit.*[67] According to the papal bull, the Native Americans were rational beings capable of understanding and receiving Christian faith and sacraments.[68] In addition, supreme rights were given to the church and legality to the Spanish presence and religious duty in America.[69] The papal bull read in part:

> We, who, though unworthy, exercise on earth the power of our Lord and seek with all our might to bring those sheep of His flock who are outside, into the fold committed to our charge, consider, however, that the Indians are truly men and that they are not only capable of understanding the Catholic faith but, according to our information, they desire exceedingly to receive it. [70]

After the papal bull, a new attempt to finish with the *encomienda* system was made by the Spanish Crown. In 1542, the

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66. The Spanish text read:

> De parte del muy alto e muy poderoso y muy católico defensor de la Iglesia, siempre vencedor y nunca vencido, el gran rey Hernando el Quinto de las Españas, de las dos Cicilias, de Iherusalem y de las Islas e Tierra Firme del Mar Océano, etcétera, domador de las gentes bárbaras, y de la muy alta y muy poderosa señora la reina Doña Juana, su muy cara e muy amada hija, nuestros señores, Yo, Pedrarias Dávila, su criado, mensajero y capitán, vos notifico y hago saber **como mejor puedo** . . . (Bold added)

2 GARCÍA-GALLO, *supra* note 58, at 655.

67. For an English translation of the text of the Bull visit, Sublimus Dei, http://www.papalencyclicals.net/Paul03/p3subli.htm (last visited November 6, 2007).

68. 2 LEVAGGI, *supra* note 51, at 104.

69. Bonar Ludwig Hernandez, The Las Casas-Sepúlveda Controversy 1550-1551, http://userwww.sfsu.edu/~epf/2001/hernandez.html (last visited November 6, 2007).

70. MCNUTT, BARTHOLOMEW DE LAS CASAS, HIS LIFE, HIS APOSTOLATE, AND HIS WRITINGS 429 (1909) cited by Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States,* 31 GEO. L. J. 1, 12 (1943).

New Laws (*Leyes Nuevas*) were enacted.[71] The *Leyes Nuevas* were unsuccessful.[72] Opposition by the *encomenderos* was stronger than the church's assertion that Native Americans were people.[73]

In 1680, the Compilation of Indian Laws (*Recopilación de Leyes de Indias*) was enacted, and intended to regulate completely the issues related to Native Americans.[74] The *Recopilación de las Leyes de Indias* was divided into nine books, and Book Six was devoted completely to the treatment of Native Americans within the Spanish colonies.[75] In addition, Book IV, Title I, Law VI read: "That in the *capitulaciones*[76] the word *conquer* is avoided, and that instead the words *pacification* or *settlement* are used."[77] Finally, Book III, Title IV, Law 9 read: "We order that no war is to be made against Native Americans to teach them the Holy Catholic faith, nor to make them obey us, nor for any other purpose."[78]

V. SPANISH SCHOLASTICS

The change to a more benign treatment of Native Americans by the Spanish crown, which was generated in the period of 150 years (between the enactment of the *Leyes Nuevas* and the enactment of the *Recopilación de Leyes de Indias*), was attributable mainly to the Spanish Scholastic movement. The Spanish Scholasticism of the 16th century, also called Neo-

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71. Michel J. Godreau & Juan A. Giusti, *Las Concesiones de la Corona y Propiedad de la Tierra en Puerto Rico, Siglos XVI-XX: Un Estudio Jurídico*, 62 REV. JUR. U.P.R. 351, 451 (1993); and Hernandez, *supra* note 69.

72. Ruth Kerns Barber, *Indian Labor in the Spanish Colonies,* 6 PUBLICATIONS IN HISTORY 112 (1932).

73. DÍAZ LÓPEZ, *supra* note 59, at 110.

74. 1 RECOPILACIÓN DE LEYES DE LOS REYNOS DE LAS INDIAS 62 (Cultura Hispánica ed. 1973) (1681).

75. 2 RECOPILACIÓN DE LEYES DE LOS REYNOS DE LAS INDIAS fs.188-275 (Cultura Hispánica ed. 1973) (1681).

76. Contract between crown and *adelantado* setting out the grant of wealth, powers, and honors to be given upon successful discovery or settlement of new territories. M.C. Mirow, *Latin American Legal History: Some Essential Spanish Terms*, 12 LA RAZA L.J. 43, 51 (2001).

77. "Que en las capitulaciones se escuse la palabra conquista, y usen las de pacificacion, y población." *See supra* note 75, at fs. 81.

78. "Mandamos que no se pueda hacer, ni haga Guerra á los Indios de ninguna Provincia para que recivan la Santa Fé Catolica, ó nos dén la obediencia, ni para otro ningún efecto." *Id.* at fs. 25.

Scholasticism, was a unique production of minds, something not seen before in legal history.[79] The impact of the production of the Spanish Scholastics may be compared to the impact of the production of the Roman period of Justinian (e.g. Gaius, Paulus, Ulpian); and more recently, to the impact of the Germanic School of the 19th century (e.g. Georg Friedrich Puchta, Friedrich Carl von Savigny, Anton Friedrich Thibaut). The Neo-Scholastics advocated a close connection between law and theology. Acts were judged exclusively by their moral significance. Issues were appraised not solely from a social or political perspective, but as cases of conscience.[80] Among the main exponents of the Spanish school of thought were: Alfonso de Castro, Bartolomé de las Casas, Juan de Mariana, Luis de Molina, Domingo de Soto, Francisco de Vitoria, Juan Ginés de Sepúlveda, Francisco Suarez, Gabriel Vázquez, and Fernando Vázquez de Menchaca.[81]

Francisco de Vitoria (1485-1546),[82] called by many the founder of international law,[83] was one of the main exponents of Spanish Scholasticism.[84] He was an authority in legal affairs in his time,[85] and very popular throughout

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79. They were studied, among others, by Ángel Losada, James Brown Scott (who translated *Las Partidas* into English), and Lewis Hanke. *See* G. C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas*, 13 AUST. YBIL 14 (1990); and Lewis Hanke, *Mi vida con Bartolomé de las Casas 1930-1985, in* EN EL QUINTO CENTENARIO DE BARTOLOMÉ DE LAS CASAS 11-19 (Instituto de Cooperación Iberoamericana ed. 1986).

80. 1 FEDERICO DE CASTRO Y BRAVO, DERECHO CIVIL DE ESPAÑA 174 (3ed. 1955).

81. 1 ABELARDO LEVAGGI, MANUAL DE HISTORIA DEL DERECHO ARGENTINO 104 (1986).

82. FRANCISCO DE VITORIA, POLITICAL WRITINGS xxix-xxx (Anthony Pagden & Jeremy Lawrance eds., 1991). For further reading on de Vitoria, *see* Coleman Phillipson, *Franciscus a Victoria (1480-1546)*, 15 J. SOC. COMP. LEGIS. N.S. 175, 176 (1915).

83. *See* Phillipson, *supra* note 82, at 197; James Brown Scott, *Note*, 22 AM. J. INT'L L. 139 (1928); and William Renwick Riddell, *Book Review*, 23 GEO. L. J. 904, 904 (1935).

84. For a biography (in Spanish) of de Vitoria, *see* Bárbara Díaz & Idoya Zorroza, Francisco de Vitoria, http://www.unav.es/pensamientoclasico/autoresyobras/Vitoria.html (last visited November 6, 2007).

85. The influence of the theories of de Vitoria extended even to decisions of the US Supreme Court during the 19th century. The Marshall Trilogy regarding rights of Native Americans to the land in the US used the theories of de Vitoria,

Europe.[86] De Vitoria was a Dominican priest who occupied, starting in 1526,[87] a chair of Theology[88] in the University of Salamanca[89] (Spain), and who had never been in

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even when they did not cite him directly. *See* Kenton Keller Pettit, *The Waiver of Tribal Sovereign Immunity in the Contractual Context: Conflict between the Ninth Circuit and the Alaska Supreme Court?*, 10 ALASKA L. REV. 363, 366 (1993).

In 1823, in the case *Johnson v. M'Intosh* (21 U.S. 543), it was decided that through the discovery theory, the US could extinguish by conquest or just war; and therefore, Native Americans could transfer valid land title only to the US. In 1831, in the case *Cherokee nation v. Georgia* (30 U.S. 1), it was decided that Native Americans were sovereign peoples, but not to the same extent as foreign states. Native Americans were domestic, dependent sovereigns to whom the US owed a special duty of care. Finally, in 1832, in the case *Worcester v. Georgia* (31 U.S. 515), the court used the history of Britain's relations with Native Americans to further develop the duty of care. *See* Angela R. Hoeft, *Coming Full Circle: American Indian Treaty Litigation from an International Human Rights Perspective*, 14 LAW & INEQ. 203, 210 (1995).

For further readings on the Marshall Trilogy, *see* Rachel San Kronowitz et al., *Toward Consent and Cooperation: Reconsidering the Political Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507 (1987); Stephanie Dean, *Getting a Piece of the Action: Should the Federal Government Be Able to Tax Native American Gambling Revenue?*, 32 COLUM. J.L. & SOC. PROBS. 157, 161 (1999); Jason Kalish, *Do the States Have an Ace in the Hole or Should the Indians Call their Bluff? Tribes Caught in the Power Struggle between the Federal Government and the States*, 38 ARIZ. L. REV. 1345, 1348 (1996); Rosemary Sweeney, *Federal Acknowledgement of Indian Tribes: Current Bia Interpretations of the Federal Criteria for Acknowledgment with Respect to Several Northwest Tribes*, 26 AM. INDIAN L. REV. 203, 204 (2002); Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 TEX. L. REV. 1 (2002); David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Reappraisal*, 23 OKLA. CITY U. L. REV. 277(1998); and Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481(2006).

86. Even Henry VIII of England referred to de Vitoria about his divorce. Phillipson, *supra* note 82, at 177.

87. Ramon Hernandez, *The Internationalization of Francisco de Vitoria and Domingo de Soto*, 15 FORDHAM INT'L L.J. 1031, 1031 (1992).

88. De Vitoria occupied the chair of theology at Salamanca from 1526 to 1546. Phillipson, *supra* note 82, at 176.

89. The University of Salamanca had been created in 1212 by Alfonso IX (grandfather of Alfonso X the Wise). By the mid 16th century, 5,000 students attended courses there, and 70 professors occupied chairs. *Id.* at 176.

America.[90] While delivering his lectures (*lecciones*) in Salamanca, his students and disciples[91] drafted class notes that turned out to be valuable documents called *relecciones*.[92] The first and the last *relecciones* are missing, but thirteen have survived.[93] The best known *relecciones* are entitled *On the American Indians* (*De indis*) and *On the Law of War* (*De indis relectio posterior, sive de iure belli*), dictated in January and June 1539.[94]

As a result of these two *relecciones,* de Vitoria stated that Native Americans were the true owners of the lands, and that they had rights to own property.[95] He provided two main arguments for his position: (i) Native Americans possessed natural legal rights as free and rational men;[96] and (ii) the Pope's grant to Spain of title to American possessions was baseless, and could not affect the inherent rights of the Native Americans.[97] To sustain his first argument he used Roman Law, Thomistic philosophy, Canon Law, and Holy Scriptures.[98] For the second argument he cited Aquinas, and said that according to Natural Law, the Pope lacked temporal authority over the Native Americans, and thus, the Pope could not give something he had no control, possession, or dominium over.[99] Finally, he argued that the law could not bind Native Americans, who were not previously subject to it.[100]

Notwithstanding these two arguments, de Vitoria spoke of a reciprocal *jus inter gentes*[101] or law of nations: a law of nations

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90. Blake A. Watson, *John Marshall and Indian Land Rights: A Historical Rejoinder to the Claim of "Universal Recognition" of the Doctrine of Discovery*, 36 SETON HALL L. REV. 481, 504 (2006).

91. By the year of his death at least 24 renowned professors had been his disciples. Hernandez, *supra* note 87, at 1041.

92. Phillipson, *supra* note 82, at 177.

93. Hernandez, *supra* note 87, at 1039.

94. DE VITORIA, *supra* note 82, at 231, 293.

95. Williams, *supra* note 64, at 68-92.

96. *Id.* at 70.

97. De Vitoria said that it was not possible for the Pope to have temporal dominium over the newly discovered lands. He said that if Jesus had not had it, then the Pope, who was his vicar, also would not have it. LEVENE, *supra* note 48, at 56.

98. Williams, *supra* note 64, at 71.

99. *Id.* at 75.

100. *Id.* at 75.

101. It is said that de Vitoria was the first to use the technical term *jus inter gentes*. James Brown Scott, *Asociación Francisco de Vitoria*, 22 THE AMERICAN JOURNAL OF INTERNATIONAL LAW 139 (Jan., 1928).

that not only forced a pact or agreement among men, but also created the force of law for the world as a whole.[102] De Vitoria claimed that transgressions to that law of nations by the Native Americans could serve to justify the Spanish conquest and hegemony in the Americas.[103]

According to the *jus inter gentes*, some basic duties were imposed (universally binding) on the Native American societies.[104] Among them were: (i) that to respect natural society and fellowship,[105] by which Spaniards should be allowed to travel, if they did no harm, within the American territories;[106] (ii) that to permit a free and open commerce within the Americas and the European immigrants (i.e. if a Native American could dig for gold, the Spanish also should be allowed, as long as they did no harm);[107] and (iii) that to propagate Christianity, by allowing the preaching of the gospel.[108] After an analysis of the situation, de Vitoria concluded that if Native Americans did not obey the basic duties, Spaniards had the right to declare a just war on them.[109]

VI. THE EVENTS AT VALLADOLID

Two other important Spanish Scholastics were Bartolomé de las Casas and Juan Ginés de Sepúlveda. They both defended their positions towards Native Americans during the events that took place at the Controversy, in the Spanish city of Valladolid, starting in the year 1550.

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102. Williams, *supra* note 64, at 77.

103. *Id.* at 70.

104. *Id.* at 79.

105. *Note benne*, one of the articles of the *Digest of the Civil Laws Now in Force in the Territory of Orleans* of 1808 (antecessor of the current Louisiana Civil Code) also read in relation to the law of nations:

> Wild beasts, birds and all the animals which are bred in the sea, the air, or upon the earth, do, as soon as they are taken, become instantly by the law of nations, the property of the captor; for it is agreeable to natural reason, that those things which have no owner, should become the property of the first occupant.

Digest of 1808 Online, Book 3, Title 20, Article 4, in Digest Online, www.law.lsu.edu/digest (last visited November 6, 2007).

106. Williams, *supra* note 64, at 79.

107. *Id.* at 80.

108. *Id.* at 82.

109. *Id.* at 83.

A. De las Casas & Ginés de Sepúlveda

Fray Bartolomé de las Casas (1474-1566),[110] Bishop of Chiapas and *Defender of the Indians* by official decree of the emperor,[111] was well known for his activities in favor of Native Americans.[112] He had crossed the Atlantic Ocean on twelve occasions,[113] and was therefore a firsthand connoisseur of the life of Natives in America. During his early years in America, he had been an *encomendero*,[114] and by the time of the speech of Montesinos in 1511, he decided to dedicate his life to the just treatment of the Natives. Although de las Casas was not a philosopher, theologian, jurist, politician, or a man of government,[115] he was a very prolific author.[116] He wrote many books, monographs, and papers; among them: *Brief Account of the Devastation of the Indies* (*Brevísima Relación de la Destrucción de las Indias*),[117] *History of the Indies*, and *Apologetic History*.[118]

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110. G. C. Marks, *Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas*, 13 AUST. YBIL 18 (1990).

111. Ángel Lozada, *The Controversy between Sepúlveda and Las Casas in the Junta of Valladolid, in* BARTOLOMÉ DE LAS CASAS IN HISTORY: TOWARD AN UNDERSTANDING OF THE MAN AND HIS WORK 279 (Juan Friede & Benjamin Keen eds., 1971).

112. He was also known as the *Champion of the Indians.* LEWIS HANKE, BARTOLOMÉ DE LAS CASAS 1474-1566: BIBLIOGRAFÍA CRÍTICA Y CUERPO DE MATERIALES xiii (1954).

113. Lewis Hanke, *Las Teorías Políticas de Bartolomé de las Casas*, 67 PUBLICACIONES DEL INSTITUTO DE INVESTIGACIONES HISTÓRICAS, FACULTAD DE FILOSOFÍA Y LETRAS UBA 8 (1935).

114. Susan Scafidi, *Old Law in the New World: Solórzano and the Analogical Construction of Legal Identity*, 55 FLA. L. REV. 191, 198 (2003).

115. LORENZO GALMÉS, BARTOLOMÉ DE LAS CASAS: DEFENSOR DE LOS DERECHOS HUMANOS 178 (1982).

116. DANIEL CASTRO, ANOTHER FACE OF EMPIRE: BARTOLOMÉ DE LAS CASAS, INDIGENOUS RIGHTS, AND ECCLESIASTICAL IMPERIALISM 14 (2007).

117. De las Casas has been criticized because of exaggerating the facts and the cruelty of Spaniards. For example, he said that in a twenty-year period, 24 million Native Americans were killed. An author analyzed that information and said that 3,500 killings per day were impossible at that time, because of the weapons that were used and the number of Spaniards that lived in America. VICENTE GAY, LEYES DEL IMPERIO ESPAÑOL: LAS LEYES DE INDIAS Y SU INFLUJO EN LA LEGISLACIÓN COLONIAL EXTRANJERA 24 (1924).

118. EN EL QUINTO CENTENARIO DE BARTOLOMÉ DE LAS CASAS 186-192 (Instituto de Cooperación Iberoamericana ed. 1986).

Juan Ginés de Sepúlveda (1490-1573), on the other hand, was known as a defender of the *encomenderos* and of the Spanish Empire.[119] Like de Vitoria, he had never been in America,[120] but was well known because of his strong philosophical, theological, and canonical formation.[121] His erudition seated him in meetings with Pope Clement VII, King Charles V, King Philip II, Hernán Cortés, Alejo Venegas, and Honorato Juan; and drove him to debates with Martin Luther and Erasmus of Rotterdam.[122] His writings in law, philosophy, and history were also very important in his time. Among his works, it is worth mentioning his translations of the main literature of Aristotle,[123] and his books entitled *Chronicles of Charles V*, *Chronicles of Philip II*, *Chronicles of the Spaniards in the New World*, *Of Glory*, *Of Marriage and Dispensation of Marriage*, and *Of Testimony and Witnesses*.[124]

In 1533, Ginés de Sepúlveda had finished writing his book entitled *Of the Conformity of the Militia with the Christian Religion* (*Democrates primus*), by which he justified the warfare activities of Charles V, even if those were religious wars;[125] that is to say, that war was consonant with the doctrines of Christianity.[126] In 1544,[127] he applied the ideas expressed in *Democrates primus* to the wars in the Hispanic American territories, and wrote *Of the Just Causes of War against Indians* (*Democrates secundus*),[128] which included a dialogue between the two main characters (i.e. Democrates and Leopoldus).[129] The second book, whose original manuscript comprised 68 folios

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119. JUAN GINÉS DE SEPÚLVEDA, DEMOCRATES SEGUNDO O DE LAS JUSTAS CAUSAS DE LA GUERRA CONTRA LOS INDIOS ix (Ángel Losada ed., 2d ed. 1984).

120. Watson, *supra* note 90, at 508.

121. GINÉS DE SEPÚLVEDA, *supra* note 119, at ix.

122. *Id.* at xi ; and AUBREY F. G. BELL, JUAN GINÉS DE SEPÚLVEDA 30 (1925).

123. In 1522, he started to translate the *Meteorum* and the *De Ortu et Intu,* and in 1548, the *Politica.* Hanke, *supra* note 113, at 44.

124. GINÉS DE SEPÚLVEDA, *supra* note 119, at xii.

125. *Id.* at xii.

126. FRANCIS AUGUSTUS MACNUTT, BARTHOLOMEW DE LAS CASAS: HIS LIFE, HIS APOSTOLATE, AND HIS WRITINGS 286 (1909).

127. It is believed that it was written during the Fall semester of 1544 and the Fall semester of 1545. GINÉS DE SEPÚLVEDA, *supra* note 119, at xiv.

128. *Id.* at xiii.

129. *Id.* in general.

without enumeration,[130] did not receive royal approval for publication in Spain. De las Casas had been one of the main opponents to the publication of the book and contributed to its banning.[131] Ginés de Sepúlveda then sent the *Democrates secundus* to Rome (where the censorship was less severe) together with an *Apología*. The *Apología* was printed in 1550, while the *Democrates secundus* had to wait for approval.[132]

B. The Controversy

On April 16th, 1550, King Charles V of Spain suspended all conquering activities in America, until he decided whether or not Spaniards were entitled to wage war on Native Americans.[133] He then called for the two main actors of each side to debate before a group (*Junta*) of jurists.[134] By 1550, Ginés de Sepúlveda was identified as supporting the way in which the Spaniards ran their activities in America; whereas de las Casas was identified as opposing the activities of Spaniards and the publication of the *Democrates secundus*.[135]

In August or September 1550, the *Junta* of jurists met[136] in the city of Valladolid.[137] Ginés de Sepúlveda took the stand first, for

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130. *Id.* at xxvii.

131. *Id.* at xvi.

132. MACNUTT, *supra* note 126, at 287; and GINÉS DE SEPÚLVEDA, *supra* note 119, at xviii.

133. GALMÉS, *supra* note 115, at 173.

134. A strong controversy had existed between moralists and theologians on the one side, and the *encomenderos* and conquerors on the other hand. CASTRO, *supra* note 116, at 128.

135. De las Casas was not alone in his opposition to the doctrine of Ginés de Sepúlveda. In 1547, the Dominican theologian and bishop, Melchor Cano had written against that doctrine; and in 1549, the Spanish lawyer and member of the *Second Audiencia* of Mexico, Alonso de Maldonado, supported de las Casas in a petition to the king. LEWIS HANKE, ARISTOTLE AND THE AMERICAN INDIANS: A STUDY IN RACE PREJUDICE IN THE MODERN WORLD 31 (1959).

136. Soto, Carranza, Cano, Rodrigo, Pedro Ponce de León, Anaya, Mercado, Pedraza, Gasca. GINÉS DE SEPÚLVEDA, *supra* note 119, at xxi.

Another author mentions that the *Junta* comprised 15 jurists. GALMÉS, *supra* note 115, at 173.

Other authors say that the *Junta* consisted of 14 members: ARTHUR HELPS, THE LIFE OF LAS CASAS THE APOSTLE OF THE INDIES 265 (1896); and AUBREY F. G. BELL, JUAN GINÉS DE SEPÚLVEDA 46 (1925).

137. GINÉS DE SEPÚLVEDA, *supra* note 119, at xxi.

three hours,[138] before the *Junta.*[139] He commented on and summarized his treatise (i.e. *Democrates secundus*),[140] claiming that Native Americans were inferior, and that therefore, Spaniards were entitled to wage war on them.[141] Not having been in America, when referring to the situation of natives in America, he had to rely on the book *General History* (*Historia General*) by the chronicler Fernandez de Oviedo.[142]

He gave at least four main arguments for his position:[143]

(i) Firstly, he said that Native Americans were barbarians and should be ruled by their superiors.[144] In this first argument he cited, among others, the theory of Aristotle on natural slaves,[145] followed by Saint Augustine;[146] and the theory of Saint Thomas Aquinas.[147]

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138. Lewis U. Hanke, *The Great Debate at Valladolid, 1550-1551, in* THE ROMAN CATHOLIC CHURCH IN COLONIAL AMERICA 48 (Richard E. Greenleaf ed. 1977).

139. MARCEL BRION, BARTOLOMÉ DE LAS CASAS "FATHER OF THE INDIANS" 165 (1929).

140. LEWIS HANKE, ALL MANKIND IS ONE: A STUDY OF THE DISPUTATION BETWEEN BARTOLOMÉ DE LAS CASAS AND JUAN GINÉS DE SEPÚLVEDA IN 1550 ON THE INTELLECTUAL AND RELIGIOUS CAPACITY OF THE AMERICAN INDIANS 68 (1974).

141. Hernandez, *supra* note 69.

142. Lozada, *supra* note 111, at 280.

143. GINÉS DE SEPÚLVEDA, *supra* note 119, at 19-85; and Marks, *supra* note 110, at 25.

144. The Latin expression that summarized the first argument read: "*Ij, quorum ea condition naturalis est, ut aliis parere debeant, si eorum imperium recusant. Hoc enim bellum iustum lege naturae Philosophorum maximi testantur.*" GINÉS DE SEPÚLVEDA, *supra* note 119, at 19; and also SILVIO ZAVALA, LAS INSTITUCIONES JURÍDICAS EN LA CONQUISTA DE AMÉRICA 15 (1935).

145. He cited Aristotle who had said: "It is natural the seeking of wealth through war, . . . to be applied not only to beasts, but also to those men who were born to obey and refused to be subjected, and such a war is then by nature just." GINÉS DE SEPÚLVEDA, *supra* note 119, at 22; and Marks, *supra* note 110, at 25.

146. He cited Saint Augustine who had said: "Act, even against his will, because although suffering, the pain is necessary for his salvation." GINÉS DE SEPÚLVEDA, *supra* note 119, at 23.

And: "God granted a very delicate and glorious Empire to the Romans for them to prevent all the serious evils that existed in many groups that in seeking glory, had desires for richness and many other vices." *Id.* at 31.

147. He cited Saint Thomas Aquinas who had said: "You will tolerate the sin of the prince if he cannot be punished without a scandal to the community,

(ii) Secondly, he claimed that Native Americans had committed crimes and sins against natural law, and therefore, Spaniards were entitled to stop them and punish them.[148] He cited, among others, Deuteronomy,[149] the readings of Saint Cyprian,[150] and Saint Augustine.[151]

(iii) Thirdly, he claimed that Spaniards were obliged to prevent Native Americans from oppressing and killing other innocent Native Americans.[152] He cited, among others, Sirach,[153] the Book of Proverbs,[154] and the writings of Cremes of Terence.[155] He also used the examples provided by the exaggerated stories about cannibalism that were very popular in Europe at that time.[156]

(iv) Finally, he argued that Native Americans were infidels of the Roman Catholic faith, and needed to be instructed in that faith

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unless his sin is of a nature that would cause more spiritual or temporal damage to the community than the scandal that would be generated." *Id.* at 25; and Hanke, *supra* note 113, at 46.

148. The Latin expression that summarized the second argument read: "*Alteram causam attulisti, vt tollantur humanarum epularum portentosa flagitia, quibus plurimum rerum natura violator, neue quod iram Dei maxime lacessit, daemonia pro deo colantur, idque prodigioso ritu humanas victimas immolandi.*" GINÉS DE SEPÚLVEDA, *supra* note 119, at 84 and 57; and also Marks, *supra* note 110, at 25.

149. He cited Deuteronomy that read: "When offering to the gods their children and throwing them to the fire, they did many different atrocities, which God dislikes." GINÉS DE SEPÚLVEDA, *supra* note 119, at 40.

150. He cited Saint Cyprian who had said: "If before the arrival of Christ those precepts in favor of God and against idolatry were kept, then, after his arrival, there is even more reason to keep them." *Id.* at 42.

151. He cited Saint Augustine who had said: "If we delay the punishment or the vengeance of those serious offenses against God, we will be exhausting his patience, and he will get angry." *Id.* at 43.

152. The Latin expression that summarized the third argument read: "*Quod me iudice permagnam uim et pondus habet ad huius belli iustitiam asserendam, vt graues iniuriae a plurimis innocentibus mortalibus, quos barbari quotannis immolabant arcerentur, quas iniurias a quibusuis hominibus repellere cunctos homines si possint, lege diuina iuberi docuisti.*" *Id.* at 84; and also Marks, *supra* note 110, at 25.

153. He cited the Sirach which read: "God entrusted to each man the care for his fellow man." GINÉS DE SEPÚLVEDA, *supra* note 119, at 59.

154. He cited the Book of Proverbs which read: "Free those which are sent to death [free of guilt and in an unfair way]" *Id.* at 61.

155. He cited Cremes of Terence who said: "I am human, and I believe there is nothing human that is indifferent to me." *Id.* at 59.

156. Hanke, *supra* note 113, at 47.

by Spaniards (i.e. evangelization).[157] He cited, among others, the teachings of Saint Gregory,[158] Saint Augustine,[159] Saint Ambrose,[160] and Saint Paul.[161] He also mentioned that he felt uneasy about the things that could happen to the priests sent unarmed to evangelize in Florida.[162]

The doctrine of de Vitoria regarding just wars was applied against Native Americans by Ginés de Sepúlveda. He tried to make clear that Native Americans could not, because of their sins, under any circumstance, wage a just war against Spaniards.[163]

After Ginés de Sepúlveda spoke, de las Casas began to speak, and took five days[164] to read entirely his *Apología* (*In Defense of the Indians*)[165] which comprised 90 quad demy

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157. The Latin expression that summarized the forth argument read: "*Quarto loco posuisti, ut Christiana Religio, qua se aditus ostendit, longe et late conuenientibus rationibus per euangelicam praedicationem dilatetur, aperta via praedicatoribus morumque, et religionis magistris munita, atque ita munita, vt non solum ipsi tuto valeant euangelicam doctrinam tradere, sed etiam a popularibus barbaris omnis timor, suorum principum, et sacerdotum remouetur, quo libere, et impune liceat persuasis Christianam religionem accipere.*" GINÉS DE SEPÚLVEDA, *supra* note 119, at 84; and also Marks, *supra* note 110, at 26.

158. He cited Saint Gregory who had said: "The one that is not liberated with the water of regeneration will stay chained to the first obligation of atonement for sins committed." GINÉS DE SEPÚLVEDA, *supra* note 119, at 55.

159. He cited Saint Augustine who had said: "There are still people that are distant, even when they are few, to whom the Gospel has not been preached." *Id.* at 55.

160. He cited Saint Ambrose who had said: "In some remote areas of the World, people have not been illuminated by the grace of God, but we have no doubts that there is a secret intention of God to give them a time in which they will listen and receive the Gospel." *Id.* at 55.

161. He cited Saint Paul who had said: "He made some of us apostles, others prophets, others evangelists, others shepherds and doctors, for the purification of saints and for the endeavors of his ministry, for the building of the body of Christ." *Id.* at 67.

162. *Id.* at 72.

163. HANKE, *supra* note 135, at 69.

164. MANUEL M. MARTINEZ, FRAY BARTOLOMÉ DE LAS CASAS "PADRE DE AMÉRICA:" ESTUDIO BIOGRÁFICO-CRÍTICO 316 (1958).

165. BARTOLOMÉ DE LAS CASAS, IN DEFENSE OF THE INDIANS: THE DEFENSE OF THE MOST REVEREND LORD, DON FRAY BARTOLOMÉ DE LAS CASAS, OF THE ORDER OF PREACHERS, LATE BISHOP OF CHIAPA, AGAINST THE PERSECUTORS AND SLANDERERS OF THE PEOPLES OF THE NEW WORLD DISCOVERED ACROSS THE SEAS (Stafford Poole trans., 1974). This book includes the text of the Latin translation, and has been generally accepted as dated some time after the debate took place. There are no surviving Spanish

pages,[166] was allegedly drafted between 1548 and 1550,[167] and was probably expanded before the *Junta* took place.[168] His *Apología* represented a voluminous encyclopedia of all his ideas, scattered throughout his previous books and monographs.[169] While doing so, de las Casas described the cruelty of conquerors and highlighted his firsthand experience (something that Ginés de Sepúlveda did not have). In addition, he claimed that the role of Spain was spiritual and not political or economic.[170] Finally, he strengthened his position by stating that Native Americans were truly men, capable of becoming Christians.[171]

De las Casas also gave his answers to the main arguments that Ginés de Sepúlveda had stated during the previous session. His principle sources were the Bible, the theologians (from the Spanish Scholastics he cited only de Vitoria), the texts on canon law, the *corpus iuris civilis*, and the writings of Aristotle:[172]

(i) To the first argument he answered that, according to Aristotle and Saint Thomas Aquinas, the term *barbarian* could be used in four different ways.[173] He claimed that from the fact that Native Americans were barbarians, it did not follow that they were incapable of government and had to be ruled by others, except for

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copies of the original *Apología*; and the only surviving Latin manuscript of the *Apología*, which is in the National Library of Paris (France), is comprised of 253 folios divided into 63 chapters without headings or summaries. *Id.* at xiv-xv.

166. ANTONIO MARÍA FABIÉ, VIDA Y ESCRITOS DE DON FRAY BARTOLOMÉ DE LAS CASAS OBISPO DE CHIAPA 546 (1879). The English quad demy size is similar to the Spanish *pliego* size, which is understood generally as 1000 mm x 800 mm.

167. DE LAS CASAS, *supra* note 165, at xiv.

168. *Id.*

169. Lozada *supra* note 111, at 280.

170. Hernandez, *supra* note 69.

171. DE LAS CASAS, *supra* note 165, at 42.

172. *Id.* at xvi.

173. He said Aristotle addressed the four types of barbarians in Books 1 and 3 of *Politica*, and Book 7 of *Etica*. *Id.* at 28.

The first type of barbarian included any cruel, inhuman, wild, and merciless man acting against human reason. The second included those who did not have a written language that corresponded to the spoken one, and did not know how to express in it what they meant. The third included those who because of their evil character or the barrenness of the region in which they lived, were cruel and strangers to reason. The fourth included all those who did not acknowledge Christ. *See* respectively *id.* at 28, 30, 32, and 49.

their evangelization.[174] He believed that Native Americans had more developed skills in the mechanical arts; [175] and were more developed than ancient people (e.g. Egyptians, Romans, and Greeks) in religion, maybe even more than the Spaniards.[176]

(ii) To the second argument regarding crimes against Natural Law, citing among others Saint Augustine,[177] he said it was necessary to have jurisdiction to punish them.[178] He understood that the King and the Pope had no jurisdiction over Native Americans, because Natives were not Christians (just as the Moors of Africa, the Turks, and the Persians were not), and hence, they could not take cognizance of their acts or punish them.[179] Also, he stated that Native Americans were different from heretics, who were guilty because, having been baptized, they did not obey the precepts of the Church.[180]

(iii) To the third argument, he said that not all Native Americans oppressed and killed other natives,[181] and there was a risk that, while trying to prevent the death of few innocents, an immense multitude of persons (including other innocents) could be killed or never would want to hear the name of Christ.[182]

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174. *Id.* at 42.

175. *Id.* at 44.

176. HANKE, *supra* note 135, at 55.

177. De las Casas said: "Augustine believes that the punishment of crimes committed by pagans or idolaters is reserved to divine judgment." DE LAS CASAS, *supra* note 165, at 86.

178. De las Casas said: "We can punish the sins of unbelievers or that they can punish ours, either when we are their subjects or when they are ours or come under our authority. Now this can happen for four reasons. The first is dwelling or habitation; for example if they should live among Christians . . . Second, by reason of origin . . . Third, a person is considered our subject if he is a vassal and has taken an oath of fidelity . . . The fourth reason is a crime committed in someone's jurisdiction, either against the ruler himself or against the property or persons who are his subjects." *Id.* at 54.

179. *Id.* at 55.

180. *Id.*

181. *Id.* at 186.

182. *Id.* at 190.

He cited, among others, Aristotle,[183] Deuteronomy,[184] and a commentary of Saint Augustine about Genesis.[185]

(iv) To the fourth argument, he said that Native Americans should be evangelized, but not by means of a war.[186] He believed that they would be called by Christ in the same way as other men (e.g. Europeans) were led to him. [187] He cited, among others, the writings of Saint Chrysostom,[188] Saint Thomas Aquinas,[189] and Saint Augustine.[190]

De las Casas also mentioned the legal doctrines of de Vitoria. He claimed that de Vitoria had been misled, due to false information and wicked lies, to believe that Native Americans had committed the alleged crimes; therefore, there was no just title for Spaniards to start a war against them.[191]

One of the members of the *Junta*, Domingo de Soto, was appointed to draft a summary of the contentions.[192] De las Casas

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183. De las Casas said that Aristotle teaches that in his *Etica*: "According to the rule of right reason when we are confronted by two choices that are evil both as to moral guilt and we cannot avoid both of them, we ought to choose the lesser evil. For in comparison with the greater evil, the choice of the lesser evil has the quality of a good." *Id.* at 191.

184. He cited Deuteronomy that read: "Fathers may not be put to death for their sons, nor sons for fathers. Each is to be put to death for his own sin." *Id.* at 193.

185. He cited Genesis that read: "If you offer rightly, but do not rightly distinguish, have you not sinned?" *Id.* at 188.

186. *Id.* at 267.

187. *Id.* at 271.

188. He cited Saint Chrysostom who had said: "Just as there is no natural difference in the creation of men, so there is no difference in the call to salvation of all of them, whether they are barbarous or wise, since God's grace can correct the minds of barbarians so that they have a reasonable understanding. He changed the heart of Nebuchadnezzar to an animal mind and then brought his animal mind to a human understanding. He can change all persons, I say, whether they are good or bad: the good lest they perish, the bad so that they will be without excuse." *Id.*

189. He cited Saint Thomas Aquinas who had said when referring to the wedding parable of Saint Luke: "That compulsion which Saint Luke mentions in chapter 14 is not one of force but one of effective persuasion, as, for example, through harsh or gentle words." *Id.*

190. He cited Saint Augustine who had said: "O happy necessity which compels one to what is better." *Id.* at 273.

191. *Id.* at 341.

192. GINÉS DE SEPÚLVEDA, *supra* note 119, at xxii.

and Ginés de Sepúlveda did not appear together before the *Junta.* Notwithstanding, the members of the *Junta* seem to have discussed the positions of each contender separately with them. In addition, the members of the *Junta* held discussions among themselves.[193]

A second debate took place on April or May 1551,[194] but few records were kept of it. Ginés de Sepúlveda had asked for permission to reply to the statements of de las Casas according to the summary of de Soto.[195] As a result, Ginés de Sepúlveda found twelve objections and gave his answers to those objections.[196] Subsequently, de las Casas answered to those twelve objections,[197] and Ginés de Spúlveda made no further rejoinder because he saw no necessity.[198]

C. The Outcome

The Controversy had neither immediate winners nor losers. No official records were kept of the debates of the *Junta*, or they have not yet come to light.[199] Historians currently work with what Bartolomé de las Casas and Juan Gines de Sepúlveda wrote after the debate. On the one hand, de las Casas wrote *Here is included an Argument* (*Aqui se contiene una disputa*),[200] in 1552, including his main arguments, the summary of Domingo de Soto, the 12

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193. HANKE, *supra* note 135, at 39.

194. GINÉS DE SEPÚLVEDA, *supra* note 119, at xxi.

195. *Id.* at xxii.

196. *Id.*

197. *Id.*

198. HANKE, *supra* note 140, at 68.

199. Hanke, *supra* note 138, at 50.

200. The complete Spanish title was: *Aqui se contiene una disputa, o controversia: entre el Obispo don fray Bartholome de las Casas, o Casaus, obispo que fue de la ciudad Real de Chiapa, que es en las Indias, parte de la nueva España, y el doctor Gines de Sepulveda Coronista del Emperador nuestro señor: sobre que el doctor contendia: que las conquistas de las Indias contra los Indios eran licitas: y el obispo por el contrario defendio y affirmo aber sido y ser impossible no serlo: tiranicas, injustas y iniquas. La qual question se ventilo y disputo en presencia de muchos letrados theologos y juristas en una congregacion que mando su magestad juntar el año de mil y quinientos y cincuenta en la villa de Valladolid.*
Text available in Spanish at, Aquí se contiene una disputa, o controversia http://digicoll.library.wisc.edu/cgi-bin/IbrAmerTxt/IbrAmerTxt-idx?type=header&id=IbrAmerTxt.Spa0035&pview=hide (last visited November 6, 2007).

objections of Ginés de Sepúlveda, and the 12 answers of de las Casas.[201] On the other hand, and contemporarily, Gines de Sepúlveda allegedly[202] wrote *Rash, Scandalous, and Heretical Propositions* (*Proposiciones temerarias, escandalosas y heréticas*),[203] that included his position regarding the outcome of the debate.

Both Bartolomé de las Casas and Juan Gines de Sepúlveda claimed that they were winners.[204] They did so according to the opinions of their friends and those who shared their opinions.[205] For example, Ginés de Sepúlveda sent a letter to Martín de Oliva, dated October 1st, 1551, in which he stated:

> Nevertheless, it cannot be said that I stood right on my two feet after the first encounter . . . Hence, in a short period of time, I was able to return the misled judges to the path of truth, and make them approve my thesis, to which I had dedicated many years of my life. Then, all without exception were convinced that the war on Native Americans was a way of bringing them to the fold of Christ.[206]

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201. *Id.*

202. The expert Ángel Lozada mentions that the referred work is attributed to Ginés de Sepúlveda. GINÉS DE SEPÚLVEDA, *supra* note 119, at xiii.

203. *Id.* at xx.

The complete Spanish title was: *Propossiçiones Temerarias, Escandalosas y hereticas que noto el Doctor Sepulveda en el libro de la Conquista de Indias que Fray Bartholome de las Casas Obispo que fue de Chiapa hizo imprimir sin liçencia en Sevilla año de 1552 cuyo título comienza Aquí se contiene una disputa o controversia.*

See, an interesting reference in Spanish, at: http://www2.uah.es/cisneros/carpeta/images/pdfs/249.pdf (last visited November 6, 2007).

204. Hernandez, *supra* note 69.

205. MARTINEZ, *supra* note 164, at 316.

206. The letter in Spanish read:

> No obstante, no puede decirse que salí muy bien parado del primer encuentro . . . Así, en poco tiempo conseguí que aquellos jueces, antes tan descarriados, volvieran al camino de la verdad y aprobaran mi tesis cuya defensa tantos años de mi vida había yo gastado. Todos, pues, sin excepción se convencieron de la licitud de la guerra contra los Indios como medio de atraerlos al redil de Cristo.

EPISTOLARIO DE JUAN GINÉS DE SEPÚLVEDA 156 (Ángel Losada ed., 2d ed. 1979).

In the long run, the results were different. On the one hand, the book of Gines de Sepúlveda, that had generated the rivalry between the two scholars (i.e. *Democrates secundus*), was not published until 1892,[207] when Marcelino Menéndez y Pelayo published it in Madrid.[208] On the other hand, the *encomienda* system, to which de las Casas had dedicated countless days and nights to fight against, continued until the 18th century, at which time it was formally abolished.[209]

VII. SOME COMMON DENOMINATORS BETWEEN EMBRYOS AND VALLADOLID

It has been shown that when society faces new developments or discoveries, it always faces controversies, debates, or questions. Different approaches to those controversies can be made, from different angles and perspectives. Among some of the perspectives, it is possible to mention firstly religious beliefs or the belief in a supernatural energy. Religious beliefs have been present in almost all controversies, and are strongly linked to morality. Religion tends to shape the conduct of men, and its postulates constantly are challenged by the new discoveries. The Roman Catholic faith was present at the Valladolid events; and it is also present, together with other religious beliefs, in the current debate on human embryos, by means of press releases or from the preachers' pulpits in many congregations.

Economic endeavors may also create another perspective when looking at developments. Back in the Hispanic possessions in America, and at the time of the Valladolid debate, the *encomenderos* were able to succeed in economic endeavors because of the inexpensive work force provided by the uncertainty of the status of Native Americans, and by the grants of land that the Spanish king had made to them. In addition, goods and objects made by craftsmen were produced for the Spanish empire at a very low cost. Currently, human embryos have the potential to cause a revolution in the health industry worldwide, because of the massive development of palliatives to diseases. In addition, the

207. GINÉS DE SEPÚLVEDA, *supra* note 119, at xxv.

208. Lozada, *supra* note 111, at 280.

209. Lesley Byrd Simpson, *Book Review*, 16.1 THE HISPANIC AMERICAN HISTORICAL REVIEW 49, 49 (1936).

controversial creation of banks of human organs for transplant may affect the current situation of tissue replacement. Finally, the patent law scheme also may be affected by the new challenges that laboratories and research centers may create.

Culture is another perspective that may be used when approaching controversies. The mix of races, generated by the Spanish presence in the Americas, turned out to be the Latino race, which varies considerably in each region of the Americas, but which mainly consists of the interbreeding of Native Americans, Blacks from Africa, and Whites from the Iberian Peninsula. At the time of the Valladolid controversy, there was exploitation of Native Americans, not only as a work force, but also as members of society at large. Currently, the experimentation with human embryos may result in clones or chimeras, which may tend to change family contexts or races.[210] In addition, exploitation of women and embryos (in the event the reader understands embryos as persons) could also coexist.[211]

Science and technology may also be considered when facing developments or discoveries. After the Spanish conquest, many developments in science occurred due to the interaction of European developments in the Americas. The research with human embryos may generate new discoveries in science and technology.[212]

Law, being a social science, is always present when facing discoveries or developments. Necessary legal frameworks derive from those developments, and try to catch up with the new trends. The Spanish presence in America generated a body of legislation to be applied in the new colonies. In addition, it was shown that the Valladolid debate influenced the provisions of the *Recopilación de las Leyes de Indias*. On the other hand, the debate on human embryos will generate legislation that will help regulate all the different aspects of such development. Also, judicial decisions of the highest courts are expected (e.g. the US Supreme Court),

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210. Lori B. Andrews, *Is There a Right to Clone? Constitutional Challenges to Bans on Human Cloning*, 11 HARV. J.L. & TECH. 643, 656 (1998).

211. Francesca Crisera, *Federal Regulation of Embryonic Stem Cells: Can Government do it? An Examination of Potential Regulation through the Eyes of California's Recent Legislation*, 31 HASTINGS CONST. L.Q. 355, 361 (2004).

212. Christopher L. Logan, *To Clone or Not to Clone: Should Missouri allow Cloning for Biomedical Research?*, 73 UMKC L. REV. 861, 874 (2005).

helping to settle the controversial matters in the common law jurisdictions.

VIII. CLOSING REMARKS

The challenges that society currently faces with human embryos have been also faced, *mutatis mutandis*, in many other instances, for example at Valladolid during the 16th century. The view of the past may help us understand the present. Considering what happened in the past, we can now expect regarding human embryos that legislation, case law, and some main actors will occupy a leading role in the years to come, and will help society define positions regarding the debate. As in the case of Valladolid, when the Native Americans were not present during the debates, the leading roles with human embryos will be occupied by others other than the human embryos themselves. History seems to have shown us that it is a fact impossible to avoid.

Society may sit and wait for a consolidated decision about human embryos: will they be seen as persons? Will they be seen as things? Or will they deserve a special intermediate treatment? Once those questions are answered, legislation and case law will face new questions, the first of which may be: what rights and obligations will they have, if any? Like when facing the status of Native Americans, this takes us to fundamental questions: What is a human being? Where does humanity begin and end? Times of great discoveries are also times of great interrogations.

THE PROTECTION OF GENETIC IDENTITY *

Laura Maria Franciosi[†] & Attilio Guarneri[‡]

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* The present article represents the development of a research activity carried on by the authors.

Part I is an expanded version of Attilio Guarneri, *Identità genetica e privacy doctrine (il modello statunitense)*, 4 LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 37-42 (2007); and Part II is an expanded version of Laura M. Franciosi, *Identità genetica e ricerca di forme alternative di tutela nell'esperienza statunitense*, 4 LA NUOVA GIURISPRUDENZA CIVILE COMMENTATA 43-61 (2007).

† Contract Professor of Business Comparative Law, Bocconi University of Milan (Italy); LL.M., Louisiana State University; Three-year doctorate in comparative law, State University of Milan.

‡ Full Professor of Comparative Law, Bocconi University of Milan (Italy).

INTRODUCTION

As everyone knows, the mapping of the basic components of the genetic code was completed in June of 2000.[1] Its beneficial effect gave us the ability to analyze the smallest biologic samples derived from an individual (a drop of blood invisible to the naked eye, a strand of hair, or a scale of dandruff), and it allowed us to verify the presence of specific genes, hence to reveal a multitude of information regarding the individual that the sample originated from. In particular, the DNA structure contains an infinite amount of information regarding the specific traits of an individual, such as, *ex multis*, the body's morphology, skin pigmentation, ethnic and racial traits. Furthermore, studies have shown that DNA determines, at least to some extent, intelligence and personality and it provides additional means of detection for the identification of hereditary illnesses, such as Down syndrome, hemophilia, and cystic fibrosis. Its negative effect was to establish a different, ulterior method, by which the personal rights of that same individual can be illicitly violated.

The analysis of the legal implications of such a phenomenon is a very complex one because of the needs to balance two opposite interests. On one side is scientific research, which fears that imposing overly strict limitations on the developments of new techniques of manipulation of genetic information would excessively restrict the research itself and would impede the achievement of new results beneficial to human society. On the other side are the privacy concerns; the need to take into account the interests of individuals to be granted efficient protection of their genetic identity. In addition, the complexity of such an analysis is increased by the speed of the above mentioned developments in respect of the lack of *ad hoc* legal provisions in

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1. *See* for example Michael J. Malinowski, *Separating Predictive Genetic Testing from Snake Oil: Regulation, Liabilities, and Lost opportunities*, 1 JURIMETRICS J. 23 (2000) (arguing that the completion of the maps of human genome has raised concerns related to the inadequacy of existing law provisions to properly deal with the new challenges of biotechnology); and Michael J. Malinowski, *Ethics in Global Biopharmaceutical Environment*, 1 SANTA CLARA J. INT. L. 57 (2006) (identifying different options to establish a workable baseline of protection of human subjects in order to develop in a responsible manner the biopharmaceutical research, and, therefore, being benefited by the manifold opportunities related to such developments).

order to deal with such new issues, and the consequent need to try to address these challenges by means of the traditional legal doctrines.

It is interesting to consider the North American judicial system in this respect, in view of the fact, as some may say, that it has developed the most advanced genetic research and techniques, and also because, as Antonio Gambaro says, it was the "cradle" of *privacy* rights.[2] Because of this, this system has been acclaimed as being the best foreign model from which to derive legal provisions aimed to discourage these new types of attacks on personal rights, and mandate compensation for their victims. Within this context, we find not only the analysis of the collection of different possible violations (*intrusions*), but also a list of entities capable of executing them, an array of legislative, doctrinal and jurisprudential sources that are used to protect the genetic identity of the individual, and an initial *panel* of solutions to the problems encountered so far. The reference to privacy rights in particular deserves to be highlighted because of the strong arguments supporting the idea that a violation of an individual's genetic information could be deemed a violation of their right to privacy.

On the contrary, the specific topic of genetic identity within the Italian legal framework, with some exceptions,[3] appears to be taking off.[4] This may be due to several factors, among which we

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2. Antonio Gambaro, *Falsa luce agli occhi del pubblico*, 1 RIV. DIR. CIV. 84 (1981).

3. *See* in particular, Stefano Rodotà, *Tra diritto e società. Informazioni genetiche e tecniche di tutela*, RIV. CRIT. DIR. PRIV. 571 (2000); AMEDEO SANTOSUOSSO, CORPO E LIBERTA, UNA STORIA TRA DIRITTO E SCIENZA (Milano, 2001) (both focusing on the legal implications of the human body as a source of genetic information and dealing with the issues that will be addressed later in the present paper, for example that of biologic group and the collection of DNA samples).

4. Within the Italian scenario, as well as many other countries, the topic of genetic information has been deemed as a *species* of the broader notion of "sensitive data" pertaining to an individual and falling within the notion of "privacy right." In particular, Stefano Rodotà, the former President of the *Garante per la protezione dei dati personali* (the Italian Authority for the protection of privacy rights, hereinafter "Garante"), highlighted that genetic information has a "structural and lasting attitude," because "the genetic asset is defined and unalterable during the whole biological life of an individual; it shows his/her uniqueness and puts the individual in relation with others; it is the direct biological link between the individual and the other generations; and, as a consequence, it is an immortal element, while, on the contrary, all the other

can briefly recall two concurring elements. On one side is the issue of genetic identity as a new concept of personal identity which shows to have a peculiar nature because the whole identity pertaining to an individual can be found even in the smallest–and, at least at first sight, insignificant–sample of human biological material separated from the body to which it pertains,[5] seems to have been neglected within the Italian scenario in favor of other issues related to the implication of the DNA manipulation and the

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biological traits will die with the individual." Stefano Rodotà, *Le informazioni genetiche*, TECNOLOGIE E DIRITTI 208 (1995). The same, in addition, pointed out that, since the genetic information is almost always manipulated in order to transform it in "genetic data," such data must be equated to the category of "personal data," subjected to the protection allowed by Italian privacy provisions. However, those provisions lack a specific definition of "genetic data" (as highlighted by the *Garante* in its decision as of May 22nd, 1999) and, consequently, it becomes very difficult to grant an appropriate protection to such a peculiar category of information. In order to fill this gap, it has been suggested to apply the definition of genetic data adopted by the Eur. Council *Recommendation,* Doc. No. R (97) 5, which includes in such a concept all data–regardless of their nature–concerning the hereditary characters of an individual or the ways to transfer them within a group of individuals linked by blood ties. Within the legal category of personal data, genetic data belong to the sub-class of "*sensitive data*," which–according to the Italian privacy provisions–can be used only with the written consent of the owner and the previous authorization of the *Garante*. But, it must be stressed that, in spite of such a general rule, several exceptions to the collection and utilization of those data are allowed: for further details see the so called Privacy Code (*Codice della privacy*) enacted with the D.lgs. as of June 30th 2003, no. 196, issued in the Ordinary section of the Italian official bulletin of the law (*Gazzetta Ufficiale*) as of July 29th, 2003, no. 174; and, in particular, art. 90 of it, named *Trattamento dei dati gentici e dei donatori di midollo osseo*. This rule requires an authorization *ad hoc* of the *Garante* for the purposes of the utilization of those data and, therefore, it could help in better dealing with the issue at stake: but, it must be warned that such a provision is a pretty recent one, since it has been adopted as of February 22nd, 2007. In the meantime, in order to fill such a gap, temporary provisions had been enacted, which contributed to render the Italian legal scenario more complex and more heterogeneous. Anyway, it deserves to be highlighted that the Italian legal framework, as well as that of many other countries, is grounded around the idea of "free and informed consent" of the individual as main element to deal with the issue of genetic information and, therefore, it raises concerns similar to those already addressed in other foreign legal models and among them the US one represents a very interesting model of comparison, as already explained.

5. For example: a broken nail, a hair, a droop of saliva left on a cup of coffee, a droop of blood in the event of an accidental cut, etc.

notion of genetic material: i.e., assisted procreation, utilization of human embryonal staminal cells, the legal status of the embryo and of the so called pre-embryo, the issue of genetic modified organisms, and so on.[6]

On the other side, the specific topic of genetic identity and the related opportunity to identify an individual by means of his/her genetic information, has thus far been presented to the eyes of the Italian society mainly in its positive aspects, as an efficient and fundamental tool in order to pursue very worthwhile aims, especially for investigational purposes: in this respect, two significant examples may be provided.

The Italian judge Giovanni Falcone–who was well known even outside Italy because of his fight against the phenomenon of the mafia, and who also had the opportunity to actively cooperate with the American investigative authorities–was killed by an explosive device while he was driving from the airport of Capaci to his apartment in Palermo. Since this event occurred in 1992, and at that time the new tools of DNA investigation were not so developed in Italy, the Italian investigative authorities required the cooperation of Americans in order to try to identify the perpetrator of such a crime. The identification was possible by extracting the DNA sample of the killer from the saliva left on the cigarette filters he had smoked while waiting for Mr. Falcone's car. In current news, the whole European society is riveted by the story of Maddy, an English child who disappeared in Portugal during a holiday with her family. At one point, it appeared she was in Belgium because a lady had seen in a coffee shop a child who resembled her. In

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6. *See*, among others, Massimo C. Bianca, *Nuove tecniche genetiche, regole giuridiche e tutela dell'essere umano*, 3-4 IL DIRITTO DELLA FAMIGLIA E DELLE PERSONE, 955-970 (1987) (focusing on the legal implications of artificial insemination); Stefano Rodotà, *Trasformazioni del corpo*, in Politica del diritto, 2006, issue no. 1, at 3-24 (dealing with the manifold notions of the term *body* when related to the human being). In addition, such an issue has been perceived as falling within the more complex area of the relationships between law and ethics and, in particular, within the bioethics field, about which the debate is very developed and many contributions have been published: *see*, for example, FRANCESCO DONATO BUSNELLI, BIOETICA E DIRITTO PRIVATO. FRAMMENTI DI UN DIZIONARIO 3-4 (2001); Paolo Zatti, *Verso un diritto per la bioetica*, *in* UNA NORMA GIURIDICA PER LA BIOETICA 3 (Cosimo M. Mazzoni ed., 1998). *See* also the reports of the Italian "Comitato nazionale per la bioetica," *available at* http://www.governo.it/bioetica.html (last visited November 6, 2008).

order to verify whether that child truly was Maddy or not, the competent authorities were able to obtain a sample of her DNA by the glass she had used to drink, and then they could compare it with the sample of DNA provided by the family of Maddy. Thanks to such a technique, they were able to determine that (unfortunately) the child was not Maddy.

In Italy, the debate about the opportunity of establishing DNA databanks for the collection of DNA profiles and/or DNA samples for investigational purposes–as well as it has been done within the US and in other European Countries–has just arisen.[7] Consequently, the analysis so far carried out has not yet reached a deep perspective, unlike those which have occurred within the US, at least with reference to the concerns about the possible new forms of intrusion and violation of the individual's genetic identity together with the manifold legal implications of such a phenomenon.

Within the European Union, such a topic so far has been addressed only from a specific perspective: the protection of so-called "biological inventions." In fact, the Directive 98/44/CE,[8] which has been implemented in Italy by Law 78/2006, addresses the new phenomenon of biological inventions and manipulation of organic material (even human). It allows such inventions, provided that they meet all the requirements to be deemed an "invention" according to the Directive's provisions, to be subjected to the rules of patent law. The first concern of the Directive, therefore, appears to be economic. Nevertheless, the same Directive shows a willingness to take into account the moral concerns related to such a phenomenon, together with the opportunity to preserve the dignity of the individual. Therefore, it

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7. As of November 2007, such an issue is in the agenda of the Italian Parliament: see, for example, the Attachment A to the hearing n. 221, held on October 10th, 2007, at 34-35, including proposal of amendments to article 6 of the draft of law n. 782 (arguing, in particular, for the introduction of *ad hoc* DNA databanks, to be created with the consent of the *Garante*), *available at* http://legxv.camera.it/docesta/312/14367/documentoesterno.asp?a=internet&annomese=2007%2C10&commit=invia (last visited November 6, 2008)

8. Directive 98/44/EC of the European Parliament and of the Council of July 6th, 1998 on the legal protection of biotechnological inventions. Official Journal L 213, 30/07/1998 P. 0013–0021; *available at* http://eur-lex.europa.eu/en/index.htm (last visited December 19, 2008).

expressly recognizes some limits to the activity related to biotechnology, in particular those of public order and good morals, in addition to strictly forbidding the patentability of human cloning and the utilization of human embryos for commercial purposes (Art. 6 § 2 of the Directive). Finally, the Italian law implementing the Directive requires the free and informed consent of the donor of biological material as a fundamental element in order to submit the request of patentability of the invention, thus complying with art. 3 of the Charter of Fundamental Rights of the European Union.[9]

But, again, such provisions appear to address the present phenomenon only from a specific point of view. The mere reference to the notion of "public order and good morals" is not able to cover all the juridical implications of it; furthermore, those are evolving concepts, whose determination is subject to periodical assessment. In addition, as we will show with our analysis, the "consent argument" does not always seem to be the best solution in order to address such an issue. Therefore, in spite of the regulation, the specific issue of genetic identity cannot be deemed to have yet been thoroughly examined or have taken into account all the possible and manifold legal implications pertaining to it. Furthermore, in order to try to reach a more complete awareness of those implications, the analysis of genetic identity, in our opinion, could benefit from comparison with the developments in a different legal system, such as the American one.

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9. Charter of Fundamental rights of the European Union (2000/C 364/01): Article 3–"Right to the integrity of the person"

1. Everyone has the right to respect for his or her physical and mental integrity.

2. In the fields of medicine and biology, the following must be respected in particular:

. The free and informed consent of the person concerned, according to the procedures laid down by law,

. The prohibition of eugenic practices, in particular those aiming at the selection of persons,

. The prohibition on making the human body and its parts as such a source of financial gain,

. The prohibition of the reproductive cloning of human beings.

The full text of the Charter is available in English at http://www.europarl.europa.eu/charter/pdf/text_en.pdf (last visited November 6, 2008).

Accordingly, the present work will try to address the legal implications surrounding the issue of genetic identity by referring to the complex and heterogeneous scenario of doctrines and legal provisions which characterizes the American legal system in attempting to better understand such a phenomenon.[10]

PART I
THE LIMITS OF THE LEGISLATIVE APPROACH

A. Intrusions and the Intruders

Initially the ability to perform DNA analysis was beneficial to the individual, as it was used to diagnose illnesses, and determine the best course of medical treatment. However, thereafter, these tests started to have a negative impact on the individual. They provided an ideal tool to benefit and facilitate the potentially discriminatory activities of entities such as employers and insurance providers, for example, that could use the otherwise unknown genetic information to determine who to hire and who to insure.[11] As it has been highlighted:

> The danger is that individuals will be judged according to genetic stereotypes and divided into groups based upon their genetic predispositions. Thus, invasions of genetic privacy are not only selective, but also segmenting: they balkanize a population based upon its genes, generating genetic divisions that may produce new structures of inequality.[12]

The potential for misuse of the data is at times augmented by the prevailing cultural environment that tends to regard genetic data as a magical force and some sort of cultural icon.

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10. Attilio Guarneri wrote Part I of the present paper, while Laura Franciosi developed Part II.

11. *See for example*: Nathalie Smith *The right to Genetic Privacy? Are We Unlocking the Secrets of the Human Genome Only to Risk Insurance and Employment Discrimination?*, 2000 UTAH L. REV. 705 (2000).

12. Radhika Rao, *A Veil of genetic ignorance? Protecting Genetic Privacy to Insure Equality*, 51 VILL. L. REV. 827, 828 (2006).

Ken M. Gatter has addressed the current gene hegemony in his speeches,[13] and the anthropologist Kaja Finkler described the central role of DNA in the definition of our identity:

> Everything about an oorganism's existence is predetermined and genetically programmed, including its variation, although geneticists recognize that the program may be affected by unknown and external factors in the environment, chance, or human manipulation. The sequence of our DNA reveals to us who and what we are; that is, what it means to be human. With DNA sequencing, some scientists have maintained that the riddle of life is close to being solved.[14]

Dorothy Nelkin and M. Susan Lindee, in turn, described how public opinion views the role of DNA:

> Just as the Christian soul has provided an archetypal concept through which to understand the person and continuity of self, so DNA appears in popular culture as a soul-like entity, a holy and immortal relic, a forbidden territory. The similarity between the powers of DNA and those of the Christian soul, we suggest, is more than linguistic or metaphorical. DNA has taken on the social and cultural functions of the soul. It is the essential entity–the location of the true self–in the narratives of biological determinism.[15]

The information's potential for misuse is made particularly dangerous by the fact that the practice of analyzing data has quickly spread over multiple levels. In fact, today there is much apprehension surrounding potential misuse of genetic information. The results of a survey conducted in North America in 1997 showed that two-thirds of the people interviewed would refuse to undergo genetic testing if they knew that their employer, or the

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13. Ken M. Gatter, *Genetic Information and the Importance of Context: Implications for the Social Meaning of Genetic Information and Individual Identity*, 47 ST. LOUIS L.J. 423 (2003).

14. KAJA FINKLER, EXPERIENCING THE NEW GENETICS: FAMILY AND KINSHIP ON THE MEDICAL FRONTIER 48 (Univ. of Pennsylvania Press 2000).

15. DOROTHY NELKIN & M. SUSAN LINDEE, THE DNA MYSTIQUE: THE GENE AS A CULTURAL ICON 41-42 (1995).

insurer that covers their medical expenses, could become aware of the results of said analysis.[16]

Scholars remind us that this is also quite relevant within the scope of major decisions that concern the private life of individuals. A person's decision regarding choices such as whether or not to marry someone, or whether or not to have children with someone, could be affected if that person became aware of the other individual's genetic profile.[17] Other studies remind us that DNA findings pertain not only to the individual that was tested, but also concern all members of the family that person belongs to.[18]

Illicit use of data is particularly insidious because–and here we move beyond the analysis of intrusion to the analysis of intruders–genetic information is no longer the exclusive monopoly of researchers, as it will soon be made available to private parties as well. In the near future, the general public will be able to purchase reasonably priced *market tests.* Now consider the analysis that could be conducted on exfoliated skin left on objects handled in an office or in a waiting room. The vulnerability of a person's genetic privacy has increased dramatically.

B. Protective Legislative Measures

The US Congress has intervened several times, and with increasing frequency, to protect the genetic identity of the individual, and prevent private entities from using genetic information as basis for discriminatory practices. The *Privacy Act* of 1974 addresses the need to protect *privacy* in general terms, with no specific provisions for genetic *privacy*. It only protects government employees from divulgation of confidential data already on file, and it offers no protection to prevent private parties from acquiring information, even if genetic by nature.[19] It was followed in 1990 by the *Americans with Disabilities Act* (ADA), which aimed to prevent discriminatory practices against disabled

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16. Gatter, *supra* note 13, at 427-428. See also Paul S. Miller, *Genetic Discrimination in the Workplace*, 26 J.L. MED. & ETHICS 189 (1998).

17. *See,* for example, George J. Annas, *Genetic Privacy: There Ought to Be a Law*, 4 TEX. REV. L. & POL. 9 (1999).

18. On this topic *see infra* Part II, paragraph 4.

19. *See* generally Anita Silvers & Michael A. Stein, *Human Rights and Genetic Discrimination: Protecting Genomics' Promise For Public Health*, 31 J.L. MED. & ETHICS 377 (2003).

individuals in the workplace. It contains at least two prerequisites: an act of discrimination and a documented disability. However, because the Supreme Court has interpreted the ADA in a manner that excludes genetic predispositions, and also because it does not pertain to acquiring data *per se*, it is largely inept for the purpose of safeguarding genetic identity.[20]

In 1996, the *Health Insurance Portability and Accountability Act* (HIPAA) followed. It was issued to protect the *privacy* of health records, and specifically addresses genetic information, but the law only applies to specific types of information and not others.[21] In summary, the overall scope of federal legislation does not offer sufficient protection against illicit genetic data acquisition. For this reason some states, such as Florida, have adopted more rigorous and restrictive laws, which mandate that DNA testing may only be conducted after obtaining consent from a duly informed individual, and that violators are subject to sanctions, incarceration, and fines.[22]

Practitioners express, however, that there are some doubts concerning the effective application of these more rigorous state laws.[23] If we look beyond the actual legislation (Federal and State), and consider the jurisprudential and doctrinal aspects, we immediately notice that there are two distinct levels of protection for genetic information: protection from government intrusion and from intrusion by private entities. The first contains a collection of cases pertaining to military personnel, inmates, etc.; the level of protection here is "weak," and at this point somewhat established, although not free of problems, both old and new.

The analysis of the second level of protection, which we now expand upon, starts with a reconstruction of the *protection of*

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20. *See,* for example, Mark A Rothstein, *Genetic Privacy and Confidentiality: Why They Are So Hard to Protect?*, 26 J.L. MED. & ETHICS 198, 201 (1998).

21. Joanne L. Hustead & Janlori Goldman, *The Genetics Revolution: Conflicts, Challenges and Conundra*, 28 AM. J. L. AND MED. 285, 287-292 (2002).

22. *See,* for example, Ben F. Overton and Katherine E. Giddings, *The Right of Privacy in Florida in the Age of Technology and the Twenty-First Century: A Need for Protection From Private and Commercial Intrusion*, 25 FLA. ST. U.L. REV. 25 (1997).

23. June Mary Makdisi, *Genetic Privacy: New Intrusion a New tort?*, 34 CREIGHTON L. REV. 965, 978 (2001).

privacy in tort, which finds its roots in the history of North American *common law*. The ancestry of the current *remedy for privacy intrusion* lies in the *physical trespass*, which was, in turn, the heir to the British medieval *transgressio.* It was elaborated upon in a famous essay written by Samuel D. Warren and Louis D. Brandeis, *The Right to Privacy*, that was published by the *Harvard Law Review* in 1890,[24] and preceded, two years prior, by a treatise named *On the Law of Torts* by Judge Cooley, the author who defined *privacy* as being *the right to be let alone.*[25]

Approximately 70 years later, William L. Prosser, in a famous essay that appeared in 1960 in the *California Law Review*, tried to systematize the variegated constellation of juridical examples of personal rights violations. On the theme of *privacy*, he created four related yet distinct subsections: *Intrusion; Public Disclosure of Private Facts; Appropriation of the Name or Likeness;* and *False Light in the Public Eye.*[26] That classification, after being widely circulated in literature and Courts' opinions, was incorporated in the *Second Restatement on the Law of Torts.*[27]

In order to analyze the juridical instruments most widely used in genetic identity proceedings that pertain to violations made by private parties, we must start with the sub-tort named *Intrusion.* Its origins can be reconstructed, by means of Prosser's classification, to the violation of *privacy*. The sub-*tort* of *Intrusion*, as a type of disturbance, may have three different aspects: physical, spatial, and psychological. The first and second indicate an actual physical space, as expressed by the aphorism: *A man's home is his castle.* Let us also recall the famous quote from *The Right to Privacy*: '*The common law has always recognized a man's house as his castle, impregnable, often, even to its own officers engaged in the execution of its commands. Shall the courts thus close the front entrance to constituted authority, and open wide the back door to idle or prurient curiosity?'*[28] The third relates to non-physical intrusions, and is tied to technological advances, such as telephone taps, microphones, etc., that involve some sort of high-tech prying,

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24. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890-1891).

25. THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888).

26. William L. Prosser, *Privacy*, 48 CAL. L. REV. 383 (1960).

27. RESTATEMENT (SECOND) OF TORTS, § 6A, v. "Privacy."

28. Warren & Brandeis, *supra* note 24, at 220.

espionage-like virtual trespassing; investigative harassment, continual phone calls and sexual harassment can also be viewed in this context. The common factor in these type of cases is Judge Cooley's "right to be let alone," that when extended from its original material and spatial concept of what is proprietary by nature, to a scope that also includes the degree of control any individual has over his/her information, impacts the overall dignity "profile" of a person. The original proprietary concept of the inviolability of a castle or a sanctuary can also be associated with the last mentioned personal profile, and in this manner convey the image of a person as being inviolable.

Psychological violations evoke the idea of *peace of mind*, an area that is proprietary and personalistic at the same time; it pertains to information about an individual, and is ruled by the principle of *jus excludendi alios.*[29] The intrusion truly consists of a violation of this private sphere, which is dominated by the identity and personality of a single individual.

Protection against intrusions into the sphere of information about oneself (information one wishes to keep private) preserves the dignity of the individual in two ways. On the one hand, it precludes unauthorized access to personal information; on the other, it prevents falsification of this data. In both directions this protection is applicable to *Genetic privacy*.

C. Balancing the Rights

Privacy protection, even genetic, must not however mean absolute protection from all types of intrusions by others. As proposed in the *Restatement Second of the Law of Torts*, the rights must be properly balanced. According to that disposition, *one, who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.*[30]

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29. From a comparative perspective, such an argument is very interesting because it involves also the proprietary paradigm because, for example, according to art. 832 of the Italian Civil Code, the so called *ius excludendi alios* is one of the main powers embodied in the definition of property and therefore granted to the owner of a good.

30. RESTATEMENT (SECOND) OF TORTS § 652B.

Hence, making annoyance calls and probing into someone's life with no due cause are considered to be illicit activities. On the contrary, the need to establish an adequate level of protection against thefts can justify an employer's "intrusions" upon the privacy of employees, and similar intrusions are permissible when government authorities need to gather evidence for a case.

While talking specifically about genetic identity violations, we must consider Prosser's principle, by which the right of being let alone does not apply to an individual while in a public place unless, as mentioned in the *Restatement Second of the Law of Torts*, the matter involves a violation of private rights. To better identify what constitutes this type of matter, it's useful to recall cases that involved photographers taking pictures of people who, while in public places, unwillingly found themselves in a vulnerable situation. An example of this could be a woman whose skirt had been thrown up by the wind, and is therefore photographed with her private parts exposed.[31] Briefly, the act of regulating the balance of rights poses restrictions upon Prosser's principle when there are specific reasons to aptly justify the applicability of *privacy* protection measures. The current trend is to progressively expand the sub-tort *of intrusion*, as occurred within the specific contexts later discussed, and apply this definition to cases that pertain to the protection of genetic identity.[32]

The topics of sexual harassment in the workplace, employee drug testing, and surveillance conducted by mechanical means such as cameras, video recording equipment etc. require, as always, the careful balancing of interests. Actions undertaken to fight drugs and thefts justify intruding upon someone else's private life, as long as any reasonable individual would deem that they did not violate the personal integrity of an individual. Sometimes, the valuation depends upon the actual intent (or lack thereof) of the intrusion, and the values involved. For example, in a spousal separation civil suit that included awarding custody of a minor, the husband took a picture of his semi-nude wife from the window of her lesbian lover's bedroom. This was not deemed to be a violation of the wife's right to privacy in view of the intent to protect the minor from being exposed to sexual activities that could occur in

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31. *See* generally Makdisi, *supra* note 23.
32. *Id*.

the family dwelling. Briefly, a reasonable opinion takes into consideration the purpose, the psychological motives (intentional or not), the means, the methods used, and the intensity of the identity violation committed towards others.

D. The Applicability of the Sub-Tort of Intrusion within the Scope of Genetic Identity

According to June Mary Makdisi, there are at least three specific questions that need to be answered in order to verify whether the sub-tort of intrusion could be applied to protect genetic identity: a) can genetic information be qualified as strictly personal information, and be protected under the assumptions of tort by *intrusion*; b) whether this constitutes a tort when it pertains to genetic information obtained from biological samples initially collected in a "public place;" c) if the extraction of genetic DNA information from biological tissues would be deemed as being highly offensive by a reasonable person.[33]

Genetic information resides within tangible materials, ones that can be seen, touched, and collected, and performing any of these actions does not necessarily mean committing a tort of *intrusion*. Genetic material exposed to public view does not reveal any information by itself. It can yield genetic information only after being subjected to close-up examinations, such as being viewed under a microscope for example, or via a genetic test. There is no doubt, in answer to the first question, that genetic data is strictly tied to someone's identity, and that acquiring all of the genetic information is essential in discovering the identity of an individual. There is no doubt, in answer to the second question, that the act of collecting genetic information does not *per se* constitute a tort of *intrusion*: if that were the case, professionals could be at fault each time they perform a genetic test. In this scenario, the genetic doctor's position is equivalent to that of the previously mentioned photographer's position. The doctor could be held liable of committing an act of *intrusion* only if he takes advantage of the involuntary vulnerability of the test subject and, without the informed consent thereof, breaches the sphere of *privacy* of an individual.

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33. *Id.* at 1024.

The *Restatement Second of the Law of Torts* suggests that illicit *intrusions* should be considered as being those that are deemed to be offensive by the victim, and those the extent of which is objectively disproportionate compared to the interests of the aggressor. Generally, the diffusion of genetic information could subjectively be considered as being both offensive and unreasonable. Let's consider the case of a genetic test that reveals a predisposition to pedophilia. Even a test that is the most accurate from a scientific standpoint can not reliably predict the future development, or on the contrary, the regression of the hereditary genetic traits of a person. In the same manner, no one can be sure that a person predisposed to develop great musculature will actually become an athlete.

In view of this premise, it then becomes clear that individuals should have the right to choose if they wish to reveal or not to others genetic information that by its nature could compromise their personal dignity. Some could argue that a genetic test showing a predisposition to rise early in the morning or retire late contains no information that warrants legal protection. What would happen if those genetic traits were later found to be connected to other chromosomes, and thereby yield a store of genetic information that current science is unable to predict? How could we deny responsibility for that *intrusion* when genetic information, once disclosed, cannot be retracted?

These questions are only indicative of the overall complexity of the topic, and, in answer to the third question, lead us to conclude that the legalities of disclosing genetic information should be established on a case by case basis. It is certain that we should consider that: a) the extraction of genetic information from someone else's tissue without their prior consent is illegal; b) the potential for *intrusion* should be assessed not at the time of collection of the sample, but when said sample is used; c) the *intrusion* may be justified in some cases due to extraordinary circumstances, such as the need to obtain relevant genetic information to prove that certain events took place and provide equitable evidence for a legal case; and d) when a person is subjected to any kind of justified genetic *privacy* intrusion, he should always be notified of it (a sub case of c).

E. The Limits of Privacy Protection

This panorama is completed by the assessment of the perplexities and limits surrounding the generalized application of the privacy doctrine for the purpose of protecting genetic identity. First of all, we should mention the concerns expressed by several worldwide medical associations regarding the establishment of generic genetic privacy regulations. In their opinion, these would protect the patient but would also represent a major obstacle for medical research.

From the same environment arises a somewhat myopic view, one that would, on one hand emphasize some sort of genetic existentialism, while on the other hand it proposes equal treatment of genetic data, with no distinction between data worthy of legal protection and data that is not. Specifically, as far as the insurance and employment worlds are concerned, it would be useful to identify and limit the scope of information employers and insurance providers may legally obtain.

It is true that by acquiring genetic information about their respective insured persons and workers these entities would be able to attain various types of cost reductions, and better plan their activities. This notwithstanding, it is also true that said access could constitute a violation of the privacy of those same individuals.

PART II
SEARCHING FOR OTHER DOCTRINES

Much of the doctrine and the jurisprudence of the US maintains that an adequate form of protection for an individual's genetic information can be found in the methods used to regulate other types of medical information, which mandate that no data may be collected or disseminated without the informed prior consent of the subject it pertains to.[34] In this fashion, genetic information would

34. For a synthesis of said trends, *see* for example, Henry Miller III, *DNA Blueprints, Personhood and Genetic Privacy*, 8 HEALTH MATRIX 179 (1998), that resorts to philosophical discourses to prove that the identity and individuality of a person do not coincide with the store of genetic information contained in DNA. According to this train of thought therefore, this data would only have mere medical value and should be regulated accordingly. Said trend is in opposition with that of the so called *genetic exceptionalism*, according to

be protected as well as medical data *tout court*, and would fall under the owner's privacy rights, meaning that the owner would have the right to control the management and diffusion of said information,[35] in accordance with the traditional concept of the right to privacy formulated by Warren and Brandeis.[36]

This legislative option however has proven itself to be an inadequate solution to the delicate issue of effective protection of genetic information. This is due to the peculiarities that connote this type of information and the values inherent thereto (e.g., the identity of the person, protection of individual dignity, etc.). The inadequacy of privacy protection is especially evident in view of three specific issues: (a) the collection and storage of DNA samples from innocent people; (b) the collection and storage of what is commonly known as "abandoned DNA"; and, (c) the issue of the "biologic group."

A. Collection and Storage of DNA Samples from Innocent Individuals

Scientific progress has not only made it possible to gather "physical" samples of DNA, but it has also given us the ability to create, using specialized programs, a series of DNA profiles that can be stored in specialized data banks.[37] While the usefulness of this data is unquestionable, especially for investigative purposes, some of the techniques used by public authorities have created

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which genetic information constitutes a *unicum*, and as such should be subject to *ad hoc* discipline. *See* on the subject: Deborah L. McLochlin, *Whose genetic information is it anyway? A Legal Analysis of the Effects that Mapping the Human Genome Will Have on Privacy Rights and Genetic Discrimination*, 19 J. MARSHALL J. COMPUTER & INFO L. 609 (2001).

35. *See,* for example, Sonia M. Suter, *Disentangling Privacy from Property: Toward a Deeper Understanding of Genetic Privacy*, 72 GEO. WASH. L. REV. 737 (2004); R.A. Curley & L.M. Caperna, *The Brave New World Is Here: Privacy Issues and the Human Genome*, 70 DEF. COUNS, J. 22 (2003). Within the case law, for example, Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 616 (1989); and, lastly United States v. Kinkade, 379 F.3d 813 (9th Cir. 2004).

36. Warren & Brandeis, *supra* note 24, at 193.

37. *See,* for example, Michael J. Malinowski, *Taking Genomics to the Biobank: Access to Human Biological Samples and Medical Information*, 66 LA. L. REV. 43 (2005) (focusing on the legal implications of storing human biological material in biobanks).

many doubts regarding the constitutional legitimacy of mass gathering and storing data and information of such a delicate nature.

Some of these activities are in fact conducted by means of a technique named *dragnet* (which, figuratively speaking, means "trawling"). When performed on a large scale for investigative purposes, it gives the authorities the ability to gather, analyze and archive genetic information on a multitude of individuals, the majority of whom have no penal record, or have never been connected to any potential criminal activity.[38] Consequently, once the investigative purpose has been concluded, and the criminal identified, the authorities find themselves in possession of vast amounts of sensitive information that, aside from its former investigative value, may be of interest to many other entities (such as insurance companies, administrative agencies, and employers).[39] Since current legislative measures and previous legal rulings do not seem to offer adequate protection in this context, there is a trend of thought that advocates addressing the issue by means of a paradigm similar to the one already instituted to protect privacy. Specifically, such a trend seems to favor granting to individuals that provide genetic information some type of actual ownership right, therefore affirming that they would hold the *proprietary rights* for the data.

Such an option would allow for the vigorous reaffirmation of constitutional guarantees of protection for the rights of individuals, the efficacy of which would actually be paralyzed if the norms that regulate privacy were to be used.[40] In order to better understand the juridical implications of this debate, we must closely examine the subject matter itself. As stated, the collection of DNA samples

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38. See *infra* note 47.

39. *See,* for example, the critical remarks of Michael J. Markett, *Note, Genetic Diaries: An Analysis of Privacy Protection in DNA Data Banks*, 30 SUFFOLK U. L. REV. 185 (1996).

40. Examples of the large portion of the doctrine that favors the institution of actual protection measures founded on the recognition of proprietary rights for genetic data versus personal rights, based on the privacy rights, are among others: Catherine M. Valerio Barrad, *Genetic Information and Property Theory*, 87 NW. U. L. REV. 1037 (1992); and recently, Leigh M. Harlan, *When Privacy Fails: Invoking a Property Paradigm to Mandate the Destruction of DNA Samples*, 54 DUKE L.J. 179, 187 (2004). There is no lack of decidedly antagonistic views, for example, Suter, *supra* note 35. The question will be specifically addressed in the paragraph that follows.

and the creation of an ensuing genetic profile have assumed a fundamental role in investigative environments. The process that leads to the identification and incrimination of the perpetrator of a crime is conducted in four steps:[41] the DNA must be collected from the scene of the crime, and analyzed;[42] the investigative authorities, on their part, must compile the profile of the potential crime perpetrator, and select the individuals from which DNA samples should be obtained; DNA samples are collected from selected individuals; and the samples so obtained must then be analyzed and transformed into an equivalent number of profiles to be compared with the profile obtained from the sample collected at the crime scene. After this process is concluded, and after all the investigative venues have been exhausted, the question of whether to store or destroy the collected samples arises.[43]

As can be noted, one of the crucial stages in this process involves the ability to obtain a series of DNA samples from members of a selected group and compare them with the sample collected from the crime scene. Another fundamental factor is the selection of the group of individuals from which to obtain DNA. Traditionally the authorities selected these individuals by availing themselves of various methods. First of all, legislation was instituted at state level to impose *ex lege* the collection of DNA from individuals known to have committed violent crimes. Recently, many states have expanded the parameters that apply to the collection of genetic material by passing *ad hoc* legislation. Some states actually also allow for collection of DNA samples of people convicted of non-violent murders, meaning lesser crimes. Other states provide for mandatory collection upon a simple arrest, prior to the actual determination of the individual's guilt.[44]

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41. Paul E. Tracy & Vincent Morgan, *Big Brother and His Science Kit: DNA Databases for 21st Century Crime Control?* 90 J. CRIM. L. & CRIMINOLOGY 635 (2000).

42. The nature of DNA is such that there is a high level of probability of finding "genetic material" left by the person that committed the murder at the scene. Everyone knows that, in fact, DNA is found in the blood, skin cells, tissues, organs, muscles, brain cells, bones, hair, saliva, mucus, nails, urine and human sperm. *Id.*

43. *Id*.

44. For further details see SETH AXELRAD, SPECIAL REPORT: SURVEY OF STATE DNA DATABASE STATUTES (2005), that can be found on the following web address web: http://www.aslme.org/ (last visited November 6, 2008).

Lately, a forth technique of genetic material sampling has gained popularity. It is called *DNA dragnets*, meaning massive "trawling" of DNA samples from subjects that fall within a group that is deemed potentially relevant for the investigation. This selection criteria uses parameters so broad that the connection to the crime committed usually loses much of its significance.[45] The implementation of this technique has raised major concerns. While in the first three instances the collection and storage of the DNA samples appears to be constitutionally legitimate according to the *search and seizure clause* contained in the Fourth Amendment of the US Constitution,[46] there have been many questions raised regarding the constitutional legitimacy of DNA samples obtained using *dragnets.*[47]

Since, generally, the "trawling" occurs with the consent of the subjects, the constitutional rights of the Fourth Amendment can not be applied.[48] The voluntary basis of this consent however, appears to be rather weak, certainly not one that is strong enough to overcome the predicament of the above mentioned constitutional rights issue, considering that, if the individual refuses to give his DNA,[49] the authorities can obtain a court order that obligates said

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45. A paradoxical example, yet one that is apt to understand the import of the phenomena and the constitutional implications thereof, could be one where DNA dragnets are performed on all of male individuals of Caucasian ancestry that live in a State, for the purpose of looking for the perpetuator of a rape. *See* Fred W. Drobner, *DNA Dragnets: Constitutional Aspects of Mass DNA Identification Testing*, 28 CAP. U. L. REV. 479 (2000), according to whom *dragnets* are essentially "perquisitions with no mandates, mass conducted on multitudes of individuals, whose only tie to the crime is the authorities' suspicion that they belong to a class of subjects that could possibly have committed that crime".

46. See *infra* contained in the text.

47. *See,* for example, Roberto Iraola, *DNA Dragnets–A Constitutional Catch*, 54 DRAKE L. REV. 15 (2005).

48. Edward J. Imwinkelried & D.H. Kaye, *DNA Typing: Emerging or Neglected Issues*, 76 WASH. L. REV. 413 (2001).

49. It must be highlighted that such a collection of sampling, thanks to the scientific progress and to the circumstance that the DNA is present in many human tissues, is usually carried out by means of a wood stick with a cotton-made end which is simply rubbed inside the mouth of a person, in order to absorb the saliva. Therefore, the circumstance that the technique applied to collect such sampling is not intrusive at all, seems to have weakened the arguments of who used to deem such a method as a form of *physical intrusion*, with prejudice to the individual. *See,* for example, M.A. Rothstein & S.

person to undergo sampling, on the basis that he refused to cooperate with the investigation.[50] In this regard however, it may be best to make a distinction. The collection of biologic material is only the initial phase of the analysis process. Once the material has been obtained, it will have to be processed in order to extract its DNA profile.

The DNA sample thus obtained will then be transformed into a DNA profile (commonly compared to some type of digital print) and this profile will be used for investigative purposes.[51] The process of comparing genetic information obtained from the crime scene to that of the samples collected pertains exclusively to the DNA profile, and is totally independent from the storage of the organic material the sample was derived from (blood, saliva, hair, etc.). On the other hand, the fact that organic material containing an individual's DNA is accessible could allow someone to obtain highly sensitive genetic information concerning said individual, for purposes that are extraneous to actual investigative needs. For example, analysis of DNA samples could reveal personal information concerning predisposition to more than four thousand different illnesses and hereditary conditions; the propensity towards a certain sexual orientation, predisposition to become addicted to some narcotic drugs or other substances (for example, the tendency to become an alcoholic) and, according to some, any criminal tendencies.[52]

Vice versa, since a DNA profile really only consists of a sequence of numbers, it can only be used for identification purposes and is not apt as a mean by which to discover any relevant information concerning the peculiarities of each

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Carnahan, *Legal and Policy Issues in Expanding the Scope of Law Enforcement DNA Data Banks*, 67 BROOK. L. REV. 127 (2001).

50. *See* Drobner, *supra* note 45, at 508; and Imwinkelried & Kaye *supra* note 48, at 423-24.

51. On this and other aspects pertaining to the manipulation of DNA, *see* R.A. Nakashima, *DNA Evidence in Criminal Trias: A Defense's Attorney Primer*, 74 NEB. L. REV. 444, 447-50 (1995).

52. D.H. Kaye & Michael E. Smith, *DNA Identification Databases: Legality, Legitimacy, and the Case for Population-Wide Coverage*, 2003 WIS. L. REV. 413.

individual.[53] For this reason, the DNA profile can be intended as being an investigative tool.[54]

In this context, all fifty states have adopted laws that authorize the storage of DNA profiles of anyone that has been convicted of a crime in the appropriate data archives. To integrate the activities that occurred at the state level, in 1994 the US Congress issued the *DNA Identification Act,*[55] which authorizes the Federal Bureau of Investigation (FBI) to create a federal reference system that centralizes all of the DNA-profiles contained in the national archives. This activity led to the creation of the National DNA Index System, a national database that allows local authorities and administrative agencies to contribute DNA profiles in their possession. The system thus created allows administrative and state authorities to use and share data originated from the collective databases, and is known as the *Combined DNA Index System* (CODIS).[56]

As briefly mentioned, in the US the cause of major concern, and the object of the current debate, is the legitimacy of storing the organic material (the DNA profile) of an individual after the investigative requirements of identifying the perpetrator and obtaining a conviction have been satisfied. It is notable that, while one side asserts that it is legal to preserve the DNA profile of a person who has been convicted of a crime, and the other side states that there are still doubts regarding the legitimacy of also preserving organic materials taken from those subjects, or vice versa, almost everyone agrees that the overall issue of storing the

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53. *Id*.

54. In this regard, the American doctrine agrees that due to the regulation of "specification" (such a juridical concept can be compared to the Italian "*specificazione*" as a peculiar way to acquire property rights on a thing), the proprietor of the DNA-profile should be the investigative authorities. Recently, Harlan, *supra* note 40. In particular, an Italian scholar admits that there is the possibility that the norms on specifications may be applied to the subject of the legal relationship between the individual, the body and the parts of the body. See Gambaro, *infra* note 106, at 45. Otherwise, it could be argued that the rules concerning intellectual property and copyrights might be applied to such an issue.

55. 42 U.S.C. 14, 312 (2000).

56. Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083 (2002).

DNA samples of innocent people is a genuine "constitutional emergency."[57]

The debate is also fueled by the notable discrepancies that exist between the laws of different states. At least twenty-nine states have adopted legislative measures that expressly authorize preserving the DNA samples in debate.[58] In contrast, only five states expressly prohibit the preservation of samples once the DNA profile comparison has been completed,[59] while at least eleven states have yet to adopt any measures on the subject.[60] As previously highlighted, part of American doctrine is of the opinion that the issue should be re-conducted to the *right of privacy* and to the constitutional status that said principle accords.

B. The Limitations of the Privacy Doctrine and the Affirmation of the Proprietary Paradigm

In this regard, it should be noted that the most significant systemization of the American right of privacy is contained in the celebrated essay of Warren and Brandeis, followed by other doctrinal contributions of remarkable prestige, together with a series of jurisprudential precedents that acted upon those same lines.[61] As far as specific legislative measures, the Constitution

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57. *Id.* and Iraola, *supra* note 47.

58. Among these for example we can cite: Alabama, Connecticut, Idaho, Massachusetts, Oregon, South Carolina, and Washington State.

59. Alaska, California, Montana, New York, and Vermont.

60. For further details, *see* Jonathan Kimmelmann, *Risking Ethical Insolvency: A Survey of Trends in Criminal DNA Databanking*, 28 J.L. MED. & ETHICS 209 (2000).

61. Warren & Brandeis, *supra* note 24. Warren was a well known lawyer from Boston, while Brandeis eventually became a Judge of the US Supreme Court. In synthesis, within their publication–defined as "perhaps the most famous and certainly the most influential article of doctrine ever written" [LANDMARKS OF LAW, HIGHLIGHTS OF LEGAL OPINION 284 (Henson ed. 1960)], the authors tried to demonstrate that the *Common Law*, within a collection of old decisions, thanks to the recourse to different *doctrines*, had in the end recognized the existence of a general sphere of privacy rights, or of a right to privacy worthy of protecting. Among the decisions that were inspired by said premise we can recall specifically a verdict of the Supreme Court of the State of Georgia, that distinguished itself because of its strongly convincing opinion on behalf of such a theory: Pavesich v. New England Ins. Co., 122 Ga. 190, 50 S.E. 68 (1905). For an initial in depth elaboration of the rights of persons from the comparative point of view, *see* 2 KONRAD ZWEIGERT & HEIN KÖTZ,

does not acknowledge any type of privacy right in any of its articles, or in the Bill of Rights, the fulcrum of the fundamental rights granted to individuals.[62] Nonetheless, the route followed by the legal interpreters while striving to institute a constitutionally warranted privacy right involved their having to resort to the *substantive due process clause* of the Fifth Amendment of the Constitution, and the so called *theory of penumbra.* [63]

INTRODUZIONE AL DIRITTO COMPARATO (INTRODUCTION TO COMPARATIVE LAW) 396, 415 (E. Cigna trans., 1995).

62. The Bill of Rights was ratified in 1791 and it comprises the first ten Amendments of the American Constitution. Other Amendments were approved later: the last Amendment in particular (XXVII)–concerning retribution for the members of Congress–was approved in 1992. For further details on the history of the American Constitution, refer to WILLIAM BURNHAM, INTRODUCTION TO THE LAW AND THE LEGAL SYSTEM OF THE UNITED STATES ch. 7 (3rd ed, West Group 2002). In this regards, we remind you that originally the Bill of Rights was formulated as being applicable only to the Federal authorities. In the 1960', the Supreme Court began issuing a series of decisions, which ruled that the applicability of guarantees contained in the Fourteenth Amendment, issued in 1868, should be extended to include the activities of the individual States. *Id*.

63. According to the provisions of the Fifth Amendment a person shall not "be deprived of life, liberty, or property, without *due process* of law". Common agreement on this subject is that the Amendment includes two distinct notions of *due process*: the first–named *procedural due process*–would consist of the guarantee directly derived from text of the Amendment, the second–called *substantive due process*–would postulate the existence of specific personal rights, comprised in the notion of "*liberty.*" This is when, among others in the shadow of the right to freedom law, the existence of an actual right to privacy was acknowledged, its existence was vigorously sustained in two *leading cases* on the topic of birth control and abortion. In Griswold v. Connecticut, 381 U.S. 479 (1969) the Federal Supreme Court ruled that a State law prohibiting the use of all means of birth control was unconstitutional, based in fact on the right to privacy of individuals, which–the *majority of opinion* argued–was to be intended to be in "the shadow" of the guarantees expressly recognized by the Bill of Rights. This right therefore gave married couples the freedom to use means of birth control. Subsequently, in Roe v. Wade, 410 U.S. 113 (1973)–a case that directly involved the issue of abortion, the same Court's *majority opinion*, instead of referring to the *Bill of Rights uti universus*, substantiated the ruling by anchoring the foundations of the right to privacy to the *substantive due process clause* of the Fifth Amendment. In synthesis, the Court deemed that said right was also inclusive of the right to abortion; at the same time however, it recognized the existence of two conflicting interests equally worth protecting: the matter of the mother's health and the fostering of potential human life. In view of this, the gestation period was divided into three trimesters, each of them characterized by the prevalence of one of the above mentioned interests. The

Although the genesis of the right to privacy in the American legal system may lie, as noted, in the Fifth Amendment, at a constitutional level the source of the protection afforded under the right to privacy, as well as its applicable limitations, nonetheless lies in the *search and seizure clause* of the Fourth Amendment.[64] In fact, recent jurisprudence strengthened the connection between the right to privacy and the above Amendment to the point that it is now regarded as being the *core value* of this last.[65]

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right to privacy was also invoked to protect some of the aspects of family and marital life. Hence a zoning regulation was deemed to be unconstitutional, on the basis that it violated the right to privacy of the family, because it specified that housing in a certain area was to be used exclusively by families composed of parents and children, which implied that families whose composition extended to include other relatives such as grandparents, could not inhabit it. Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977). In contrast, it was ruled that the right to privacy does not extend to include acts of consensual sodomy performed by a homosexual couple within the privacy of their own home. Bowers v. Hardwick, 478 U.S. 186 (1986): at this junction, the subject to be examined by a Court was a law from the State of Georgia that prohibited the performance of those acts. That law was subsequently declared to be unconstitutional by the Supreme Court of that State, because it was deemed to be contrary to the dispositions of the State constitution. Powell v. State, 510 S.E. 2d 18 (Ga. 1999). Finally, in the case of Cruzan v. Director, Missouri Dept. Of Health 497 U.S. 261 (1990), it was argued that the right to privacy encompassed also a "right to die:" Nancy Cruzan was an irreversible coma patient. Her parents sought to remove of the tube that provided her with artificial nutrition, so that she may be allowed to die a natural death. The Supreme Court ruled that artificial nutrition is a medical treatment method, and as such can be discontinued to satisfy an person's wish to die with dignity. In this case, however, the law of the State of Missouri–that imposed a very high probationary standard on the interruption of medical treatment–was not deemed to be unconstitutional in recognition of the fact that it ensued from the State's strong intent to preserve human life. In 1997 the question of "the right to die" was revisited, and this time said right morphed into the "right to assisted death." Washington v. Glucksberg, 521 U.S. 702 (1997).

64. The Fourth Amendment of the US Constitution prescribes:

> . . . the right of the people to be secure in their persons, house, papers, and effects, against unreasonable search and seizure, shall not be violated, and no Warrants shall be issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

65. For illustrative examples of these movements see Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1756 (1994).

The Fourth Amendment guarantees pertaining to the inviolability of a person, dwellings and personal property is not, however, absolute. Instead, as clearly enunciated in the written content of the clause,[66] it may be subjected to limitations, upon condition that these last are reasonable and within the scope of the formal requirements established therein. Therefore, for example, a house can only be searched after obtaining a warrant *ad hoc* from the appropriate authorities, etc.[67]

Besides reasons that meet the formal and substantive requirements to restrict the rights granted by the said Amendment, another factor that nullifies the inviolability of that right is the subject's consent. Obviously, consent must be freely given, and as such not granted under any form of coercion, or at least not given as a result of false statements made by public officials.[68]

Another element worth considering is the important question of what exactly is intended by the word *search*. In fact, whenever the actions undertaken do not constitute a "search" in the technical sense, the rights accorded by the Fourth Amendment cannot be enforced. Originally, the opinion was that matters of this kind

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66. *See supra* note 64.

67. Additionally, it was ruled that it is legal to conduct a search without a warrant, if extraordinary circumstances arise (for example, for an emergency situation of such nature that it was objectively impossible for the authorities to obtain a warrant in advance). *See* Illinois v. Mc Arthur, 531 U.S. 326 (2001). Another ruling exception that was peacefully accepted was the legitimate arrest of a citizen: in this junction, the public officials that perform the arrest have not only the right but the duty to conduct a search (for example, to verify that the subject is unarmed or to prevent him from destroying evidence, i.e. bags of drugs in the case of a drug dealer's arrest). *See* Chimel v. California, 395 U.S. 752 (1969). This right encompasses not only searching the arrested person, but also his/her house, car, etc.; United States v. Robinson, 414 U.S. 218 (1973); Maryland v. Buie, 494 U.S. 325 (1990).

68. In Bumper v. North Carolina, 391 U.S. 543 (1968) the officers in charge of the search told the homeowner–untruthfully–that they possessed a legal search warrant. The woman then gave them permission to come in. During the Court proceedings, when the defense lawyer objected to the lack of a warrant, and argued that the search was therefore illegal, the public prosecutor replied that the search was rendered legal by the explicit consent of the subject thereto. The US Supreme Court ruled that said consent was invalid because it was obtained under coercion, specifically "*by acquiescence to a claim of a lawful authority.*" In any case, it should be mentioned that public officials are not required to inform the subjects of their right to withhold consent. *See* Schneckloth v. Bustamonte, 412 U.S. 543 (1968).

could be settled only under the hypothesis of *physical intrusion into a constitutionally protected area.*[69] For example, in 1928 the US Supreme Court ruled that using a phone tap device to record a subject's incriminating phone conversations did not fall under the criteria of *search;* since a conversation *per se* can not be intended as being a tangible object, it could not be said that an actual form of physical *intrusion* onto a constitutionally protected area[70] had taken place.

The court abandoned this "tangible" criterion only in 1967, with the leading case *Katz v. United States,*[71] which also pertained to the issue of phone taps, and elaborated the criteria of *reasonable expectation of privacy*. Specifically, the ruling established that the act of placing an electronic device on an external wall of a public phone booth, for the purpose of intercepting telephone conversations, constituted an actual *search* and is subject to the mandates of the Fourth Amendment. The fact that it occurred in a public place was deemed to be irrelevant, based upon the fact that the provisions contained in the Fourth Amendment were formulated to protect the rights of individuals, and not of locations. What the provisions were meant to protect as "private" should have been respected whether the scene of the *intrusion* was considered public or not. Since Mr. Katz had a *reasonable expectation* that his phone conversations would remain private, the interception constituted an actual *search,* and, in order to perform said search, the investigators should have obtained an *ad hoc* warrant in advance.

As can be noted, the ruling marked the shift from an approach based on substance to a personalistic one. *A contrario*, meaning what individuals willingly disclose to the public, even while in their homes or in their offices, falls outside of the circle of protections granted by the Fourth Amendment.[72]

In spite of the revaluations caused by the *Katz* case, the court, in a subsequent case, pronounced a ruling based on the tangible *physical intrusion* criteria, reintroducing the *open fields doctrine*,

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69. Boyd v. United States, 116 U.S. 616 (1886).
70. Olmstead v. United States, 277 U.S. 438 (1928).
71. Katz v. United States, 389 U.S. 347 (1967).
72. *Id*.

which had been seemingly overruled.[73] The expression *open field* is intended to describe the stretch of terrain that is on the outside of the *curtilage* of a dwelling. Specifically, this includes the plot of land on top of which a dwelling was built, and it includes all the facilities it may contain (such as garages, verandas, access paths, lawns, flower beds, etc.).[74] The principle affirmed by the court was that the *open field* could not guarantee the privacy of those activities that the Fourth Amendment meant to protect from interference and surveillance conducted by public authorities.[75]

The *rational parameters* of said movement were for the most part founded on the consideration that, although in theory the legitimacy of those intrusions is questionable, in reality the associated entities generally tend to make allowances in these areas. One last hypothesis deserves to be considered: that of trash. According to the court, trash is not protected by the Fourth Amendment, because "plastic bags of refuse, left on or along public roads, can be easily accessed by animals, children, refuse collectors, the curious and anyone else." Because of this, "the owners cannot claim to hold a subjective *expectation of privacy*, that society can accept as being objectively reasonable,"[76] with this recalling the arguments *a contrario* deducible by the *Katz*[77] case.

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73. Oliver v. United States, 466 U.S. 170 (1984). The so called "*open field doctrine"* was mentioned for the first time in Hester v. United States, 265 U.S. 57 (1924).

74. In the case of a country home, *curtilage* indicates the area of ground that surrounds a dwelling, but it does not pertain to the whole parcel of land. *See* MERRIAM WEBSTER'S: VOCABULARY OF ENGLISH (last ed.).

75. Therefore the actions of the police, which consisted of walking around the lot and discovering the existence of marijuana plants via a gap in the fence at the back of the property, did not constitute a search, and as such did not require a warrant, regardless of the fact that said plants were not visible from the road in front of the house. Along the same parameters, United States v. Dunn, 480 U.S. 294 (1987).

76. California v. Grenwood, 486 U.S. 35 (1988): in the case *de quo*, the police, who suspected the homeowner was selling narcotics, checked the garbage left just outside of the *curtilage* of a dwelling. The Court ruled this action did not constitute a search in the technical sense, and as such did not necessitate a warrant. The accent was posed particularly on the fact that the rubbish was left in a public area for the deliberate purpose of consigning it to a third party–in charge of the collection–who would have been able to go through the garbage himself, or allow someone else to do so i.e. the police.

77. Katz v. United States, 389 U.S. 347 (1967) and the corresponding text.

The court's decision constitutes a specific application of the *open fields doctrine*. The motive for the verdict, however, postulates the recall of a distinct juridical institution: property rights.[78] In synthesis, according to the court, abandoning goods outside of one's own sphere of jurisdiction (limited to the area that can be qualified as being c*urtilage*) suggests that someone is willingly renouncing their rights thereto, and *a fortiori*, the right to exercise any form of control over these goods which, therefore, acquire the status of *res derelictae.*[79]

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78. On this subject, we must keep in mind the *caveat* mentioned by A. Gambaro in regards to the ambiguity of the term "property" and the risks that would be encountered while doing a comparative investigation whereas the term "property" was to be translated into the Italian term *proprietà*; this would lead to the suppression of precious juridical situations connected to said term both within the Common law itself and along the lines of the less prominent category of "*diritti reali*" (i.e. rights on a thing) of the Italian legal system. ALBINA. CANDIAN, ANTONIO GAMBARO, & BARBARA POZZO, PROPERTY, PROPRIÉTÉ, EIGENTUM, 3 (1992). The same author also highlights the possible connotations of the juridical language, as pertaining to property, also as viewed from within the same legal system (from example, in American Law, the concept of "property" and the reference sources vary between the ones obtained from approaching the issue of rights protection from a Constitutional standpoint against the inhibiting actions of the public authorities or whether the subject is approached in order to discuss the issues concerning the transfer of titled property rights). In view of these considerations, the same author proposes to "refer to the central nucleus of the ownership issue, considering the different disciplines as being the blade-like solutions that originate from an individual key issue, or rather, establish which subject has the most potential to be useful, be enjoyed and is flexible enough to allow for the expansion or disposal of objects in our collection that can directly satisfy life's needs." As a result of this approach, the proprietary discipline would then be "assumed independently of the categories it derived from, meaning the group of regulations that dictate what the subjects that are authorized to act in regards to an item and, on the contrary, determine everything that the other subjects should do, not do or tolerate in regards to that same item." *Id.*, *Proprietà in diritto comparato (Property in Comparative Law), in* XV DIGESTO DISC. PRIV. 504-506 (1997). For an analysis of the challenges inherent to juridical translation, as well as the various options available to those who wish to study a foreign legal system, refer also to the brilliant suggestions of Rodolfo Sacco, *Traduzione giuridica*, DIGESTO DISC. PRIV., Aggiornamento 722 (2000); and to those of OLIVIER MORÉTEAU, DROIT ANGLAIS DES AFFAIRES (Précis Dalloz 2000), whose analysis focused mainly on the language issues within business relationships. Accordingly, during the present analysis, references made to the property paradigm shall be viewed from the standpoint of the preceding observations.

79. In a previous verdict, the Court's ruling was based upon *bona vacantia*, deeming that the conduct of police officers, who looked through the trash of a

Although it may appear to have been initially neglected, the paradigm of ownership started to resurface with all of its might in the debate pertaining to the fundamental rights of the individual and their limits of applicability. What we wish to highlight is the fact that, although rights such as privacy and ownership are connected, they are addressed autonomously and separately, with different regulatory legislation. Having concluded the detailed examination of *privacy doctrine's* jurisprudential evolution, we can now address the constitutional implications that pertain to the collection and storage of DNA samples. Specifically, we will try to verify if applying the regulations of the privacy protection laws to the delicate matter of genetic information is the best and most efficient option by which to direct them, or if, as the doctrine already proffered, it may be preferable to grant each individual ownership rights over this information, rights that would be constitutionally guaranteed and protected with *ad hoc* measures.

We must premise the discussion of this subject with an important distinction. As previously stated, whenever a sample of DNA belonging to an individual that has been convicted of a crime is collected or stored, these activities appear to be constitutionally legitimate, since they are conducted in accordance with the formal and procedural guarantees prescribed by the Fourth Amendment (noting that the constitutional legitimacy of State regulations has never been questioned). As far as what pertains more specifically to the *dragnets* phenomena, the constitutional legitimacy of that practice is guaranteed by the subject's consent, who voluntarily decides to authorize collection of a sample of their DNA under conditions, of course, that do not involve any form of coercion or false statements on the investigative authorities' part.[80] In this regard, it seems appropriate to recall that in the context of the practice of *dragnets*, the consensual element tends to lose its efficacy due to the fact that if when confronted with the rightful refusal of the subject, the appropriate authorities can be petitioned to issue an order that effectively coerces that person into agreeing

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hotel room to verify if the suspect was indeed using narcotics, did not constitute a "*search,*" but in fact, the trash was an example of *bona vacantia*.

80. On the topic *see supra* the opinions listed in *supra* note 34, and the corresponding text.

to the DNA sample[81] collection. In both instances–voluntary and coerced consent–the limitations imposed by the Fourth Amendment are inapplicable, and as a consequence, the privacy rights are nullified.[82] Consequently, the genetic material acquired by means of *dragnets* is no longer covered by the constitutional privacy right.[83] The above conclusion is vulnerable to critique when it fails to consider that the issue being examined, as previously indicated, involves two distinct events: the collection of genetic material, and, once the investigative needs are exhausted, its subsequent storage. There is no doubt that both voluntary and mandated consent, in the instance of biological material collection (and the processing needed to extract a DNA profile),[84] result in the invalidation of the subject's privacy rights. Conversely, it is highly debatable that the effects of the consent or injunction can also be considered an implicit authorization for the final–ulterior and distinct–purpose of storing the genetic material for an indefinite amount of time, and, for example, consent to its being potentially used in an investigation connected to a different crime. The consent to the subsequent storage of the sample could be documented, meaning it could be specifically addressed within the above named official mandates. In that case however, the validity of the consent may become an issue. It seems unlikely that the subjects consenting to the indefinite storage of their DNA sample can be considered as having done so while duly informed, since future scientific advances could render DNA samples able to fulfill purposes that were inconceivable at the time said consent was given. On the other hand, as far as the court injunction is concerned, the constitutional legitimacy of the provision could be

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81. *See supra* note 50, and the corresponding text.

82. According to the teachings of Warren & Brandeis, *supra* note 24, at 218, "the right to privacy is extinguished by the effects of divulging the information pertaining to the individual, or by the consent of this last."

83. About this see the concerns mentioned by Iraola, *supra* note 47.

84. We must also consider the fact that, while a DNA profile is rendered by a sequence of numbers, only apt to serve as identification for investigative means, genetic information obtainable through biologic materials is highly sensitive by nature and can be used for a multitude of purposes. In this regard, see the n. 18-23 and their corresponding text and, in particular, Michael J. Malinowski & Radhika Rao, *Legal Limitations of Genetic Research and the Commercialization of Its Results*, 54 AM. J. COMP. LAW 45 (2006) (analyzing the economic and financial implications of the developments occurred within the biopharmaceutical and biotechnological field).

contested on the basis of the alleged public *reasonableness* thereof, as referenced in the Fourth Amendment.[85]

Aside from the above observations, we must keep in mind that these legal situations are totally independent and distinct from the initial collection and the analysis of genetic data. This necessitates conducting two separate assessments of the factors that nullify the constitutional provisions of the Fourth Amendment. Waiving the privacy rights concerning the collection of the DNA sample does not involve, *ipso iure,* the willingness to forego privacy rights concerning the subsequent storage thereof.[86]

This specific issue, for example, has been expressly addressed in The Netherlands, where there has been a debate concerning the legal status of the human biological material as a consequence of the fact that, due to recent developments in genetics, the preservation of DNA samples in specific data banks has become customary. In this regard, in spite of the fact that the issue seems to have been addressed from the privacy right perspective, the property and privacy paradigms appear to be strictly intertwined. In particular, the debate focused on the status of human biological material stored in those data banks is unclear and implies the risk of violating the donor's rights. Accordingly, the enactment of regulations has been strongly recommended to clarify the purpose of the cell bank, the time period for which the material may be kept, and the possible uses of the material.[87] In this regard, it has been suggested to strengthen the consent argument by imposing upon keepers of DNA samples the duty to require *ad hoc* and time by time informed consent from the owners of such material, not only for present applications but also for future ones. In addition, the individual to whom the DNA sample pertains to should be entitled to request full information about the use and the status of his/her DNA sample and even to exercise the right to have that sample destroyed.[88] Those last remarks show how the property paradigm plays an important role in spite of an approach which at

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85. Ref. Ken M. Gatter, *Genetic Information and the Importance of Context: Implications for the Social Meaning of Genetic Information and Individual Identity*, 47 S. LOUIS U. L.J. 423, 445-446 (2003).

86. On the topic see Harlan, *supra* note 40, at 192.

87. *See* in particular Joke I. De Witte & Jos V.M. Welie, *The status of genetic material and genetic information in The Netherlands*, 45 SOC. SCI. MED. 1 (1997).

88. *Id.* at 47.

first sight is oriented in favor of the privacy doctrine. In fact, it has been held by part of the doctrine that keepers of the DNA data banks should be deemed as being in the same position as that of the owner of a storage facility, who, after all, does not own what is stored. On the contrary, the individual to whom the DNA sample belongs would retain the ownership of that sample.[89]

In view of the observations made so far, we could deduce that, as long as great care is taken to respect the sensitivity of the subject matter, the right to privacy laws could be employed to adequately protect the genetic information of an individual. As premised, this is the direction taken by the currently prevailing doctrine,[90] and has seemingly been endorsed by the legislative bodies as well.[91]

This being said, other scholars consider this legislative approach to be totally inadequate due to the intrinsic limits of privacy protection laws, and in view of the unique traits of genetic information itself. Specifically, arguments proffered by the supporters of said orientation (which is certainly not a minority trend) are founded on the following observations:

(i) The obsolete nature of the *reasonable expectation of privacy* criteria. According to the prevailing judicial interpretation of this formula, in order to maintain said *expectation*, an individual should not sign checks (since they are legal instruments destined to be circulated), nor should that person conduct telephone conversations or walk around his neighborhood. Further, once home, this individual should take care to shutter all windows, to eliminate each and every fissure, and speak softly while conversing;[92]

(ii) The tendency to accord public opinion an important role in the judgment of the bearing of opposite interests, with the

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89. *Id.* at 46-48.

90. Compare with n. 1 and 2 and the corresponding text.

91. These anchor the protection of genetic information to the *privacy doctrine*, for example: the *Health Insurance Portability and Accountability Act (HIPAA)* of 1996 (Pub. L. no. 104-191, 110 Stat. 1936, 42 & 29 U.S.C.); and the *Standards for Privacy of Individual Identifiable Health Information*, issued by the U.S. *Department of Health and Human Services* in 2000 (65 Fed. Reg. 82, 461; 45 C.F.R., pts. 160 & 164).

92. Specifically, Sundby, *supra* note 65, at 1789-1790.

subsequent, progressive weakening of the inviolable nature of the right being examined.[93]

Specifically in regards to genetic information, the inadequacy of the prevailing privacy protection laws are fully revealed once the information is "unveiled." For example, we may think about an instance where a doctor analyses a DNA sample to determine if the patient is predisposed to develop a certain ailment. In the American legal system, the doctor-patient relationship is among those classified as being *confidential relationships,* meaning a type of legal relationship whose connotations have a very strong fiduciary element, and is intrinsically *intuitu personae* by nature.[94] This dictates that the doctor, as recipient of the patient's trust, is bound to abide to a series of specific obligations in addition to those traditionally attributed to a standard contractual relationship. Chief among said obligations–at least for the purposes of this work–is to maintain the confidentiality of any information acquired.[95]

What is most dreaded by the *privacy doctrine* critics is the risk that DNA samples taken for medical reasons, and their pertaining genetic information, may be subsequently passed on to official authorities and then be used for investigative purposes. The protection offered by the prescription that prevents disclosure of that information is not, in fact, absolute. The acts of acquiring and using highly confidential information do not constitute, according to a US Supreme Court ruling, a violation of the constitutional rights granted to an individual. This was observed in a 1976 ruling that stated:

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93. *Id.*

94. A *confidential relationship* involves parties in different contractual positions: from within said special relationship. The individual that assumes a so called *dependent* role must be identified; this would be the person who legally confides in the counterpart, who is defined in turn as being the dominant party, and consequently trusts in the judgment of this last, believing that this individual will act in the best interest of the first party. J.D. CALAMARI & J.M. PERILLO, CONTRACTS 353 § 9-10 (Thomson-West ed., 5th ed. 2003); W. PAGE KEETON ET AL., PROSSER AND KEATON ON THE LAW OF TORTS 738 § 106 (5th ed, 1984).

95. For a specific application of the discipline being examined in regards to genetic information, see the latest work by Susan M. Denbo, *What Your Genes Know Affects Them: Should Patient Confidentiality Prevent Disclosure of Genetic Test Results to a Patient's Biological Relatives?*, 43 AM. BUS. L.J. 561 (2006).

> This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed[96]

In this regard, it should be noted that the appointed courts applied this principle specifically to the collection of biologic material samples, deeming that the actions of health institutions, who forwarded samples of genetic material–collected for medical reasons, with the legal consent of the subject–to investigative authorities, did not constitute a violation of the constitutionally protected *expectation of privacy.*[97]

Lastly, there is another argument that exposes the inadequacy of using privacy rights legislation as an instrument by which to protect genetic information. As briefly suggested previously,[98] DNA resides in many types of human tissue, easily acquired even in public places (let's consider the examples of hair or saliva left on a cup at a coffee shop). The "public" nature of DNA effectively weakens the expectation of an individual who believes he/she is the only one that has access to, or can determine the use of, said information. Therefore, the peculiar nature of DNA effectively lowers the level of what can be perceived as a *reasonable expectation of privacy*. The complexities pertaining to the issue at hand become truly evident when applied to the case of "abandoned DNA," the principal topic of discussion in the section that follows.

Due to the asserted inadequacy of the regulating genetic information by means of the *privacy doctrine*, a new direction, previously outlined, has appeared on the horizon of American

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96. United States v. Miller, 425 U.S. 435 (1976).

97. For example, People v. Perlos, 462 N.W. 2d 310, 324 (Mich. 1990). These trends seem to infringe upon the validity of the theory sustained by the doctrine, according to which, in order to guarantee the efficacious protection of the individual genetic privacy, we must emphasize the confidential nature of that information and the importance of the element of trust in the relationship between the owner of the information and the recipient thereof, instead of resorting to a property right based paradigm. Suter, *supra* note 35, fully agrees with this opinion.

98. *See supra* note 42.

legislation. This favors endowing an individual with actual property rights over his genetic information. This option, it is said, would be more effective in protecting the individual from illicit intrusions upon his sphere of intimate genetic information and, on the other hand, would also serve to duly recognize the peculiar nature of this information, and the values that pertain thereto (i.e., the identity of individuals, protection of the dignity of individuals, etc.)[99] The option in favor of the proprietary paradigm would therefore be better because it would:

(i) Guarantee an *ad hoc* process for all of the possible juridical scenarios that may arise in regards to this subject. Different from the right to privacy, which seems to have been modeled along rigid criteria and are reconducible to the double binomials of "confidentiality of information-privacy" and "disclosure of information-decrease of privacy," the paradigm of property rights–especially as denoted by Hohfeld's definition on the merit of which is it has been greeted–seems to hold greater flexibility and malleability.[100] The right in question is composed of a number of authorities and powers, which can be restricted or limited without abrogating the right itself. A specific application of such a theory is, in fact, the so called "resilience of property rights," which imports that the scope of a right can be restricted,

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99. *See* the observations made in Section 3, which follows.

100. Wesley Newcomb Hohfeld was the author of two influential articles published in the *Yale Law Journal*, in which he identified and divided the fundamental concepts used to describe legal relationships among parties, taking care to also express the pertaining concepts in precise and rigorous terms (Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Legal Reasoning (I)*, 23 YALE L.J. 16 (1913); and *Id.*, *Fundamental Legal Conceptions as Applied in Legal Reasoning (II)*, 26 YALE L.J. 710 (1916)). The American Law Institute adopted the orientation of Hohfeld as paradigm upon which to structure the establishment of the Restatement of Property. The fulcrum of that structure is truly the adoption of a concept of property as understood in comparative terms regarding relationships, among which the notions of "right," "privilege," "power" and "indemnification" are weighed against just as many opposite concepts. The eventual limitations imposed upon one or more of these relationships would not invalidate the object right. Recently within the doctrine it was stated that "it is truly the metaphor of property as a range of rights constitutes a more appropriate description of the way by which the majority of these new acknowledged forms of property operate." *See* Recent Cases, *infra* note 134. For further elaborations on this point, *see* Barrad, *supra* note 40, at 1054; and Patty Gerstenblith, *Identity and Cultural Property: The Protection of Cultural Property in the United States*, 75 B.U. L. REV. 559 (1995).

then extended back to its original form without impediments (as well as it happens in the Italian legal system about the so called *elasticità del dominio* principle, according to which the right of property significantly restricted by the concurrence on the same *res* of another right, as for example the right of usufruct, can be nevertheless expanded again when the latter has expired);[101]

(ii) Give the person who owns the rights instruments of authority more efficient than those offered by privacy protection laws. In this case for example, it would allow the titled owner of the biological material, and genetic information, the right to regain possession of the sample after the investigative needs have been met. Conversely, the protection offered by the right to privacy legislation only extends to prescribing compensatory damages for violations, and as such is inadequate to effectively protect the individual after that right has been violated; [102]

(iii) Offer constitutional guarantees for this right, and specifically those granted by the Fifth Amendment. As previously stated, the subject's consent, the actions of the pertaining authorities, or the inability to adjust the threshold of a *reasonable expectation of privacy,* cause the diminishment–if not the obliteration–of the individual right to privacy. As a result, the Fourth amendment provisions would not apply. Vice versa, granting property rights over the "assets" in question would ensure the ability to enforce the provisions contained in the Fifth Amendment. Said Amendment provides that citizens cannot be deprived of their property rights without *due process of law*, and it also mandates that property cannot be seized for public use without duly indemnifying the owner. For DNA *dragnets*, the principles of *due process of law* and public use could be applied, while the requisite of due indemnification would not be satisfied, as it would be constitutionally illegal for the authorities to store DNA.[103]

The question, as previously outlined, is in any case controversial, and there is no lack of arguments supporting the opposite theory.[104] These last can be summarized by a single

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101. *Id.*
102. Harlan, *supra* note 40, at 215.
103. *Id.*
104. In this regard, see notes 34-35 and the corresponding text.

theme: the fear of commercializing the human body,[105] which is founded on the notions of alienability and the freedom to dispose of goods, intrinsic to property laws.[106] This worry may be calmed by the jurisprudential precedent established by the ruling in *Moore v. Regents of the University of California*[107] case. The Supreme Court of California rejected *inter alia* the plaintiff's suit. The claimant was a patient whose cells had been processed in order to obtain "cell line" that could be patented and become object of numerous lucrative commercial agreements. The plaintiff sought restitution of the cells, or at least recognition of his ownership and therefore his entitlement to reap the financial benefits derived from the commercialization of said "asset." The court, specifically, based its decision on the lack of jurisprudential precedents to legitimize that an individual holds a *property interest* right over parts or materials that have been detached from his body.[108] In the

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105. On the latest, for example, *see* Radhika Rao, *A Veil of Genetic Ignorance? Protecting Genetic Privacy to Ensure Equality*, 51 VILL. L. REV. 827 (2006), that presents a stimulating proposal: to wrap the "veil of genetic ignorance" around every individual, to insure that people are equally treated, and by this prevent any possible form of discrimination.

106. Within the Italian doctrine, the theme of adequacy of the proprietary paradigm, in regards to the body and its parts, has been specifically addressed by Antonio Gambaro, who offered a critical assessment of the traditional arguments sustaining the intangibility of the human body. Antonio Gambaro, *Tessuti biologici e parti del corpo*, *in* LA PROPRIETÀ, TRATTATO DI DIRITTO PRIVATO 39 (Giovanni Iudica & Paolo Zatti dir., 1990).

107. 249 Cal. Reporter. 494 (CA. COA 1988); aff'd in part, rev. in part, 793 P.2d 479 (Cal. 1990); cert. denied, 111 S. Ct. 1388 (1991). The Italian translation of the California Court of Appeals sentence is available in *Foro it.*, 1989, IV, 417, with notes by M. Paganelli, *Alla volta di Frankestein: bioteconologie e proprietà (di parti) del corpo umano,* as well as the RIVISTA CRITICA DEL DIRITTO PRIVATO 443 (1989), with notes by B. Edelman, *Discutendo il caso Moore*, ivi, 469.

108. Truthfully, there was a precedent: the case Venner v. State, 354 A.2d 483 (Md. Ct. Spec. App. 1976), judged in Maryland, in which the actual question of whether a subject can retain *property rights* over biological material detached from the body was addressed. It was concluded that an instance wherein an individual claims ownership and authority rights over property such as bodily secretions, nails, hair, blood, escrements, organs or other parts of the body was not unheard of. The California Court of Appeals in fact referenced that same case to support its opinion which states that the relationship between and individual and his bodily parts should be included in the category of *property rights* (although in the Moore case said right was not deemed sustainable). The *Venner* case was used as a *distinguishing* by the Supreme

opinion of the court, this right had been precluded by a number of factors that sustained the opposite theory.[109] To this effect, it should be noted that American jurisprudence cannot be said to be unified in its support of this decision. The same majority opinion has been countered by vigorous dissenting opinions in favor of acknowledging *property interest* rights for materials detached from someone's body.[110]

In view of the observations made so far, in synthesis, it becomes noticeable that the primary question posed by the genetic information debate concerns the new era of genetic analysis and the morphed concept of identity. How should we interpret the relationships that exist between ourselves, our bodies, and our identity, now that just about every "particle" of our body can fully reveal our genetic information? The true magnitude of this question was revealed by "abandoned DNA."

C. The Controversial Case of "Abandoned DNA"

First of all, we must define abandoned DNA. This type of DNA is defined as being any human tissue sample from which genetic information can be extracted; material that has become separated from a body for reasons other than the conscious consent

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Court of California when it was called to render a verdict in the final instance of the Moore proceedings. Specifically the Court ruled that, since the *Venner* case involved a penal procedural issue and not a civil controversy aimed to establish "which party was entitled to reap a financial benefit derived from the ownership of an asset," as in the proceeding *de quo*, that same would not have been applicable to the situation at hand (793 P.2d 489, note 28).

109. The California Supreme Court decision seems to have been drawn on concerns on political and social nature rather than actual juridical technicalities: in fact, one of the most important reasons for the denial of the plaintiff's claim of *property right* over materials detached from his body, was the concern that if the right was acknowledged (and the compensation granted) it cold potentially inhibit scientific research and experimental activities, with great consequences for the community. Moore v. Regents of the University of California, 793 P.2d 489.

110. *Id*. Those who support applying the property right paradigm to genetic information do not view said instance as an insurmountable obstacle for their solution and propose that the *distinguishing* criteria should also be applied to the case at hand. From the latest by Harlan, *supra* note 40, at 202-207.

of the subject, or subsequent to an official authority's injunction order.[111]

As previously noted,[112] since DNA resides in many types of human tissue, the fact that a person may leave traces of genetically relevant material in his/her path is an ordinary event. Routine examples of this phenomenon are the traces of saliva left on coffee cups, cigarette filters, drops of blood from an accidental cut, hair, and even nail trimmings. In this regard, we must remember that even a very small part of human tissue can be enough for testing purposes, since this type of analysis does not require significant amounts of material. On the other hand, as previously noted,[113] thanks to scientific advances, the ability to collect and examine genetically relevant material from the scene of a crime has proven to be an extremely useful and effective investigative tool.

Notwithstanding the undisputable usefulness of these activities, the major cause of concern in the American environment (and others) is the now widespread police practice of collecting and analyzing samples of abandoned DNA, which are used not only to investigate a current case, but also may be used in future or potential investigations.[114]

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111. Imwinkelried & Kaye, *supra* note 48.

112. *See supra* note 42, and the corresponding text.

113. In this regard, see the contents of Section 1.

114. The collection of abandoned DNA is a very useful method of investigation since the samples of human tissue are readily accessible and, since they can be taken without the subject's knowledge, this same cannot raise any question or objection in regards to it. In this regard, the American culture denotes the existence of multiple collection techniques. The most frequently used is the one by which the investigators limit themselves to taking a DNA sample from the traces of biologic material left by the individual (since it can be found, for examples, on items used daily). In other instances, this is accomplished by more ingenious methods. Seattle Police, for example, suspected an individual of killing a young lady, but did not have enough evidence to request a warrant. In order to obtain a sample from him, and compare it with one taken from the crime scene, they resorted to a ploy: they mailed a letter written on a non-existing attorney's office letterhead that encouraged individuals to join in a *class action* lawsuit against municipal authorities for the purpose of obtaining funds allegedly overpaid to them; in order to join, the individual had to fill out a form, put it in a pre-addressed enclosed envelope and mail it back to the sender. Thanks to the saliva left the envelope flap, the police got the DNA sample they needed, and after the two samples were compared, the suspect was convicted of second degree murder.

This topic currently poses serious constitutional problems, especially since the Federal and State criminal justice regulations are silent on this point. If, as already ascertained, the acquisition and storage of an individual's DNA samples–within the mentioned limits–is to be disciplined by a set of rules of different rankings that prescribe specific attributes of form and substance, then abandoned DNA does not seem to belong to any of the currently established constitutional and legislative categories.[115]

In this respect, it was noted that this phenomenon was partially due to a terminological error. Juridical implications and terminological concerns are intrinsically connected since the applicable legislative regime varies with the denomination attributed to the matter. As a result, it was argued that abandoned DNA could be freely collected and stored because it did not fall under the provisions of the Fourth Amendment. Its collection, in fact, did not constitute a *search* in the technical sense. That theory is supported by two ruling cases.

In first place, the asset could not be covered by the constitutional protections of the Fourth Amendment because the contrary criteria applied by the US Supreme Court in *Katz,*[116] could be applied. According to this ruling, anything that individuals willingly choose to make public, even from within their homes or offices, falls outside the scope of protection.[117]

The applicability of this form of protection would also be invalidated by the status legally awarded to DNA after it is discarded among refuse. In this case the same principle expressed by the court in the *California v. Greenwood*[118] ruling would become applicable. According to the ruling, there can be no *reasonable expectation of privacy* in regards to goods that can be readily accessed by anyone due to the fact that they have been placed in a public place, with the intent to dispose of them. As can be recalled, a direct consequence of the court's reasoning was that

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On this point, Elizabeth E. Joh, *Reclaiming "Abandoned" DNA: The Fourth Amendment and Genetic Privacy*, 100 NW. U.L. REV. 857 (2006).

115. Curley & Caperna, *supra* note 35, according to which this type of material raises new questions in regards to the protection of privacy rights.

116. Katz v. United States, 389 U.S. 347 (1967).

117. *See supra* note 72, and the corresponding text.

118. *See supra*, note 76, and the corresponding text.

trash could be classified as being *res derelicta*, and as such be claimed by third parties.

In both cases, therefore, abandoned DNA would fail to pass the *reasonable expectation of privacy* test. Both theories have been criticized. In first place, it was emphasized that renouncement of the Fourth Amendment rights, according to the ruling rendered by the court in *Katz*, presupposed that the goods were "consciously" exposed to the public. In the instance of abandoned DNA, this phenomenon would be totally involuntary and unavoidable. Further, as far as the general circumstances are concerned, it could be said that this is also an "unconscious" phenomenon. Although it is common knowledge that hair is shed or that saliva traces can be left on flatware and glasses, the same cannot be said of the awareness that DNA samples can be extracted from it nor, *a fortiori*, does it seem reasonable to presume that the massive amounts of information that can be extracted from this material, or that the extent of its possible uses,[119] are matters of common knowledge.

Closely tied to the first objection is the argument that supports the second. Without the element of conscious choice, the equivalency between abandoned DNA and trash is deprived of any logical or juridical basis. In fact, while in the case of trash the *animus derelinquendi* can be implicitly deduced by the act of abandoning it in a place where it is likely to be collected by third parties (and therefore this would result in a loss of rights thereto), the same cannot be said in regards to biologic material that an individual inadvertently drops along his path.[120]

The question of the intent required for a good to be deemed *res derelicta* has been analyzed and elaborated upon by Italian doctrine as well. Specifically, besides some differences of opinion concerning elements of secondary importance, it was more or less unanimously agreed that, in order for an item to be considered abandoned–with the consequent loss of inherent rights–it must be

119. Imwinkelried & Kaye, *supra* note 48, at 438.

120. In United States v. Thomas, 864 F.2d 843, 846 (D.C. Cir. 1989), the Court ruled that "in order to determine if an instance of "abandonment" is relevant in accordance with the IV Amendment, the Court must focus on the indent of the individual who is said to have abandoned said object."

accompanied by the conscious decision to do so on an individual's part.[121]

It also seems that another consideration may be added. Saying that a person may appropriate someone else's biological material (for example a Marilyn Monroe fan that picked up a piece of the diva's hair from the path she trod and kept it as a relic) is one thing, but it is vastly different from a situation that involves actually analyzing said material in order to extract from it the juridically distinct "asset" represented by the genetic inheritance contained therein.[122] A great part of the debate unleashed by this event, as we were saying, focused on the exact qualification and denomination to be attributed to "abandoned DNA," in view of the inappropriate and ambiguous nature of that expression.

In this regard, several suggestions were made. One proposal suggests considering this type of DNA as being the equivalent to fingerprints, and applying to the first the same legislative rules that regulate the second.[123] This option does not however appear to be

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121. Worthy of reference: 1 G. Branca, ENC. DEL DIR. 3 (1958), v. *Abbandono (derelictio)* ("*Abandonment always has two aspects: the material and the spiritual*", this last specifically defines the *animus derelinquendi*); G. Deiana, v. *Abbandono (Private Law), id*. at 5 ("*abandonment is commonly perceived as being the action of an owner who discards something with the intent to renounce his dominion over it* "); 5 S. Romano, NOVISS. DIG. IT. 546 (1960), v. *Derelictio*,

> This material detachment from something, this total discontinuation of any relationships with it, will then constitute *derelictio* as it represented the actuation of the will to lose dominion over it. Chronologically, therefore, this will is a *prius*, but it does not become effective until after it translates into an actual act of abandonment.

Lastly, *a contrario*, 29 A. Trabucchi, ENC. DEL DIR. 618-621 (1979), v. *Occupazione (Private Law)* ("*the two elements that render the activity an actual establishment of ownership are the initial possession and the* animus occupandi;" said affirmation correlates with the preceding declaration of the Amendment, as far as the type of goods that would qualify as relevant matter *"another category expressly referenced by the code as meeting the applicability requirements is the* res derelictae*. And, since it repeats the traditional doctrine in the matter, these things do not qualify unless the action of derelictio was accompanied by the intention of abandoning the rights on the subject matter (*animus derelinquendi*);*" finally "the existence of animus derelinquendi *must be presumed in order to qualify the object as having been subjected to this action"* and "*the* animus derelinquendi *must be intended as being a specific orientation towards the renouncement of the rights held over the object*").

122. In this regard, see the considerations expressed in Section 1.

123. Imwinkelried & Kaye, *supra* note 48.

satisfactory since, although it is true that a fingerprint can be traced back to an individual, it is also true that this does not contain a set of genetic information that pertains directly to the core traits of a human being's identity. After the investigative purposes are exhausted, the potential usefulness of a fingerprint tends to decrease.[124]

Another proposal suggests considering DNA equivalent to the body and its parts, giving the owner property rights over these "assets."[125] The topic, as is noted in the previous paragraph, is highly debatable because it poses challenges of philosophical, moral, and religious relevance. Also, this option seems to be hindered by the regulations concerning the matter of organ transplants, since generally the individual is acknowledged as having a *quasi-property right* on these body parts.[126]

The extremely controversial nature of the issue has left some people with the belief that the relationship between the individual, his body and body parts has been dropped in a sort of "judicial limbo."[127] In consideration of this, part of the doctrine brought forth the proposal to qualify the DNA of an individual as a separate juridical item, altogether distinguished from any other item and as such subject to a juridical *ad hoc* discipline, which would allow courts to take into consideration the totally peculiar nature of it (as proposed by the *genetic exceptionalism doctrine*).[128] This option also makes the distinction between human tissue and the genetic information therein contained, and properly accounts for the complex implications that accompany that type of information.[129] However, it must be warned that nowadays the *genetic exceptionalism* approach seems to have lost some ground within the American debate, in the light of the strong limits to the development of scientific research which would result from it.

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124. After reaching its future potential, the fingerprint will be able to reveal if a subject has a criminal record or not.

125. *See* for example Michael J. Lin, *Conferring a Federal Property Right in Genetic Material: Stepping into the Future with the Genetic Privacy Act*, 22 AM. J. L. AND MED. 109 (1996).

126. Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000).

127. *Id*. at 375.

128. For further considerations on the matter, *see* McLochlin, *supra* note 34.

129. Harlan, *supra* note 40, at 194.

The attempt to correctly qualify abandoned DNA also took place from a terminological standpoint. The question was confronted directly in Australia, more specifically by the State of Victoria. The residents of which demanded legislation to prevent investigative authorities from conducting *covert DNA sampling*, due to the authorities' tendency to avail themselves of objects used on a daily basis in order to obtain from them DNA samples for their investigative purposes. In this case, expressions such as "abandoned DNA" were deliberately avoided in consideration of the juridical implications associated with the term "abandonment."[130]

In view of the above determination, in the US, it was then proposed to name abandoned DNA *covert involuntary DNA sampling*, to emphasize the absence of any voluntary characteristic in the subject matter.[131]

D. The Issue of the "Biological Group"

The doctrine that postulates to use legislative measures based on the recognition of *property rights* in the matter of genetic information, denounces the inadequacy of the *privacy doctrine.* This is also due to a peculiar characteristic of that type of data: the set of genetic information is common to multiple individuals, by virtue of a close blood tie.

The scope of genetic information then involves not only just a single individual, but a plurality of subjects, whom, due to sharing that tie, form a "biological group." For example, members of that group would include ancestors and descendents but not spouses, due to the absence of a common blood tie with these last. The biological group, therefore, does not exactly align with the family nucleus.[132]

The magnitude of the issue manifested itself within the American juridical system thanks to some comparative[133] research that mentioned a decision rendered by the Supreme Court of

130. The information is reported in Joh, *supra* note 114, at 882.

131. *Id.*

132. On the "biological group," *see* Denbo, *supra* note 95, at 564.

133. Recently, Hrobjartur Jonatansson, *Iceland's Health Sector Database: A significant Head Start in the Search for the Biological Grail or an Irreversible Error?*, 26 AM. J. LAW AND MED. 31 (2000).

Iceland.[134] In 1998, the Parliament of Iceland enacted a law authorizing the creation of a centralized, non-identity specific database. This would be used for collecting and archiving medical data, in order to promote new (or perfect currently existing) methods of diagnosis, prevention and treatment of multiple illnesses.[135] More specifically, in order to facilitate early prevention and diagnosis, it was deemed proper to include in the database encoded versions of the medical history of all of the citizens of Iceland (both living and deceased), that had not expressly exercised their right to prevent their personal records from being included in said database (called the *opt-out clause*). It was also decided that the data could be connected to that of other databases that contained genealogic and genetic information.[136]

Two years after the law was instituted, the guardian of a fifteen year old girl whose father had passed away, in accordance with the lawful right to prevent the collection and archiving of personal information, asked the authorities to omit the records of the deceased father from the database. The request was denied on the basis that the law did not expressly allow for an individual to use the *opt-out clause* in regards to the genetic information of a deceased parent. The event became a legal controversy. The plaintiff maintained that she held a juridically relevant interest over the subject matter. If her parent's genetic information was not omitted from the database, her own current and future state of health could be gleaned from that data; this information could potentially cause future discrimination against her. The verdict rejected the argument on the basis of the encoded and non-identity specific nature of the data.

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134. Guomundsdottir v. Iceland, No. 151/2003, November 27th, 2003 (Ice.), reported in *Recent Cases*, *Icelandic Supreme Court Holds That Inclusion of an Individual's Genetic Information in a National Database Infringes on the Privacy Interests of His Child*, 118 HARV. L. REV. 810 (2004).

135. *Act on a Health Sector Database*, No. 139/1998 (Ice), the English text version available at http://eng.heilbrigdisraduneyti.is/laws-and-regulations/nr/659 (last visited November 6, 2008).

136. *Id.* at sect. IV, art. 10. But also look at the critical observations expressed by on the matter by Jonatansson, *supra* note 133, at 31, which underline how, as a result of said practice, Iceland became the only Country in the world that has authorized a private company to collect and store the genetic legacy of an entire population, with *inter alia* of the right to use said genetic patrimony as object of commercialization.

The Supreme Court of Iceland however revised the decision, affirming that: (i) the plaintiff did have a juridically relevant interest in the matter; (ii) said request seemed to be in accordance with the dispositions of the Icelandic Constitution; (iii) the original court had failed to recognize that the natural traits of the subject matter made the personal privacy right applicable to more than a single individual; and (iv) the encoded nature of the data was not sufficient to guarantee adequate protection of the rights of the individuals involved. The most personal and intimate data of an individual could in fact be deduced from the contents of the associated genealogic and genetic databases.[137]

The focal point of the verdict is that, for the first time, an individual was acknowledged legal rights over the genetic information of another person. Along those lines, part of the American[138] doctrine asserts that the current configuration of American privacy law provisions, which are structured over a strictly individualistic concept of private information, and the fact that the nature of genetic information is common to a group and not merely to a single individual, property laws may better serve as a paradigm to ensure that a greater level of protection is provided for information that belongs to all of the individuals involved.[139]

Once more, the malleability and flexibility of the concept of property would allow confronting the issues derived from the state of co-division of said sensitive data among individuals. Particularly it is sustained that, as far as the characteristics of the subject matter are concerned, the regulations pertaining to the theme of joint ownership (*joint tenancy, co-ownership*) could be applied. These norms in fact would allow disciplining potential conflicts among individuals that hold the same right, as well as

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137. Recent Cases, *supra* note 134, at 811-812.

138. From the latest, Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055 (2004).

139. *Contra*. *see* Denbo, *supra* note 95, who favors applying the *confidential relationship* criteria, by which doctors should reveal confidential information to the family members of the patient only with the express consent of this last, while they should abstain from revealing the information if it ascertains the presence of a terminal illness: this would be justified by the fact that the right to privacy of each biological group member also implies the right of remaining uninformed. The same, however, admits that it would be difficult to actuate this distinction without first establishing a criterion by which to define in which cases information could be disclosed, or not.

exert control over cases pertaining to the ownership of genetically shared material.[140]

With reference to such an issue, for example, the Italian Civil Code provides criterion in order to manage the relationships among co-owners with regard to the owned good; it requires different types of majorities according to the effect which the decision that has to be taken will have on the good. In particular, it might require a simple majority, a qualified one, or even a unanimous decision depending upon how such a decision will affect the good and the relevant ownership right. For example, the unanimity of vote is required for the destruction of the good.[141] But, if these rules on one side could provide for such relationships, on the other side they do not appear to be a so efficient tool because of the objective difficulty to apply them in a real situation involving DNA samples stored in a databank. In addition, the application of the property paradigm to the phenomenon of the biological group appears to be problematic with regard to a further issue: the potential conflicts among members of the same group. The risk that a member of such group might not be interested in being aware of his/her genetic characteristics and genetic future because such an awareness would affect in a negative way his/her life without procuring any benefit at all, especially with reference to the "mono-factorial" diseases (i.e. the diseases due to one single element which can be deemed a sort of "defect" in the genetic heritage of an individual, and whose development cannot be avoided or slowed down by adopting, for example, a healthier style of life). On the contrary, another member of the same group might be very interested in being aware about the same genetic data, for example for procreation purposes. About such not-so uncommon scenarios, a solution could be that of recognizing the equal value of both interests and therefore to grant the power and the task to ensure the respect of both interests to a competent authority (for example, a National Health System Authority) which should ensure and enforce the right of the first person not to be informed but, at the same time, the right of the latter to receive full information. In addition, that competent authority should adopt all the measures in order to avoid the dissemination of such data. As it appears at first sight, such a proposal would be very difficult to

140. Recent Cases, *supra* note 134, at 816-817.
141. Italian Civil Code, arts. 1105 & 1108.

manage and, on the other side, it would evoke the risk of a sort of Leviathan, a super-entity entitled to control and manage all data pertaining to the whole society, and to individuals on their own.[142]

CONCLUSION

As can be noted from the previously discussed characteristics of the subject matter, the protection of genetic information is yet to be defined. In this regard, the major source of concern appears to be the need to reassess the traditionally assigned juridical categories to ensure that the genetic patrimony of individuals is protected by thorough and effective legislative measures. The initial tendency appears to point towards regulating genetic information with measures that may be adjusted according to the specifics of the context, with the option to choose, as needed, which of the two *doctrines* may better serve to effectively protect this type of information. But, again, the above mentioned appears to be only one of the possible options to properly address such an issue which, for the strict interdependency of moral and economic reasons, in our opinion deserves to be analyzed and discussed in-depth, in order to try to find a balance between distinct, and sometimes conflicting, interests.

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142. For further remarks about such an issue, see Carlo Augusto Viano, *La transizione genetica*, RIVISTA BIMESTRALE DI CULTURA E POLITICA 1014-1022 (2000).

RETHINKING CIVIL-LAW TAXONOMY: PERSONS, THINGS, AND THE PROBLEM OF DOMAT'S MONSTER

Eric H. Reiter*

Since the time of Gaius, whose *Institutes* divided private law into persons, things, and actions, the categories of persons and things have enjoyed an implicit (and sometimes explicit) primacy as the *summa divisio* within the private law. Though the third category–"actions" in Gaius and Justinian, today reinterpreted as "obligations" or "ways of acquiring property"[1]–has by now perhaps outstripped the others, "persons" and "things" continue to have pride of place in civil codes, and by setting up legal subjects and legal objects, respectively, they make possible the law of obligations in which persons and things interact.

Gaius' structure–and its implicit hierarchy–has cast a long shadow.[2] It still provides the basic architecture of the civil law–sometimes explicitly,[3] sometimes more

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* Assistant Professor (History/Law and Society), Department of History, Concordia University, Montreal; of the Bar of Quebec; ereiter@alcor.concordia.ca.

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1. *See* Peter Stein, *The Quest for a Systematic Civil Law*, 90 PROC. BRIT. ACAD.: LECTURES & MEMOIRS 147, 156-57 (1995) (discussing the early-modern developments). In what follows I will use the term "obligations" except in cases where the historical category "actions" is specifically meant.

2. *See generally* Donald R. Kelley, *Gaius noster: Substructures of Western Social Thought*, 84 AM. HIST. REV. 619 (1979).

3. For example in Books 1-3 of the French *Code civil* (*Des personnes*; *Des biens et des différentes modifications de la propriété*, *Des différentes manières dont on acquiert la propriété*) or Books 1-3 of the Louisiana Civil Code (Of

subtly[4]–and for this reason it is unlikely to disappear any time soon. Even in the common law, the influence of this structure is evident in Blackstone's *Commentaries* and in the recent *English Private Law*, to name just two examples.[5] My purpose in what follows is recast the dichotomy between persons and things as a problem not of classification (what goes where) but of the construction and function of legal categories as normative spaces within which classification takes place. To do this, I think we need to replace a static view of legal categories as discrete pigeonholes with a dynamic view that emphasizes their interactions. This idea of interaction is crucial, I will argue, since legal categories do not exist in analytical isolation. Rather, they are in tension with each other, their fluid and contingent boundaries continually being renegotiated, with meaning coming out of this process of give and take. Human interactions themselves are inconceivably complex–what William James called a "great blooming, buzzing confusion"[6]–and a static view of legal categories as boxes labeled "persons," "things," and "obligations" belies this complexity. My point is that the blurring of the boundaries between categories is not a failure of taxonomy, but a valuable tool for enriching legal analysis and bringing it into closer alignment with human experience.[7]

Two puzzles of categorization–one recent, the other historical–can serve to introduce and illustrate my point about the importance of an interactive understanding of legal categories. Both

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Persons; Things and the Different Modifications of Ownership; Of the Different Modes of Acquiring the Ownership of Things).

4. For example in the General Part of the *Bürgerliches Gesetzbuch* (which begins with the divisions Persons, Things/Animals, and Legal Transactions) or in the Preliminary Provision of the Civil Code of Québec ("The Civil Code of Québec, in harmony with the Charter of human rights and freedoms and the general principles of law, governs persons, relations between persons, and property").

5. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (1765-69) (1979); ENGLISH PRIVATE LAW (Peter Birks ed., 2000).

6. 1 WILLIAM JAMES, THE PRINCIPLES OF PSYCHOLOGY 462 (Frederick H. Burkhardt et al. eds., 1981).

7. *See generally* STEPHEN WADDAMS, DIMENSIONS OF PRIVATE LAW: CATEGORIES AND CONCEPTS OF ANGLO-AMERICAN LEGAL REASONING (2003) (discussing blurring and overlapping of categories in judicial reasoning in the common law).

underscore some of the difficulties in negotiating the boundary between persons and things by putting into the foreground the constructed and hence normative nature of legal categories.

The first puzzle comes from an unusual news story.[8] John Wood of South Carolina failed to make payments at a self-storage facility, and found his possessions had been sold at auction in North Carolina. Another man, Shannon Whisnant, purchased a barbeque smoker at the auction, and found when he brought it home that it contained a dried-out, severed human leg–Wood's leg, in fact, which he had lost in a plane crash some years before, had hung on his fence to dry out, and was keeping so he could be cremated with it after his death. Whisnant, who said he was "freaked out" by his find, called the police, who confiscated the leg. But Whisnant quickly had second thoughts, realizing, a bit belatedly, the profit potential. With Halloween coming, he began charging people for a peek inside the now empty smoker, $3 for adults, $1 for children, and he sought to reclaim the leg to improve gate receipts.

The dispute quickly became legalized, with each side groping for legal vocabulary to characterize claims that fell into the gray area between persons and property. Whisnant asserted a property right, claiming that since he had bought the smoker and its contents, he was now rightful owner of the leg. Wood on the other hand called this "despicable," and asserted a personhood claim: the leg–though currently detached–was integral to his plans for post-mortem bodily reunification.[9] Sensing trouble–he no longer had the leg, remember–Whisnant suggested a joint custody arrangement, the details of which unfortunately did not make it into the papers, but which in any case Wood refused. The police sided with Wood, but on property rather than personhood grounds. They gave him back his leg because, by their way of thinking, "The guy don't have a leg to stand on:" Whisnant had given up ownership when he surrendered the leg to the police.[10] In the end, perhaps inevitably, the affair left behind the realms of personhood

8. *Up in arms over a leg*, THE GLOBE AND MAIL, October 4th, 2007, at A2.

9. In many ways this is a real-life analogue of the hypothetical "case of the stolen hand" discussed in JEAN-PIERRE BAUD, L'AFFAIRE DE LA MAIN VOLÉE: UNE HISTOIRE JURIDIQUE DU CORPS 9-16 (1993).

10. *Amputee gets leg, princess wins case,* THE GLOBE AND MAIL, October 6th, 2007, at A2.

and property for a different branch of law: obligations and contract, as the parties agreed to settle their dispute before the cameras in the television courtroom of Judge Greg Mathis.[11] Judge Mathis opted for personhood, or did he? Wood got his leg back, but Mathis ordered Wood to reimburse Whisnant $5,000 for the cost of the leg.[12]

My second puzzle is more serious in intent but it touches the same problem of the tension, even the competition, between the categories of persons and things. It comes from the seventeenth-century French jurist Jean Domat. In his 1689 treatise *The Civil Law in Its Natural Order*, in the course of his discussion of the status of persons resulting from nature (rather than from law), Domat lists a number of liminal states to illustrate particular analytical problems.[13] Domat's list includes children born dead, children still in the womb, premature children, posthumous children, hermaphrodites, eunuchs, the insane (*Les Insensez*), the completely deaf and mute, and those suffering dementia or other mental deficiencies (*Ceux qui sont en démence, & dans ces autres imbécillitez*). The list ends, however–most interestingly–with "monsters that do not have human form" (*Les monstres qui n'ont pas la forme humaine*). Domat writes:[14]

> Monsters that do not have human form are not considered to be persons, nor are they counted as the children of those who give birth to them. But those that have the essentials of human form and just have something extra or something missing count like other children.
>
> Although monsters that do not have human form are not considered to be persons nor to be children, they count as such with respect to their parents, and they are counted among their children for the purposes of any privileges or

11. Eric Connor, *TV judge to decide who gets amputated leg,* USA TODAY, October 10th, 2007, *available at* http://www.usatoday.com/news/offbeat/2007-10-10-amputated-leg_N.htm (last visited Novemeber 6, 2008).

12. *TV judge rules South Carolina man can keep amputated leg, but must pay $5,000,* INTERNATIONAL HERALD TRIBUNE, November 1st, 2007, *available at* www.iht.com/articles/ap/2007/11/01/america/NA-ODD-US-Abandoned-Leg.php (last visited Novemeber 6, 2008).

13. 1 JEAN DOMAT, LES LOIX CIVILES DANS LEUR ORDRE NATUREL 11-13 (Luxembourg: André Chevalier, 1702). The list that follows translates as directly as possible Domat's terminology.

14. *Id*. at 13 (author's translation).

> exemptions granted to fathers or mothers according to the number of children.

Both Domat's monster and Wood's leg are taxonomic puzzles because they fall squarely between our categories of "persons" and "things." Wood's leg clearly has a dual nature–a money-making commodity to Whisnant, a severed part of himself to Wood. Domat's monster, though it appears in the discussion of persons, is explicitly not a person, but a taxonomic riddle that challenges the integrity of legal categories and the binary either/or classificatory decisions that taxonomy is normally held to require. I would like to leave aside the severed leg for the time being and look more closely at the problem of Domat's monster and its implications for our understanding of the workings of legal taxonomy.

Domat is not alone in his discussion of monsters. In his *Commentaries on the Laws of England*, for example, Blackstone writes:

> A MONSTER, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, yet if it hath human shape, it may be heir. This is a very ancient rule in the law of England; and its reason is too obvious, and too shocking, to bear a minute discussion.[15]

Blackstone's modestly veiled reference at the end of this passage is fleshed out by his source, Bracton, writing in the more brazen 13th century:

> *Who may and may not be called children and reckoned as such.* Those born of unlawful intercourse, as out of adultery and the like, are not reckoned among children, nor those procreated perversely, against the way of human kind, as where a woman brings forth a monster or a prodigy.[16]

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15. BLACKSTONE, *supra* note 2, at book 2, chap. 15 (vol. 2 at 246-47) [orthography modernized].

16. 2 HENRY DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 31 (George E. Woodbine ed., Samuel E. Thorne trans. 1968-77). Blackstone also cites Coke, who repeats Bracton's remarks. *See* EDWARD

Ultimately, all these discussions trace back to Justinian's *Digest*, where both Paul and Ulpian discuss the status of monstrous births,[17] and beyond that to the *Laws of the Twelve Tables*, which stated (characteristically laconically) that "a dreadfully deformed child shall be killed."[18] The evident discomfort behind these remarks relates to long popular traditions regarding unusual births–for example conjoined twins. On the one hand, such children were historically associated with presumptions of the sexual impropriety of their parents, specifically with bestiality. On the other hand they were held to be portents of disaster and divine disfavor.[19] Clearly, popular opinion, at least, put the monster's status as a human being in doubt, and the law followed suit in its hesitance to treat such children as persons.

COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON 7.b, 29.b (Francis Hargrave & Charles Butler eds., 1853).

17. Dig. 1.5.14, *in* THE DIGEST OF JUSTINIAN (Alan Watson trans. & ed., 1985):

> Paul, *Views*, *book 4*: Not included in the class of children are those abnormally procreated in a shape totally different from human form, for example, if a woman brings forth some kind of monster or prodigy. But any offspring which has more than the natural number of limbs used by man may in a sense be said to be fully formed, and will therefore be counted among children.
>
> Dig. 50.16.135, *id.*:
>
> Ulpian, *Lex Julia et Papia*, *book 4*: Someone will ask, if a woman has given birth to someone unnatural, monstrous or weak or something which in appearance or voice is unprecedented, not of human appearance, but some other offspring of an animal rather than of a man, whether she should benefit, since she gave birth. And it is better that even a case like this should benefit the parents; for there are no grounds for penalizing them because they observed such statutes as they could, nor should loss be forced on the mother because things turned out ill.

18. XII. Tab. 4.1, *in* 3 REMAINS OF OLD LATIN 441 (E.H. Warmington trans., 1961).

19. *See* David Cressy, *Monstrous Births and Credible Reports: Portents, Texts, and Testimonies*, *in* TRAVESTIES AND TRANSGRESSIONS IN TUDOR AND STUART ENGLAND: TALES OF DISCORD AND DISSENSION 29 (2000); ZAKIYA HANAFI, THE MONSTER IN THE MACHINE: MAGIC, MEDICINE, AND THE MARVELOUS IN THE TIME OF THE SCIENTIFIC REVOLUTION (2000); and DUDLEY WILSON, SIGNS AND PORTENTS: MONSTROUS BIRTHS FROM THE MIDDLE AGES TO THE ENLIGHTENMENT (1993).

Domat's monster is something of a test case, an exception to prove the rule. It is a problem deliberately posed because it challenges categories, while at the same time having a certain practical importance.[20] But how does the monster fit into Gaius' paradigm of persons-things-obligations, a structure that underlies the work of all of these authors? Domat, in treating the monster under persons, follows the *Digest*, which puts the main discussion of the case of the monster under the title "Human Status," thus emphasizing the monster's nature. Blackstone, however, puts the monster in his book on the rights of things; he is less concerned with what the monster is than with what the monster can and cannot do (namely, inherit). This point is crucial: where we start the analysis in large measure determines where it will end up.

Domat gives us some hints as to taxonomy by bringing forward issues that remain implicit in his Roman sources. Following Paul, he says specifically that monstrous births that do not have human form "are not considered to be persons" and are not counted as the children of those who bear them.[21] Those with "the essentials of human form," by contrast, are considered to be the children of their parents, though Domat does not say whether or not they are legally reputed to be persons (most likely they would be). Again following the *Digest*, this time Ulpian, Domat recognizes the difficulty of this position, since such children "count as [children] with respect to their parents," and so they are considered to be their children for the purposes of privileges and exemptions dependent on the number of offspring.[22]

At this point Domat breaks from his Roman sources and adds a footnote that changes the terms of the question. He notes, "We can add, as another explanation for this rule, that these monsters are a

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20. As is amply demonstrated today by the difficult moral, legal, and ethical issues raised by the separation of conjoined twins. *See* the fascinating English case Re A (Children) (Conjoined Twins: Medical Treatment) No. 1, [2000] H.R.L.R. 721 (England, C.A.). For commentary on this case, see especially George J. Annas, *The Limits of Law at the Limits of Life: Lessons from Cannibalism, Euthanasia, Abortion, and the Court-Ordered Killing of One Conjoined Twin to Save the Other*, 33 CONN. L. REV. 1275 (2001); the symposium in 9:3 MED. L. REV. (Autumn 2001); and ALICE DOMURAT DREGER, ONE OF US: CONJOINED TWINS AND THE FUTURE OF THE NORMAL (2004).

21. DOMAT, *supra* note 13 at 13. *Compare* Dig. 50.16.135, which suggests the opposite.

22. DOMAT, *id*.

greater burden than other children."[23] This note changes the terms of the discussion in an interesting way, because we get a hint of exactly what rides on the solution to the taxonomic question of what the monster is. Domat's footnote moves us in a very different direction: it presents a situational definition of the person that points out the tensions between taxonomy and the social function–in this case the human needs–of what is being classified. I will come back to this point shortly.

Still, we have not answered the question: if these children that our pre-modern forebears viewed as monstrous are not persons (or if they are persons only imperfectly and for specific purposes, rather like slaves in the antebellum American South),[24] what are they? According to the logic of Gaius' schema, they must fit somewhere, since the tripartite division is an exhaustive structuring of the private law–as Gaius put it, "All our law is about persons, things or actions."[25] These children would seem not to be things, which Domat defines as "everything that God created for man,"[26] but since Domat divides things into those in commerce and those not in commerce, perhaps monsters without human form (and also Wood's severed leg?) might be things not in commerce.[27] Indeed, there is evidence that in England parents or others sometimes exhibited such children for profit, and these cases periodically came before the courts of common law or Equity. Though not

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23. *Id.* at 13 n. *x* (*On peut ajoûter, pour une autre raison de cette regle, que ces monstres sont plus à charge que ne sont les autres enfans*). This point occurs neither in the *Digest* nor in its medieval gloss, and seems to have originated with Domat. It occurs regularly in the other editions of Domat I have examined–for example in (Paris: Aux dépens de la Société, 1745), vol. 1, p. 13 and (Paris: Nyon, 1777), vol. 1, p. 19–but confirmation of its origins must await further study of the earliest editions of the work.

24. Slaves were non-persons in some situations, persons in others, three-fifths persons in still others. *See* Malick W. Ghachem, *The Slave's Two Bodies: The Life of an American Legal Fiction*, 60 WM. & MARY Q. 809 (2003).

25. G. 1.8, *in* THE INSTITUTES OF GAIUS 23 (W.M. Gordon & O.F. Robinson trans., 1988).

26. DOMAT, *supra* note 13 at 16 (*tout ce que Dieu a creé* [*sic*] *pour l'homme*).

27. *Compare* BAUD, *supra* note 9 at 78-88 (arguing that the human body should be considered a thing not in commerce rather than a person). Baud cites the *Digest* on monsters as well; *id.* at 71. *See generally* ISABELLE MOINE, LES CHOSES HORS COMMERCE: UNE APPROCHE DE LA PERSONNE HUMAINE JURIDIQUE (1997); and Grégoire Loiseau, *Typologie des choses hors du commerce*, 2000 REV. TRIM. DR. CIV. 47.

surprisingly the courts did not deal explicitly with the question of classification (though as always the issues are there, in the background), the results suggest that these children were viewed as being outside the market, for moral if not taxonomic reasons. In the 1682 Chancery case *Herring v. Walround*, for example, a "monstrous birth" (conjoined twin girls) was shown to the public for money, and the exhibition continued even after the children died. The Chancellor reportedly "most disliked these Doings" and ordered the body (bodies?) buried forthwith.[28] Treating Domat's monster as a thing–even a thing not in commerce–would however seem to be at odds with Domat's remarks about the esteem of the parents and the care that such children require, which point in a different direction, towards the language of relationship and obligation, and thus to the third branch of Gaius' schema. While the monster is not itself an obligation (though how do we conceptualize obligations without in part reifying them?), it clearly engages that aspect of the law. By its very nature the monster embodies dependence on others (its parents, society more generally), and so it elicits bonds of relationship and interconnectedness that call for a situational understanding that is at odds with the more ontological analysis characteristic of the categories of persons and things.

The examples of the monster and the severed leg illustrate the difficulty in isolating and circumscribing the physical world (not to mention the world of human interactions) so as to make it fit neatly into a single preordained category. Domat's monster is neither a person nor a thing nor an obligation, and yet it is all three at the same time. Wherever we might put it, it reaches into (or holds onto) the other categories, claiming aspects of all of them. Even concentrating on the *summa divisio* of the paradigm and limiting the choices to either a thinglike person or a personlike thing is insufficient, since as Domat indicates the relations between such a child and others are crucial to its nature. Moreover, the monster simply points out in starker relief what is true also for everything we subject to legal analysis: in different aspects and from different points of view everything partakes of all three categories, and so defies the neat categorization that Gaius' schema as classically conceptualized demands.

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28. Herring v. Walround (1682), 2 Chan. Cas. 110, 22 E.R. 870 (England, Ch.) ("A monstrous Birth shown for Money, a Misdemeanor").

I would like to turn now to a closer examination of Gaius' schema and the function it and legal categories more generally serve in the civil law. Gaius divided the world of private law into persons, things, and actions, and in so doing he created the three fundamental categories of the civil law. But by this he also–and this is my point in what follows–necessarily posited the existence of boundaries between the categories–points of contact where one category gives way to another. Categories have a seductive effect, however: like black holes, they tend to pull things towards their centers, leaving their edges, as well as their interactions with their neighbors, as ill-defined areas of discomfort. In what follows, I want to turn attention away from the middles of the categories and focus instead on the boundaries between them. In so doing, I hope to shift our understanding of legal classification away from a process of binary, either/or decisions that place material in the appropriate pigeonhole and towards a more dynamic model that emphasizes the interactions between categories such as "persons" and "things." I am particularly interested in the possibilities of rethinking the category of persons, since I believe it has not been given its due, at least in part because it tends to be on the losing side of binary taxonomic decisions. Exploring the dynamic interactions between categories can, I think, reclaim a space for the person against encroachments by its neighboring categories, while at the same time add dimensions to the concept of the person that have been underemphasized or ignored in the law. Since the civil law is an integrated system, rethinking persons necessarily involves rethinking things and obligations, as we will see, though I leave it to others to explore these implications.

I. BOUNDARIES

Gaius' taxonomy privileges a view that something must fit into one and only one of the categories, and distinct sets of rules are engaged and different legal actions made possible depending on where something is put. Since the system is exhaustive, Domat's monster, for instance, must be either a person, or a thing, or an obligation. No fourth option exists (like the categories "others" or "et cetera" beloved of common lawyers),[29] and no straddling of boundaries is possible. This is not to say classificatory problems

29. *See* WADDAMS, *supra* note 7, at 11-12.

do not exist. Roman jurists long ago pointed out difficulties–Ulpian, for example, noted that the household partook of both persons and things, depending on the point of view from which it is examined.[30] More recently, we can point to the examples of the corporation–which can be seen as a person in status, as a thing in relation to its shareholders, and as a nexus of contracts organizationally[31]–or of profitable biotechnological innovations derived from the human body.[32]

The logic of legal classification is still however largely driven by an understanding of the boundaries between categories as clear lines necessitating either/or choices–difficult choices, to be sure, but choices nonetheless. We see this in the logic of civil codes, which locate different issues in distinct books, and in legal education, which in the civil law world usually mirrors the structure of codes and treats persons, things, and obligations in separate courses and in separate textbooks. The effect of this is to keep the categories conceptually insulated from one another: viewing them as boxes within which to file legal data puts the emphasis on difference rather than on overlap and connection.

In the case of Gaius' schema, the tendency is to view it according to the structure of Gaius' *Institutes*, and so as a series of binary oppositions arranged in a linear fashion, first persons then things and finally actions (now obligations):

Persons	Things	Obligations

This linear view creates two interfaces between categories, and scholars have recently begun exploring their implications: the

30. Dig. 50.16.195.1, *supra* note 17:

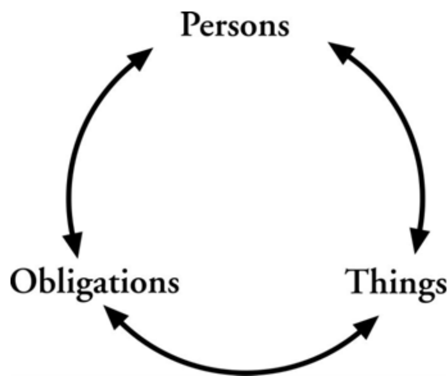
> Let us consider how the designation of 'household' is understood. And indeed it is understood in various ways; for it relates both to things and to persons: to things, as, for instance, in the *Law of the Twelve Tables* in the words 'let the nearest agnate have the household.' The designation of household, however, refers to persons when the law speaks of patron and freedman: 'from that household' or 'to that household;' and here it is agreed that the law is talking of individual persons.

31. Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583 (1999).

32. E. RICHARD GOLD, BODY PARTS: PROPERTY RIGHTS AND THE OWNERSHIP OF HUMAN BIOLOGICAL MATERIALS (1996).

persons-things interface[33] and the things-obligations interface.[34] This sort of relational thinking is welcome, since it begins to make Gaius' static structure more dynamic, but the either/or binary oppositions in this view are too limited to deal with the sort of taxonomic mixing that cases like Domat's monster bring up.

If we loop the linear paradigm around into a circle, we create a new interface between persons and obligations, which gives us a place to analyze issues such as the relationships raised in Domat's footnote mentioned earlier:



This does not fully solve our problem, however, since the system still breaks down into a series of binary either/or pairs. This third–and still shadowy–interface between persons and obligations is important, even crucial to understanding the system, since it brings into the analysis issues of relationship that are otherwise left out.[35] What is needed is a model that incorporates the multi-valence and fluidity of all three categories, a model that

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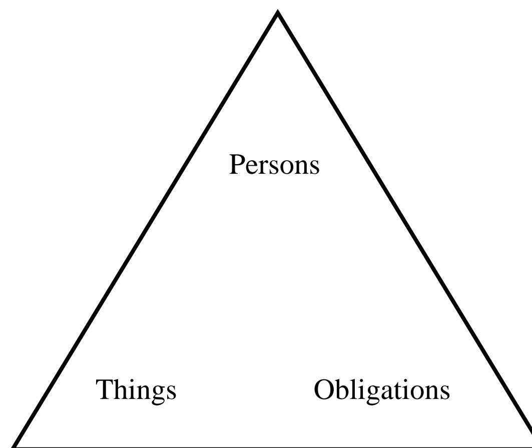
33. Besides the other contributions to this workshop, see especially Christopher D. Stone, *Should Trees Have Standing?–Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450 (1972); Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982); BAUD, *supra* note 9; Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U. L. REV. 359 (2000); and MARGARET DAVIES & NGAIRE NAFFINE, ARE PERSONS PROPERTY? LEGAL DEBATES ABOUT PROPERTY AND PERSONALITY (2001).

34. *E.g.* Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131 (1970); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

35. See the fascinating article by Catherine Labrusse-Riou beginning to explore this interface: *De quelques apports du droit des contrats au droit des personnes, in* ÉTUDES OFFERTES A JACQUES GHESTIN: LE CONTRAT AU DEBUT DU XXIE SIECLE 499 (Gilles Gouveaux et al. eds., 2001).

can account for the constantly shifting analytical alliances between them.

I would like to suggest that we can approach a visualization of the dynamic view of Gaius' paradigm that I have in mind if we think of the private law not as the usual spectrum, nor even as a circle (with obligations linking back to touch persons), but rather as a triangle, where classification takes place within the area enclosed by the triangle, rather than along its perimeter:



This model, I think, makes it clear that Gaius' schema represents a closed system, embracing the private law.[36] At the same time, I believe it provides a more realistic graphical illustration of the interrelations between all three categories than does the more familiar linear model.

Each point of the triangle, then, represents one of the categories, either persons, or things, or obligations. As we move towards the center of the triangle, we get a more and more balanced mingling of all three categories–we might think of the blending of three colors at the center, rather than sharp lines dividing three zones. Interactions primarily between two categories take place close to the sides of the triangle, while

36. The ambiguities and difficulties of classification between public law and private law are significant in themselves and require analysis, but are beyond the scope of this article. It seems clear that an interface does exist between private and public law (one thinks of the fluid boundary between delict and crime, or between the private and public aspects of fundamental rights and freedoms), though representing this interface graphically presents challenges (what is the area outside the private law triangle: public law? non-law? both?).

relatively unproblematic examples of each category would be close to the triangle's points.[37] For example, we might place things without an owner (such as wild animals) at the extreme point of the things category–though clearly things and so within the private law, until occupied by an owner they do not interact with persons.[38]

I do not want to push this kind of structuralist modeling too far, but I think it does offer at least two heuristic advantages. First, it brings into play the third interface between persons and obligations, and so it allows us to bring ideas of interaction and relationship into our legal concepts of persons and things, rather than isolating them from these ideas. Second, it makes it clear that all three of the categories play a role in virtually any classificatory decision: as I just indicated, it is extremely rare that something will unproblematically belong to one and only one category, without influence from the others.

In other words, this model can help move the process of legal taxonomy away from the empiricism of simple either/or choices and towards a rhetorical and normative process of constructive and constitutive interaction between different areas of legal knowledge. Though binary oppositions might be cognitively easier for the mind to grasp, the addition of a third option–particularly one in dynamic relation to the others–opens up additional analytical nuances and possibilities. Our legal categories are fictions[39]–they

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37. I do not want to suggest that moving towards the triangle's points moves us closer to essences or archetypes. All three categories–persons, things, and obligations–are juridical constructions that work normatively to structure legal problems and subject matter rather than as strictly empirical labels. Instead, moving towards the points of the triangle reflects a decreasing intensity of interrelations with the other categories. For an insightful example of the analysis of the normative implications one of the categories–persons–*see* Ngaire Naffine, *Who Are Law's Persons? From Cheshire Cats to Responsible Subjects*, 66 MOD. L. REV. 346 (2003).

38. In passing, one might ask whether the other two points of the triangle–persons untouched by things or obligations, and obligations untouched by persons or things–are conceptually possible. Obligations, it would seem, are not, since by definition they involve both persons and an object: *see e.g.* 1 ROBERT-JOSEPH POTHIER, TRAITÉ DES OBLIGATIONS *in* ŒUVRES DE POTHIER 79 (nouvelle édition 1821). By contrast, persons, or at least human persons, are inextricably linked to other persons (if not to things), which gives rise to certain natural obligations linked to status (as between parent and child).

39. *See* Yan Thomas, *Fictio legis: l'empire de la fiction romaine et ses limites médiévales*, 21 DROITS 17 (1995), discussed in Alain Pottage,

have a long pedigree in the civil law, of course, but they are fictions nonetheless–and it is essential to ask what we are calling on our fictions to do and how well they are doing it.

Reconceiving Gaius' schema as interactive has important implications for understanding the person in law, as it forces us to shift our attention from ontological status (is something a person or a thing?) to how it is positioned or embedded within a social matrix of relationships–a concern central to the feminist critique of traditional views of personhood in law.[40] At the same time, by focusing on the interfaces between the categories and on the interactions that take place at these zones of juncture, we can begin to counter the colonization of one category by another, which is an inevitable byproduct of binary taxonomy and clear boundaries between categories. The category of persons has I think long suffered encroachments by its neighbors, each of which deals with matter more congenial to the liberal model of law: objects of wealth on the one hand, and means of acquiring objects of wealth on the other. I would like to turn now to look at these issues in the context of the persons-things interface.

II. THE PERSONS-THINGS INTERFACE

The traditional view has been that there is (indeed, that there must be) a clear boundary between persons and things, which corresponds to the distinction between subject and object, being and having, the self and the world.[41] Given the anthropocentrism at the heart of liberal humanism, this boundary is regarded as central to, even inherent in, the nature of human society.[42]

Introduction: The Fabrication of Persons and Things, in LAW, ANTHROPOLOGY AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 1, 12-18 (Alain Pottage & Martha Mundy eds., 2003).

40. *See* especially Jennifer Nedelsky, *Reconceiving Autonomy*, 1 YALE J. LAW & FEMINISM 7 (1989); Jennifer Nedelsky, *Property in Potential Life?: A Relational Approach to Choosing Legal Categories*, 6 CAN. J.L. & JURIS. 343 (1993); and ROBERT LECKEY, CONTEXTUAL SUBJECTS: FAMILY, STATE, AND RELATIONAL THEORY (2008).

41. *See generally* Pottage, *supra* note 39; and Alain Sériaux, *La notion juridique de patrimoine: brèves notations civilistes sur le verbe avoir*, 1994 REV.TRIM. DR. CIV. 801.

42. *See generally* DAVIES & NAFFINE, *supra* note 33, at 2; Ross Poole, *On Being a Person*, 74 AUSTRALASIAN J. PHIL. 38, 46 (1996); and DONALD R.

Disagreement largely centers on the placement of this boundary (particularly in areas like the status of embryos or fetuses[43] or biotechnology[44]) rather than on its existence. Conflict arises from (or at least is exacerbated by) the fact that the nature and location of this boundary engages so many different normative discourses. Law, religion, science, ethics, and morality each address the basic question of what is a person and what is a thing, but give widely divergent answers to it.

In practice, however, the boundary between persons and things blurs. In some contexts, human beings are effectively treated as things (for example as objects of the power of the state or of employers),[45] while sometimes certain things are (or conceivably should be) treated as persons or parts of persons (such as human body parts,[46] or objects with particular emotional connections to a human being,[47] or certain animals,[48] or things of common benefit like the environment[49]). The problem is that in a system with a

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KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 8 (1990). This is of course a hotly contested question, which has inspired a vast literature. For one challenge to this anthropocentrism, *see* CHRISTOPHER D. STONE, EARTH AND OTHER ETHICS: THE CASE FOR MORAL PLURALISM (1987).

43. *See e.g.* Robert Kouri, *Réflexions sur le statut juridique du foetus*, 15 R.J.T. 193 (1980); Martine Herzog-Evans, *Homme, homme juridique et humanité de l'embryon*, 2000 REV. TRIM. DR. CIV. 65; Timothy Stoltzfus Jost, *Rights of Embryo and Foetus in Private Law*, 50 AM. J. COMP. L. 633 (2002); and Jessica Berg, *Owning Persons: The Application of Property Theory to Embryos and Fetuses*, 40 WAKE FOREST L. REV. 159 (2005).

44. *See e.g.* GOLD, *supra* note 32; Alain Pottage, *Our Original Inheritance, in* LAW, ANTHROPOLOGY AND THE CONSTITUTION OF THE SOCIAL: MAKING PERSONS AND THINGS 249 (Alain Pottage & Martha Mundy eds., 2003).

45. *See e.g.* Anne Barron, *Legal Discourse and the Colonisation of the Self in the Modern State, in* POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE DEATH OF MAN 107, 109 (Anthony Carty ed., 1990).

46. BAUD, *supra* note 9; and Stephen R. Munzer, *An Uneasy Case Against Property Rights in Body Parts*, 11 SOC. PHIL. & POL'Y 259 (1994).

47. Radin, *supra* note 33, esp. 959-61.

48. Alain Roy, *Papa, Maman, Bébé et... Fido! L'animal de compagnie en droit civil ou l'émergence d'un nouveau sujet de droit*, 82 CAN. BAR REV. 791 (2003); and Simon Cushing, *Against "Humanism": Speciesism, Personhood, and Preference*, 34 J. SOC. PHIL. 556 (2003).

49. Stone, *supra* note 33; and Christopher D. Stone, *Should Trees Have Standing? Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 S. CAL. L. REV. 1 (1985).

clear boundary between persons and things, a choice must be made for one category or the other, which amounts in most cases to a choice between treating something as extrapatrimonial or patrimonial, as outside or within the market.

Our liberal Western world grants property discourse tremendous power to transform our view of what constitutes a thing and in so doing to colonize other areas of law. Personhood discourse, by contrast, has largely lacked countervailing power, both because it has been less coherently theorized and because its characteristic concerns are less easily translated into the language of law. For this reason, the negotiation between the categories of persons and things has generally taken place from the standpoint of the latter.[50] John Austin argued a century and a half ago for the logic of viewing persons as exceptions to universal reification rather than seeing things as exceptions to universal agency,[51] and the comparative historical fates of the law of property and the law of persons bear this out. In cold instrumentalist logic, whatever can be treated as a thing is treated as one, unless there are compelling reasons to the contrary (which generally derive from the anthropocentric bias just mentioned).[52] Even with the abolition of slavery, the most egregious commodification of the human being, the patrimonialization of aspects of the person–one thinks of

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50. *Compare* C.B. Macpherson, *Human Rights as Property Rights*, *in* THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER PAPERS 76, 84 (1985), who argues that hitching other concepts (such as human rights) to the power of property might be useful in establishing them.

51. 2 JOHN AUSTIN, LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW 686 (5th ed. by Robert Campbell, 1885): "The Law of Things in short is The Law—the entire *corpus juris*; *minus* certain portions of it affecting peculiar classes of persons, which, for the sake of commodious exposition, are severed from the whole of which they are a part, and placed in separate heads or chapters."

52. An early critic of this was Louis Josserand, *La personne humaine dans le commerce juridique*, D. 1932.CHRON.1, 4.

privacy,[53] image,[54] body parts and genetic information[55]–has worked towards the assimilation of persons into things. In common-law jurisdictions this is perhaps unsurprising, as the concept of the person in the common law has steadily atrophied, which leaves the courts little choice but to designate as property anything that has no more obvious category.[56] But even in the civil law the power of property rights makes them a beacon for litigants, and the extrapatrimonial is increasingly becoming patrimonialized.[57]

Boundaries constantly move, which means categories are fluid. Given the central importance of both persons and property in Western liberal and humanist ideologies, defining what happens in the zone of interaction between the categories of persons and things becomes crucially important. It makes a profound

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53. For an early discussion of privacy as a form of intangible property, *see* Note, *Modern Developments of the Jurisdiction of Equity*, 7 COLUM. L. REV. 533, 534 (1907), cited in Kenneth J. Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFF. L. REV. 325, 334 (1980). The recasting of certain aspects of privacy as a form of property right continued in William L. Prosser's influential article *Privacy*, 48 CAL. L. REV. 383 (1960).

54. In the United States, though there were earlier antecedents, the line of cases interpreting the right to one's image as a proprietary right begins with Haelan Laboratories v. Topps Chewing Gum, 202 F.2d 866 (2d Cir. 1953), *cert. denied*, 346 U.S. 816 (1953), which established the "right of publicity" in American law. *See generally* Eric H. Reiter, *Personality and Patrimony: Comparative Perspectives on the Right to One's Image*, 76 TUL. L. REV. 673 (2002).

55. GOLD, *supra* note 32. *See also* the famous decision in Moore v. Regents of the University of California, 793 P.2d 479 (Cal. S.C. 1990), *cert. denied*, 499 U.S. 936 (1991).

56. *See* Eric H. Reiter, *Gaius, le droit des personnes et la common law anglo-américaine, in* 2 PERSONNE ET RES PUBLICA 163 (Jacques Bouineau ed., 2008).

57. An example is the legal status of clientele (particularly a physician's patients), which has been the object of vigorous debate in France. *See* Thierry Revet, *Clientèle civile*, 2001 REV. TRIM. DR. CIV. 167; Judith Rochfeld, *Les ambiguïtés de la 'patientèle' ou comment une chose qui n'en est toujours pas une peut désormais constituer licitement l'objet d'un contrat de cession…*, J.C.P. 2001.I 301.432; François Vialla, *Un revirement spectaculaire en matière de patrimonialisation des clientèles civiles*, J.C.P. 2001.II 10 452.69. On the patrimonial/extrapatrimonial distinction, *see generally* Grégoire Loiseau, *Des droits patrimoniaux de la personnalité en droit français*, 42 MCGILL L.J. 319 (1997); and Reiter, *supra* note 54, at 681-705.

difference in the character of a legal system whether classification proceeds from the basis of the primacy of persons or the primacy of things, and different justifications are required for each.

The problem with allowing the category of things–and more particularly the concept of property–to set its own boundaries is that property today is largely conceived in market terms: courts (if not individuals) deal more comfortably with things considered as wealth valued in monetary terms than with things considered as unique objects valued subjectively.[58] This insulates the category "things" from both the personhood concerns of the category "persons" (which touch on subjective value) and from the relational issues of the category "obligations" (which touch on responsibility and duty), both of which potentially bring to our analysis of things important concerns not captured in market calculus. The ostensibly universal logic and language of the market make property seem the great equalizer, a vulgate into which virtually anything may be translated. The normative implications of this process are too important to be accepted uncritically.

Even our language for taking things out of the property system presupposes evaluative market language as the norm.[59] The very linguistic form of concepts like "extrapatrimoniality," "not in commerce," and "inalienability" presents them as exceptions to the predominant paradigms of "patrimony," "commerce," and "alienability" respectively. The association between things and the market is so close that it seems somehow perverse to say that there might be things that are "not in commerce" yet still property. This is particularly so with regard to the person and the rights closely connected to personhood (such as privacy, bodily integrity, and so forth–the extrapatrimonial personality rights of the civil law[60]). Though not all alienability need be market driven,[61] and though a patrimony also theoretically contains things of value that are not

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58. *See generally* Bernard Rudden, *Things as Thing and Things as Wealth*, 14 OXFORD J. LEGAL STUD. 81 (1994).

59. *See* Alain Pottage, *The Inscription of Life in Law: Genes, Patents, and Bio-Politics*, 61 MOD. L. REV. 740, 765 (1998) (noting that "to create or defend an exception is to concede the claims of the rule").

60. *See generally* Adrian Popovici, *Personality Rights—A Civil Law Concept*, 50 LOY. L. REV. 349 (2004).

61. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

owned, the rhetorical power of property discourse within liberal society is such that fine gradations are difficult to sustain against it.

Consider the popular notion of "identity theft."[62] The language of property is more viscerally evocative in modern Western society than alternative terms like "appropriation of personality" (which itself still echoes property language) or "violation of personality," which conceptualize the problem (more naturally) as a personhood rather than a property issue. The association with theft serves to patrimonialize identity (itself a slippery concept) into an object of property and thus to link it to ownership, the most powerful right in the arsenal of the liberal legal world.

This subtle politics of labeling is closely related to the equally subtle politics of taxonomy. If we reduce classification at the interface between persons and things to a question of the scope of property rights, we create a slippery slope whose bottom is the position where anything to which the creativity of a market-dominated society can assign a value is brought within the property regime to be subjected to the full panoply of broad legally-enforced rights of ownership. The category of persons hardly stands a chance against this–it becomes little more than a placeholder for things not yet propertized.

Allowing the persons-things interface to become a one-way membrane that permits only ever-increasing commodification misses the potential of the other kinds of conceptual exchanges that might take place between persons and things. Categorization at the persons-things interface is more than simply coming up with two definitions, one for persons, another for things, and choosing the proper pigeonhole in which to file something new. An interface between categories means that the categories are related to one another, mutually and on equal terms, and not simply as colonizer-colonized. This allows us to see not just how aspects of the person can function as things, but also how our concept of the person depends on connections to certain things.

Pushing things further, persons and things are just part of the analysis: questions of classification really involve all three parts of the private law–persons, things, and obligations–working together to set the terms of our interaction with the world and the degree of

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62. *E.g.* Sean B. Hoar, *Identity Theft: The Crime of the New Millenium*, 80 OR. L. REV. 1423 (2001); and Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227 (2003).

influence the world will have on us. Broadening the analysis beyond a binary opposition–and away from the transactional overtones of property discourse–allows us to enrich the persons-things interface with the relational concerns characteristic of the third part of our triangle. I think this allows a better understanding of the role things play in human relationships and the ways in which personhood and market concerns interact in defining these relationships.[63]

The standard sites for discussing issues like these are with respect to the human body and personality rights like privacy.[64] Both of these examples sit squarely in the liminal zone between persons and things, since they are associated with the human being but are detachable and so transactable in market terms. At the same time, they touch on ideas of relationship, interconnection, and responsibility associated with the language of obligations. A stark binary choice–person or thing–is unsatisfactory. Market discourse makes us uncomfortable in this context, since we are generally unwilling to treat kidneys like automobiles, but at the same time a kidney is no more a person than Buick is (unless we are willing to get creative with the fiction of legal personality[65]). In a system where the category of persons is rigidly circumscribed in opposition to things, the taxonomic possibilities for things like kidneys or one's image are lacking, and such things have nowhere to go except somewhere along the property spectrum. And once classed as things, the assumptions about the property institution take over, and some degree of market commodification is the result.[66]

The civil law distinction between extrapatrimonial and patrimonial rights perhaps gets closest to what I mean, since it distinguishes between the personal aspects of rights (their

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63. For interesting insights into this question, *see* Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD. 1 (1993); and David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U.T.L.J. 325 (2003).

64. See the literature cited *supra* note 33.

65. Naffine, *supra* note 37 (on the different arguments and justifications behind the idea of legal personality).

66. *See* Richard Gold, *Owning Our Bodies: An Examination of Property Law and Biotechnology*, 32 SAN DIEGO L. REV. 1167, 1230-31 (1995). I am more skeptical than Gold about the appropriateness of applying even a changed property discourse to things intimately connected to the person.

personhood qualities) and their public aspects (their value- or market-oriented side). The problem, however, is that concepts like extrapatrimoniality and "not in commerce" do not do full justice to what is going on at the persons-things interface, since they already assume both the language of property discourse and an either/or view of classification. To address this problem of the insufficiency of binary choices, various writers have made a case for intermediate categories–examples include Jean-Pierre Baud's idea of "things without price," or Gérard Farjat's idea of "centers of interest," or Geoffrey Samuel's work on "interests" in the common law.[67] Such intermediate categories, these authors argue, could encompass things like the human body or the family relationship or even Domat's monster that do not fit easily elsewhere.

Multiplying categories is not the answer, however, since it simply adds new boundaries and thus creates new either/or dilemmas. Nor is it feasible, I think, to abandon categories entirely and adopt a more pragmatic, situational model of private law in the manner of the common law, where categories are infinitely expandable, overlapping, and non-exclusive (as in *Halsbury's Laws of England*[68] or the *Canadian Abridgement*[69]). The civil law comes with a structural history that has become part of the law itself. This structure can be modified (an example is the consolidation of family law from elements drawn from persons, things, and obligations), but the traditional foundation based on Gaius has proved resilient and of continuing utility.

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67. BAUD, *supra* note 9, at 217-22; Gérard Farjat, *Entre les personnes et les choses, les centres d'intérêts: prolégomènes pour une recherché*, 2002 REV.TRIM. DR. CIV. 221; and Geoffrey Samuel, *The Notion of an Interest as a Formal Concept in English and in Comparative Law, in* COMPARATIVE LAW BEFORE THE COURTS 263 (Guy Canivet, Mads Andenas & Duncan Fairgrieve eds., 2004).

68. HALSBURY'S LAWS OF ENGLAND (4th ed. 1973). The categories in *Halsbury*, of which there is a growing list of more than 160, range from the highly general (Contract, Tort, Real Property, Restitution) to the narrowly defined (Agriculture, Animals, Auction, Aviation, Barristers). Overlap is common: for instance we find both Tort and Negligence, Contract and Sale of Goods, and so on.

69. CANADIAN ABRIDGEMENT (2d ed. 1992). As with *Halsbury*, here the categories are numerous (about one hundred), of varying degrees of generality, and frequently overlapping (Contract, but also Sale of Land, Insurance, Employment Law, and so on).

It seems to me more useful to explore the possibilities of the idea of interfaces. By this I mean a zone where the categories mingle and blend: where the linkages between personhood and property can be articulated while resorting neither to full market commodification nor to full legal subjectivity. An interface is not simply a new either/or choice: it is a space where the answer is "both," a zone of interaction where either category alone would be insufficient to deal with the complexities of the subject matter, and would result in an unacceptable narrowing or distortion of what was being categorized. This idea of interaction, however, points to the relational ideas characteristic of the third area of our triangle–the law of obligations–and indicates that the analysis around the concepts of persons and things is more complicated than even a dual persons-things interface alone can capture.

III. Bringing in the Persons-Obligations Interface

The third category in Gaius' schema has been the most obviously fluid both in conceptualization and in content, which is at least partly due to its role as the legal site for concepts that mediate between self and society.[70] It represents links or interactions between persons or things, and so, I would argue, touches qualities of movement between categories, of moral engagement, and of relationship.

This category embraces a wide variety of subject matter–Peter Stein has called obligations the "joker in the pack of civil law categories"[71]–and this is one reason why it is so difficult to pin down. The definitional shifts surrounding this category over the centuries are fascinating, and indicate a searching for a way to generalize the different possible links between persons and things:[72] "obligations" looks one way, putting the stress on interpersonal relations, while "ways of acquiring property" looks

70. KELLEY, *supra* note 42 at 8 has described it as "the theoretical point where self-consciousness becomes social consciousness and where the defining faculty of human will, as expressed in language as well as behavior, becomes essential both for social activity and for legal regulation."

71. Stein, *supra* note 1 at 158.

72. ANDRÉ-JEAN ARNAUD, ESSAI D'ANALYSE STRUCTURALE DU CODE CIVIL FRANÇAIS: LA RÈGLE DU JEU DANS LA PAIX BOURGEOISE 92 (1973) (making a similar point with reference to the mixture of subjects found in Book 3 of the French *Code civil*).

another way, emphasizing the relations between persons and things.

As I have suggested, the traditional linear model of Gaius' paradigm is misleading, since it relates this third category only with things, and not with persons. In law persons interact both with other persons and with things: contracts of sale, lease, and deposit, for example, involve things (and persons too, of course), while contracts of mandate, partnership, and employment involve persons, their status, and their interpersonal relationships much more than their things. The element common to both is the creation and governance of relationships.

Viewed broadly, then, this third category brings to the statically conceived categories of persons and things relationships and interactions of all kinds: from social or affective relationships (such as aspects of family), to legal relationships (such as employer/employee and aspects of parenthood or marriage), to relationships with things (such as custodial obligations). These various kinds of interactions, moreover, call attention to qualities such as affect and power that are crucial to understanding how legal systems actually function, but that are otherwise missing from the schema. In short, if we view the category "persons" as the realm of being and the category "things" as the realm of having, this third category works with the others to emphasize the intermediary states of becoming and getting. Brought into the persons-things mix, this focus on process rather than product brings into focus moral and ethical aspects of the law that otherwise tend to remain hidden and so difficult to articulate or conceptualize, and that work to change the terms of analysis of both persons and things.

CONCLUSION

To return to the examples with which I began, I think we can now see more clearly how both the leg in the barbeque smoker and Domat's monster challenge the static and linear view of Gaius' schema. The leg, being too recognizably human to be clearly a commodity, but at the same time too detached to be clearly a person, fits neither category and so engages neither set of rules unproblematically. As for monsters without human form, although Domat clearly excludes such beings from the category of persons,

we see that it is precisely the human qualities they do have (particularly their parentage, but also any physical resemblance to humans) that keep them from fitting clearly into the category of things. Similarly, their lack of most of the usual formal attributes of humanity keeps them out of the category of persons: only in cases where such monsters have a sufficiently human form do they become persons.[73] Their connection with each category–persons and things–is however colored by their interactions: with their parents especially, but also with society generally and with the assumptions of others about their nature, their abilities, and their origins. And it is these interactions, with their overtones of duty, responsibility, and obligation, that really add complexity–but also interest–to the problem of Domat's monster.

Though Domat's treatment of the monster would not be the way we would discuss this issue today, his recognition of the interplay between form, nature, and particularly community is an excellent illustration of the issues that categorization in law must engage. Taxonomy is a necessary evil in law, but how we do it is anything but necessary and need not be evil. Categories shape the material being categorized, and discrete, coherent, and bounded categories invite us to view persons and things as themselves discrete, coherent, and bounded, though the richness of human experience says otherwise. Moving beyond the limitations of this view of taxonomy and emphasizing instead fluidity and interaction can help us embrace rather than avoid complexity and multivalence in legal analysis, whether we are dealing with intangibles like the right to privacy or very tangible things like legs discovered in barbeque smokers.

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73. This pre-modern emphasis on the formal rather than the moral or other characteristics of humanity is interesting historically, though shocking in modern ethical terms. It is however disquieting to compare the often alarming rhetoric surrounding conjoined twins cited in DREGER, *supra* note 20.

ROBERT ANTHONY PASCAL
WRITINGS ABOUT LAW, 1937-2008*

I. THE STUDENT YEARS

1937. *Duration and Revocability of an Offer* [under the Louisiana Civil Code], 1 LA. L. REV. 182 (1938).

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II. THE TEACHING YEARS

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* Compiled by Professor Robert A. Pascal (Summer 2008), with the assistance of Ms. Julieta Marotta and Mr. Agustín Parise. Copies of all materials are on file with the JCLS.

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III. THE RETIREMENT YEARS

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