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***ARE PERSONS PROPERTY?  
LEGAL DEBATES ABOUT PROPERTY AND  
PERSONALITY***

**By Margaret Davies and Ngaire Naffine**

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**T**he title of Margaret Davies' and Ngaire Naffine's book asks the question, *Are Persons Property?* In the course of answering this deliberately provocative question the authors offer a nuanced and sophisticated argument about the ways in which these two core concepts of law have always been intertwined with each other. Moreover, they help us see how law and prevailing ideologies mutually constitute each other. They use effective concrete examples to show how certain (often unexamined) conceptions of the nature of persons underlie legal analysis, and they show how the law reinforces these conceptions. And they convincingly show how this conception of the person (and its relation to property) is ill suited to women. Thus the feminist critique that the presumed subject of both law and political theory is male is here given clear, concrete evidence in the form of detailed examples of how the law handles issues of women's sexuality and pregnancy. As with the best of feminist criticism, the authors show that the limitations that are illuminated by the ill fit with women are deep limitations that show up in other areas as well, such as the difficulty the law has with conceptualising rights and responsibilities with respect to dead bodies and intellectual property. The reader comes away from this effective and insightful book with a clear picture of how the history of both law and philosophy have contributed to the prevailing power of the intertwined concepts of property and persons. And the authors make a convincing case that these concepts, as they now stand, cannot provide adequate answers to the many puzzles they pose.

I think the best statement of the book's argument, and why it is important, is found in the conclusion:

Our constant refrain has been that the legal person is born out of a quite particular way of dividing up the world into subjects and objects. Both our

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self-relation and our relations with others are highly mediated by property or by metaphors of property.<sup>1</sup>

It is important to recognise this particular division and its consequences for our relationships and our way of seeing the world, precisely because it is not a necessary conceptual framework. The authors help us see how this division is mutually constructed by both law and the dominant modes of political thought in ways that obscure the very fact of construction. The concepts of person and property that mutually sustain one another come to be seen as natural. In law, this is particularly true with respect to the concept of the person, which the authors argue is far less theorised than the concept of property. It is far more frequent that legal cases ask judges to self-consciously ask about the meaning of property and how it is to be extended into new domains like intellectual property in genetic material. But the unexamined division of the world into subject and object and the presumed nature of the person are crucial to their analysis.

The book argues that the core of the relation between the concepts of person and property is the notion of self-ownership, and it is this notion that over and over again influences the law, even when it does not explicitly recognise the concept. The authors' objective is to show that this understanding of the person is central to the tradition of liberal thought that is at the core of Anglo-American common law.

[O]ur enduring concern has been to show how moral and cultural beliefs about persons and property inevitably shape perceptions and descriptions of the substantive law. . . .the philosophy of self-ownership underpins the notion of the self, which is integral to the liberal legal tradition. The norm of self-ownership is supposed to be a statement, in the strongest possible terms, that the individual in principle ought to be free from the control of any other person. It is impossible to separate this liberal morality of autonomous personhood from the positive law: the person is (their own) property not because the positive law explicitly recognizes such a principle, but because the model of the person which informs the law is a self-owning, bounded, self-determining individual.<sup>2</sup>

This statement nicely captures the ambitions, significance and challenges of the book. We see here the values that underlie the link between persons and property — autonomy, freedom, self-determination. I will return later to the question of what becomes of these values when we challenge the link between persons and property that the authors trace for us.

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<sup>1</sup> M Davies and N Naffine, 'Are Persons Property? Legal Debates About Property and Personality' (2001) 185.

<sup>2</sup> Ibid 184.

The authors situate their claim of the importance of self-ownership within the context of a tradition that insists that the concepts of persons and property are mutually exclusive, in the sense that persons cannot be property. They want to show that far from being mutually exclusive, the two concepts are mutually constituting. Moreover, they argue that because of the centrality of self-ownership, sometimes persons are treated as property. I think the authors do an excellent job of showing the mutual constitution, but do not as convincingly show that self-ownership is the core of the relationship between the two concepts.

Let us begin with their discussion of how the law handles pregnancy, which is, in my view, their most effective discussion of how ill-suited the dominant conception of the person is to women's experiences. The legal controversies usually arise when doctors judge that medical intervention is required for the life or health of the foetus and the pregnant woman does not want this intervention. As the authors see it, the dominant conceptual framework ought to, if consistently applied to women, ensure that the woman's preferences would prevail.

With the liberal legal individual characterised as a self-proprietor, it seems that women must be afforded full control of their bodies if they are to be recognised as autonomous legal individuals and this must remain the case, whether or not the foetus is at risk.<sup>3</sup>

In fact, the cases are more ambiguous. Courts in both the US and England have ordered the woman's wishes overridden, sometimes mandating a forced caesarian section. Part of the problem, as the authors see it, is that starting with a conception of self-ownership, the courts find themselves in an untenable position.

But does it make sense to think of the pregnant woman as an owner of her self? Does the law allow for this? And if so, what are the implications for the foetus? Can both woman and foetus be possessive individuals? If the woman is regarded as a possessive individual, is not the foetus reduced to a species of property? And reciprocally, if the foetus is granted personality, does not the woman become a form of housing for the foetus?<sup>4</sup>

While I think both of the above characterisations (of the woman or the foetus as property) are unnecessary even for the possessive individual, the authors pointedly identify the key problem: 'With differentiation and self-ownership the hallmark of personality, the idea of a legal person within another legal person is necessarily incoherent.'<sup>5</sup> Of course, the law has tried to handle this problem by saying that the foetus is not a legal person. But as the authors rightly point out, judges are uncomfortable with the suggestion that the foetus stands in the same relation to the

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<sup>3</sup> Ibid 84.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid .

pregnant woman as any other body part such as a leg or a liver. The authors very effectively show two things: 1) the dominant conception of the person is not helpful in analysing the controversies around pregnancy and 2) despite the high level of public attention and the judges' own unease with the categories available to them, these cases have not generated a fundamental re-examination of the underlying concept of the person.

What these legal controversies about the autonomy of pregnant women have singly failed to do is explicitly call into question the adequacy of the self-proprietor model of legal personality. At no time has there been any suggestion that the possessive individual fails in his ability to describe the populace at large. Indeed the most recent cases from England, while formally affirming the rights of pregnant women to refuse medical treatment, simultaneously assert that the starting point of any legal analysis must be the separate, bounded (implicitly non-pregnant), autonomous legal subject.<sup>6</sup>

In my view, it is the phrasing of this last sentence that is most accurate, and the general point that is most important. The separate, bounded, autonomous legal subject provides an inadequate model of the person for purposes of law or political thought. And the problems posed by pregnant women reveal this, as well as the imperviousness of the conceptual framework to rethinking. As the authors point out, pregnancy may not be the average condition of the whole population, but it is hardly an anomaly — every person alive has come into being as the result of a pregnancy.

What I am less persuaded of is the exact role of self-ownership. The authors do tell us that one of the main philosophical founders of modern liberalism, Kant, explicitly rejected the idea of self-ownership. Locke, on the other hand, made it central. Modern liberal theorists, they point out, disagree about the usefulness of the concept for capturing the core values of freedom or autonomy. With few exceptions, the courts do not invoke the language of self-ownership in the cases in which the authors contend that the underlying notion is informing their analysis. Some feminists explicitly invoke the language of self ownership to protect women's autonomy, with respect to issues such as abortion and control of their body during pregnancy. Others argue against such language.

I think the authors' general points are correct and crucial: there is an underlying conception of the person which has important consequences for substantive law and that conception has historically evolved as integrally connected to property. The core liberal value of autonomy is the characteristic of the bounded, separate, self-determining subject and property has been crucial to the capacity to shape one's world, to wield power and to be shielded from it. One's actual capacity for self-

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<sup>6</sup> Ibid 86–7.

determination is closely tied up with one's relations to property. And, of course, such a conceptual framework leads naturally to a notion of self-ownership as the entitlement of the autonomous person. I am just not convinced that the notion of self-ownership is as clear, well established and central a component of the person-property nexus that is at the heart of the contemporary Anglo-Saxon liberal framework as the authors think it is. I think it is more likely that self-ownership is one piece of the framework around which there has always been ambiguity and ambivalence at far higher levels than around the basic image of the autonomous subject who enacts his self-determination through property relations.

What the authors show so well is the many layers of tensions and complexities that arise from the notion of self-ownership. At the heart of that tension is the belief, on the one hand, that strong protections of self-ownership will avoid the possibility of being exploited by others. On the other hand, is the concern that once the body is conceptualised as property, even one's own property, it opens the person to the threat of commodification. The authors note this tension repeatedly, for example pointing to the 'paradox' within [Margaret Jane] Radin's work, that it 'sets property against property. The self is understood as a function of property, and this propertyed self is in turn expected to protect against the commodity form of the person.'<sup>7</sup> They offer the clearest example in their discussion of *Moore v Regents of the University of California*, one of the increasing number of cases about the patenting of genetic material (or information). In this case, cells taken from a patient's spleen were used by doctors to develop and patent a 'cell line', and the patient claimed a share in the property in that cell line. The authors tell us that '[t]he majority feared that the recognition of Moore's claim would reduce the body to mere property'. But they point out that

the concept of property deployed by the majority resembles complete or absolute ownership, rather than the flexible and contextual notion more commonly recognised by the common law, meaning that the fear of commodification is perhaps over-stated. . . . [M]inority judgments regarded some form of self-ownership as necessary to protect the human body from exploitation.<sup>8</sup>

And again, they remind us that property is a complex and nuanced concept that, particularly in the common law, has far more flexibility than laymen's conventional notions attribute to it:

Property in the genetic person need not be absolute ownership consisting of all of the possible rights in the bundle, but could be more partial, for instance it could include the right to control access and use, but not the right to alienate.<sup>9</sup>

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<sup>7</sup> Ibid 9.

<sup>8</sup> Ibid 173.

<sup>9</sup> Ibid.

This last point holds out the possibility of using the full nuances of property to overcome the tensions of self-ownership, to provide protection without commodification. As we will see later, this is one of many fascinating hints or suggestions that the book offers without trying to develop. It is not clear whether the authors think that if one developed the concept of self-ownership in this way, or through other imaginative uses of the complexities of the legal concept of property, one could overcome other limitations, such as those they point to in the discussion of pregnancy.

My own sense is that it is not the idea of self-ownership as such that is at the heart of the problem with pregnancy. The authors rightly see self-ownership as a powerful metaphor for autonomy (which takes on a life of its own, sometimes in destructive ways). In my view, any notion of the bounded, self-determining person will run into trouble in conceptualising pregnancy and the problems that can arise from it. In pregnancy, the self or person is in the process of (or participating in the process of) the development of another self. No matter what metaphors or concepts are used for autonomy, they will face a challenge in pregnancy. A potential self within a self will pose different responsibilities to the pregnant self than those a non-pregnant self bears toward others. Whether those responsibilities are best conceptualised as moral rather than legal, because the law rightly does not consider the foetus a legal person, is another question. In my own view, thinking through the puzzles of how to respect the autonomy of the pregnant woman is useful because it poses particularly starkly the reality of the interdependence of all persons. To recognise this interdependence is not to deny the value of autonomy, but it does require reconceptualising autonomy. Relationships of interdependence and even dependence are not antithetical to autonomy, but in many instances necessary to it. (Parent-child, student-teacher, state-client relationships all involve dependence and all, when functioning properly, develop autonomy.)

My point here is to agree with the authors that the difficulty judges have with pregnancy should reveal the need to rethink the basic concepts of person and autonomy. Our disagreement is one of emphasis. I think that the notion of self-ownership is a component of the dominant understandings of personhood. But I think it is less clear and central, and I think that the problems with pregnancy do not lie with self-ownership as such, but with the deeper underlying notions of personhood and autonomy. While the authors place great emphasis on self-ownership in many of their statements, I think the important contributions of the book stand even if one does not agree with their view on the exact role of self-ownership within the broader person-property nexus they so effectively analyse.

Let me now return to some of the many interesting hints the authors offer about the directions a reconceptualisation of persons and property might take. The book maps for us the dominant versions of these concepts, the ways they have developed to be intertwined with one another, and points to their limitations. (I do not have

the space here to go into their very interesting discussions of how these limitations appear in the courts' efforts to handle the issues surrounding dead bodies and the increasingly important domain of intellectual property.) It is not the purpose of the book to present an alternative, but it leaves the reader with the clear sense that some alternative should be developed and with a good idea of the kinds of issues that a reconceptualisation must grapple with.

The book shows us that a re-working of the concepts of persons and property must be done with women as well as men in mind. And although sometimes indirectly, it repeatedly points to one of the key problems with property as the central vehicle for autonomy: it is distributed unequally. The modern liberal concept of equality has developed so that, in principle, everyone — not just white, propertied men — should enjoy the core values of autonomy, dignity, bodily integrity. But the twin concepts of property and person have not evolved in ways that facilitate the equal enjoyment of the core values they are meant to embody.

In addition to giving us detailed examples of the ways the dominant concepts fail to deal adequately with a variety of problems (some of which involve the inequalities of gender and class), the authors point to a set of deep issues that might need to be reexamined. For example, as I noted at the outset, they tell us that the reigning concepts of person and property divide up the world into subject and object in a particular way. One of those ways is to presume that something like 'spirit' resides only in animate beings and generally only in humans.<sup>10</sup> Thus only humans are persons and everything else can be reduced to property. A further consequence is that property law is about the relations between persons with respect to things. Persons' relations to things themselves is not the subject of property law. Thus existing property law has often shown itself poorly equipped to handle the relationship indigenous peoples have to the land. And, although the authors do not discuss it, the issue of animal rights raises questions about whether property — ostensibly defined in sharp contrast to persons — is an adequate legal category for animals.

The book's helpful identification of the underlying division of the world into subject and object thus indirectly points to the depth of the issues that would arise if the whole framework of persons and property were to be reconsidered. For example, I have already noted how the expansion of the liberal understanding of equality has generated tensions in the notion of property as a key vehicle for autonomy. If one were to see human beings not as sharply distinguished from all other creatures on earth, but on some kind of continuum of entitlement to respect, care and dignity, we would face a vastly expanded problem of defining equality and giving effect to it. The new moral and legal problems that would arise are rather

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<sup>10</sup> Ibid 24.

staggering. And, of course, in some teachings, it is not just what we conventionally think of as animate but the earth itself that is owed duties of care and respect.

The authors provide us with additional hints suggesting that the best response to the existing limitations of the persons-property nexus may not be to abandon the category of property, even in those areas where its limitations have been most starkly revealed. As I noted with respect to property in one's cells, the answer may be to look to the rich complexity that the concept of property has displayed over the years. They note for example that

particular aspects of indigenous knowledge are neither private property nor universally accessible. . . . The difficulty which Western minds have in conceptualizing and protecting such knowledge arises from the more simple dichotomy which we tend to employ — something is either property or not property (and therefore accessible to all).<sup>11</sup>

Davies and Naffine remind us that the common law has historically been able to conceptualise property in more complex ways. At the same time, they alert us to the fact that the limitations of the law are themselves embedded in deep cultural understandings: 'As the case of indigenous knowledge illustrates, the very mechanism of intellectual property brings with it certain cultural presuppositions about individual creativity which are very difficult to dislodge.'<sup>12</sup>

It is difficult to gauge the extent to which one can extract the legal concept of property from the framework it has been embedded in for at least 200 years. On the other hand, it is hard to imagine a framework of legal and political thought without *some* conception of property. So perhaps the challenge of shifting its meaning is inescapable. Davies and Naffine offer a compelling account of what is at stake, including the necessity of recognising the way legal meanings and cultural understandings are mutually constituting, just as the concepts of property and persons are. Attempts to shift the legal meaning of property will have to take on the liberal framework of thought including its underlying conception of the person, and, conversely, efforts to change that framework need to take account of the role of property within it.

In sum, '*Are Persons Property?*' offers an excellent analysis of the ways the concepts of persons and property are mutually constituting and a sophisticated commentary about the ways the law interacts with broader cultural beliefs. We see how the law both gives effect to and relies on unexamined conceptions of the nature of the person, and indeed the world. The book helps us see how powerful the property-person nexus is, both as a matter of law and as a dimension of the

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<sup>11</sup> Ibid 133–4.

<sup>12</sup> Ibid.



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dominant modes of Western thought. By pointing to the limitations of this nexus, they challenge us to rethink it. They give us valuable hints at both the resources that may be found within legal history and the depth of the challenge that faces anyone trying to shift the dominant understandings. By effectively using contemporary case law, they show us that the same judges who employ the dominant framework often reveal their own unease with its capacity to adequately handle the issues arising out of pregnancy, intellectual property and the treatment of dead bodies. They thus compellingly invite their readers to use the impressive argument of the book to take the next steps forward to develop an alternative framework. This book should contribute to a widespread recognition of the need for concepts that can handle the puzzles presenting themselves in courts in a way that is true to the deep values of freedom and equality that underlie the flawed framework of property and persons.

