Chapter 4
Philosophy, Personality and Property

Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases. — Jeremy Bentham

[T]o be a full individual in liberal society, one must be an appropriator, defined by what one owns, including oneself as a possession, not depending on others, free. — O’Donovan, 1997

INTRODUCTION

What is a body, a matter of law? (Rao, 2007; Scott, 1981). Where is the body? Is it integral or severable from the legal person? Is it a commodity? Have our bodies, our selves, and our labour become commodities with a market exchange value? (Radin, 1996). The bioscientific conversion of the body into information has become labelled postmodern. Jean Baudrillard described this postmodernity as ‘hyperreality’. (Poster, 1999). This means that only the viewer only acknowledges the real in its image — reality, as the hyperreal, is “always already reproduced”. (Id.). The process of conversion of the body, the human organism, into genetic information is just such a reproduction. Just as the process of conversion of the personality into reputational information is also such a reproduction. This means that the body need no longer exist only as a corporeal reality, but also as the ‘mirroring’ body, quite literally ‘a body of information.’ (Halewood, 2008)

This represents a further stage of ‘de-physicalization’ of property begun with Hohfeld’s (1917) seminal recognition of property as a bundle of rights. The body is now cast as genetic ‘information’ representing property de-physicalized twice over with intellectual property in bodies, not only is there a bundle of rights in things, but also rights to information about things, or rights to things as information. What has happened to the body reflects what has happened to the economy. Society has moved from one of production to one of information, from manufacturing to information processing. Avatars and their accessories epitomize this shift.

DOI: 10.4018/978-1-61520-795-4.ch004
A. OWNERSHIP OF PERSONS

Similar to most social institutions, property rights are justified by the benefits they bring to individuals in society. The overriding understanding of this justification for all types of property has been an economic formula. Property rights are the most effective method to produce social wealth. (Hughes, 1998). This same general justification has given rise to theories regarding the non-economic benefits of property. Add to this idea that persons are now all free and equal is supposed to be fundamental to modern liberal legal systems - the free person is not only the basic legal unit but also the very raison d’etre of our law. (Davies & Naffine, 2001). We do not recognise slavery; one person cannot own another. It is regarded as an abomination to commodify another human being in this manner. This was seen most clearly in the case of Moore v Regents of the University of California 793 P2d 479 (Cal. S. Ct. 1990).

The Western democracies outlawed slavery in the nineteenth century, though as Russell Scott (1981) has observed, it has “not all disappeared from the Eastern world or from the African and South American continents.” Although English law never openly tolerated slavery, England was home to a number of slavers who derived immense wealth from the traffic in persons. English slavers, however, wisely conducted their trade in other parts of the world. (Baker, 1990). In the famous Sommersett’s Case of 1772, English law decided against slavery, proclaiming its allegiance to the Enlightenment person and promising a protection for freedom. It was concluded that there was no “positive, or legislative, authorisation of slavery in England.” This point of view accords with the views of two of the leading philosophers of political and legal liberty, Immanuel Kant and John Locke, who, in different ways, both condemned the idea of treating other persons as property. Hegel (1952, trans. by Knox) went on to develop a theory of property linked to self-ownership.

According to Kant (1930, trans. by Infield) “a person cannot be property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.” Locke, too, was adamant about the importance of freedom from possession by others. In The Second Treatise on Government, Locke (1690, repub. 1967) begins his discourse on slavery by saying that: “The Natural Liberty of Man is to be free from any Superior Power on Earth, and not to be under the Will... of Man ... not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another man.” Further: “This Freedom from Absolute, Arbitrary Power, is so necessary to, and closely joined with a Man’s Preservation, which he cannot part with it, but by what forfeits his Preservation and Life together. For a Man, not having the Power of his own Life, cannot, by Compact or his own Consent, enslave himself to anyone ... No body can give more Power than he has himself; and he that cannot take away his Life, cannot give another power over it.” (Id.).

Thus, according to modern legal orthodoxy, the categories of person and property are now meant to be utterly separate and distinct. To be a person, it is said, is precisely not to be property. It might then be argued that the one concept negatively defines the other. (Davies & Naffine, 2001). I believe that this idea is susceptible of at least one other analysis especially in light of the concept of avatars as extensions of one’s person. The issue is not about slavery, i.e., whether one person can own another, but rather about whether we are in some way our own property. Can a person be property in the sense that he is somehow the proprietor of himself? Can property rights be perceived as a means to protect a personality interest or ‘personhood’ of an individual?

Persons are not property: to be a person is not to be reduced to the property of another. Yet, I would suggest that we own ourselves. If this is so, then to be a person is to be imbued with the idea of property. To be a person is be a proprietor