

## **Informed Consent as an Alternative to Property Claims in *Moore v. Regents of University of California***

### **Introduction**

In deciding that Moore did not have a property claim against the University of California for the products of his excised cells, the majority in *Moore v. Regents of University of California* makes two main points. First, that liability in these cases would place an unacceptable burden on researchers, as they would be held responsible for knowing the legal status of every cell with which they work.<sup>1</sup> Secondly, that a requirement of informed consent alleviates most of the problems relating to the patenting of a patient's genetic material.<sup>2</sup>

The *Moore* decision has come under fire for choosing to recognize only a right to informed consent and not a property right in removed organs and tissue. But I will argue here that the *Moore* decision is still essentially correct, and that critiques offered by both the dissenters and legal academics fail for one of two reasons. First, the critiques underestimate the solving power of informed consent requirements. Secondly, the critiques grossly overestimate the scope of the necessary patents in these cases, and in doing so they paint an unnecessarily extreme picture of the legal consequences of such patents.

### **Broussard's Concerns**

Justice Broussard writes that, while the majority doesn't claim that an excised organ can't be property at all, it does rely on the notion that "a *patient* retains no ownership interest in a body

---

<sup>1</sup> *Moore v. Regents of University of California* at 29, col. 2.

<sup>2</sup> *Id.* at 30.

part once the body part has been removed from his or her body.”<sup>3</sup> He argues that while an excised organ in the possession of one laboratory would clearly be considered property if it were stolen by another laboratory for financial gain, the *Moore* majority leaves the patient with no such recourse.<sup>4</sup> Though he points out a definite conflict, Broussard ignores the overriding interest in medical research that would be hindered by a recognized property right. The majority argues at several points that recognizing a tort in this area would place unreasonable burdens on researchers by suddenly forcing them to know the biographies of every cell with which they work.<sup>5</sup> Whether or not informed consent is required, if the courts are willing to recognize an absolute property right in one’s removed body parts, that burden will never be lifted from researchers.

Justice Broussard goes on to emphasize that “far from elevating these biological materials above the marketplace, the majority’s holding simply bars *plaintiff*...from obtaining the benefit of the cells’ value, but permits *defendants*...to retain and exploit the full economic value of their ill-gotten gains.”<sup>6</sup> (The debate about the legitimacy of the defendants’ gains will be discussed below.) Though it seems counterintuitive to disallow control on the part of the originator of the cells, there may be external justification for such an outcome: at the point that individuals are allowed to sell their tissue and organs on the open market, economic pressures may force sales that are detrimental to the seller’s health. What if Moore’s spleen hadn’t been cancerous, but had still possessed the properties that made it valuable? Is it unreasonable to think that at some point

---

<sup>3</sup> *Id.* at 31, col. 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 29, col. 2.

<sup>6</sup> *Id.* at 31, col. 2

a price tag would be high enough to induce the forfeiture of a perfectly healthy organ? Though the donor would be giving up their organ willingly and after being completely informed, the element of coercion brought in by economic necessity cannot be underestimated. (Though possibly invaluable later in life, a law student's kidney might seem a small price to pay for, say, enough money to pay off student loans.) Though it may not be the majority's justification for deciding against Moore, this sort of paternalistic concern may be a possible explanation for the seeming imbalance in recognition of property rights.

### **Justice Mosk and Economic Fairness**

Justice Mosk's first argument is that the broad common law concept of property would afford Moore "the right to do with his own tissue whatever the defendants did with it," which Mosk understands to include the option of dealing with other companies or researchers in order to develop products from the tissue.<sup>7</sup> Mosk seems to believe that a full disclosure on the part of the medical center would have included the revelation that the spleen would be capable of generating billions of dollars in profit, and that a fully informed Moore could then have taken his tissue elsewhere. But it is unreasonable to expect that researchers could make such a disclosure before the actual research was done; doing so would have required that they predict the potential profits of their research before it was even started, something that would have been impossible and irresponsible to do. Even if they had suggested that profit was a possibility and required Moore to waive any claim to such profits, it seems highly unlikely that Moore would have chosen to shop his cancerous spleen around elsewhere. Moore was at the medical center for treatment, not for financial gain.

---

<sup>7</sup> 32,1

Mosk also argues that Moore's contribution is at least as significant as the researchers' contributions, and that the cell line should be considered Moore's property because without Moore's cells "there would have been no Mo cell line."<sup>8</sup> But equating Moore's contribution with the contribution of the researchers is completely at odds with the Lockean understanding of property, under which someone who has "mixed his labour" with raw materials and "joined to [them] something that is his own...thereby makes it his own property."<sup>9</sup> It is not as if Moore expected that after the operation that researchers would have his spleen bronzed and returned to him; he willingly gave up the organ and other tissues, assuming that they would be discarded. At this point the items had zero value to Moore, and it is only after the researchers began working with the discarded materials that they became economically valuable.

The correct analogy would look something like this: Bob has a large block of marble sitting in the middle of his driveway, and wishes it removed because it makes backing his Escalade out of the garage nearly impossible. He hires Stan to haul the marble away, assuming that Stan will take it to the dump. Instead, Stan takes the marble home, chisels it into an eerily accurate sculpture of a local law professor, and sells it to the professor for \$300,000. I think it's clear that in this case, no court in the country would award Bob a portion of those profits. Not only was the unsculpted marble of no value to him, but he actually placed a value on having it removed.

Finally, Mosk argues with the majority's decision on grounds of economic fairness, concluding that a denial of Moore's property rights will lead to the unjust enrichment of the research institution. Quoting the congressional testimony of a respected ethics professor, he

---

<sup>8</sup> *Id. at* 32, col. 2.

<sup>9</sup> John Locke, *Second Treatise On Government* at 6, col. 2.

writes that “If biotechnologists fail to make a provision for a just sharing of profits with the person whose gift made it possible, the public’s sense of justice will be offended and no one will be the winner.”<sup>10</sup> But this view critically underestimates the solving power of simply requiring informed consent. As the majority argues, instead of providing a remedy after the fact for invasions of privacy and injuries to dignity, as a property theory attempts to do, “the fiduciary-duty and informed-consent theories protect these interests directly by requiring full disclosure.”<sup>11</sup> A thus properly informed patient can then make the choice to take his organs elsewhere, or to concede any profits and go ahead with the treatment.

### **Demaine & Fellmeth: BioPatents as Involuntary Servitude**

While Broussard and Mosk are concerned mainly with the immediate outcome of the *Moore* decision, Demaine & Fellmeth offer a critique that looks a bit further down the road: “Under the *Moore* majority’s reasoning, a patient whose cells have been patented would be prohibited from donating or selling any patented part of his biochemical self.”<sup>12</sup> They argue that such a situation approaches the Supreme Court’s notion of “badges and incidents of slavery,” in that it “resembles an exclusive property right in part of another human being.”<sup>13</sup> But this takes a much broader view of such patents than is necessary. In the case of *Moore*, the patent should only cover the direct application of the cells to the production of lymphokines, and not to the cells themselves; there is no need for these patents to be retroactive in nature, reaching back to cover the source material for their intended application. Bracketing the issue of disclosure for a

---

<sup>10</sup> *Moore* at 33.

<sup>11</sup> *Id.* at 30.

<sup>12</sup> Linda J. Demaine & Aaron Xavier Fellmeth, “Reinventing the Double Helix” at 42.

<sup>13</sup> *Id.*

moment, if Moore, after giving up his spleen, were to go another hospital and offer his cells for research that directly competed with the work done by the UC researchers he would, rightfully, run into a problem.

At the point that there is a legitimate interest in protecting the work done by research institutions, Moore would necessarily be prohibited from competing (though the limitation would effect the competing institutions more than it would Moore.) But this would in no way limit Moore's ability to donate blood or organs for use in transplants or transfusions, or to donate his tissue for use in other areas of medical research. It is unclear whether these limitations are actually placed on such patents in practice, but they could certainly be employed in a way that would alleviate Demaine & Fellmeth's quasi-slavery concerns.

Demaine & Fellmeth also drag Kant into the fray, suggesting that his categorical imperative--essentially, that human beings not be used simply as a means to an end--is violated by "the harvesting and patenting of naturally occurring human biochemicals."<sup>14</sup> But this seems beyond the scope of Kant's concern. First, the relevant biochemicals are being given up voluntarily. Had Moore woken up in a bathtub full of ice only to find a note reading "Call 9-1-1. We took your spleen," there would certainly be cause for Kantian concern. But the willing forfeiture of unwanted or unneeded organs should not trigger the same sort of response. Additionally, the biochemicals in question are no longer part of the human body once they are being used. Kant's concern was quite obviously for the spirit and dignity of the individual in question; if Moore's spleen was to be removed for his own good, it seems unlikely that Kant would be worried about its subsequent disposal. A possibility that *would* concern Kant is the use of a patient's cells to clone that patient or a recognizable portion of that patient. But the *Moore*

---

<sup>14</sup> *Id.* at 43.

majority accounts for this as well. They note that “[l]ymphokines, unlike a name or face, have the same molecular structure in every human being.”<sup>15</sup> The implication is that in any case where any identifiable portion of an individual were to be reproduced or patented, they would find that a significant interest had been violated. It just happened to be the case the Moore’s cells did not meet this requirement.

### **Conclusion**

That the *Moore* decision is troubling is understandable. The critiques offered by Demain and the dissenting justices speak to the unsettling possibility that, in certain situations, human beings could be forced to cede control over their own bodies or genetic material. But the *Moore* majority is fully aware of this concern. They balance the desire for human autonomy and privacy against the need for unfettered research, and conclude that enforcement of informed consent laws ought to be sufficient to protect both sets of interests. Provided that patents on human biochemicals are effectively limited in their scope as to not retroactively apply to all of a patient’s genetic material, the reasoning of *Moore* should continue to provide sound guidance in future decisions.

---

<sup>15</sup> *Moore* at 29, col. 2.