

# **Justifying The Case Of John Moore V Regents Of The University Of California From A Gewirthian Perspective**

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## **ABSTRACT**

The case *John Moore v Regents of the University of California* sets a precedent as to the relationship between human body parts and property rights. In this case John Moore was not successful in claim a right to his own body parts once they had been removed for research purposes and the question has to be raised whether this decision indicates that every part of the human body manipulated through modern biotechnology cannot be regarded as the property of those from whom the information originated. This article will discuss the issues of ownership and consent to uses made of genetic material from a Gewirthian perspective. Gewirth's thesis is that every agent, by the fact of engaging in action, is logically committed to the acceptance of certain evaluative and deontic judgements and ultimately of a supreme moral principle, the Principle of Generic Consistency (PGC), which is addressed to every agent: Act in accord with the generic rights of your recipients as well as of yourself. From the examination of the Moore case under the PGC, the decision made by the Supreme Court has seriously infringed Moore's human rights. It is submitted that Moore should be accorded his human right and be rewarded the royalties in accordance with the market value created. A new form of human rights, incorporated into intellectual property rights, can resolve issues relating to informed consent issues, not just in respect of community rights but also for individuals.

Keywords: *John Moore v Regents of the University of California*, ownership, Gewirthian, Principle of Generic Consistency, PGC

## **I. Introduction**

For the past few years, many fundamental questions have been brought up in public in respect of the commercial exploitation of parts of the human body. The questions are: can parts of the human body be claimed as the subject matter of a property right such as a patent? Is it right to patent parts of the human body? Is it morally justifiable to regard parts of the human body as commercial commodities? The *Moore* case sets a precedent as to the relationship between human body parts and property rights. In this case John Moore was not successful in claim a right to his own body parts once they had been removed for research purposes and the question has to be raised whether this decision indicates that every part of the human body manipulated through modern biotechnology cannot be regarded as the property of those from whom the information originated? If so, who can decide whether to grant rights to researchers and how can this be done?

In addition to the question of ownership, another question is , what kinds of rights can be awarded over human genetic material? Moreover, there are increasing public worries about the whole issue of the production of gene products involving human genetic material, and in particular the extension of the research to human beings themselves. It is therefore necessary, in addition to the consideration of the right of ownership, to ask should the impact and consequences of the science and intellectual property rights be considered as important factors relating to society as a whole. Whether or not these answers can fully be found in the decisions made by the court is one thing, the important question for discussion is whether all related issues have been comprehensively expressed in relation to human integrity.

## **II. The Facts of the Moore Case**

The case of *Moore vs. Regents of the University of California* is one of the most important cases<sup>1</sup> in relation to commercial exploitation of parts of the human body through modern biotechnology.<sup>2</sup>

In this case, John Moore was a cancer patient who had been suffering from hairy-cell leukaemia. He had received medical treatment at the UCLA Medical Center in October 1976. Because of his bad condition, Dr. David Golde recommended splenectomy surgery and obtained written informed consent from John Moore authorising the surgery.<sup>3</sup> A team of doctors removed Moore's spleen and subsequently used the spleen for some experimental purposes.<sup>4</sup> Before and after the surgery, Dr. Golde and his hospital researcher, Shirley Quan, took samples of Moore's blood, bone marrow and other bodily substances. They told Moore the samples were to be used for diagnosis and monitoring the surgery but not that they would be used for research.

The medical team soon realised from their research on Moore's tissue that "certain blood products and blood components were of great value in a number of commercial and scientific efforts"<sup>5</sup> and that access to a patient whose blood contained these substances would provide a "competitive, commercial, and scientific advantage".<sup>6</sup> However, they had no intention of informing Mr. Moore that his spleen and other cells were commercially useful and could be exploited via the research being undertaken.<sup>7</sup>

Later, following the surgery, the spleen tissue was bred into cell cultures and then developed into a new cell line. In order to confirm the success of the cell line, the researchers removed additional samples of Mr. Moore's body products. Dr Golde took samples of blood, blood serum, skin, bone marrow aspirate, and sperm during the next few years following the surgery when Mr. Moore returned to the UCLA Medical Center for post-operative treatment. The research team filed for a patent on the cell line and on March 20th, 1984 the University of California, Dr Golde and Ms Quan were granted U.S. patent No. 4438032.<sup>8</sup> The cell line was named the "Mo cell line."<sup>9</sup> Subsequently, the patent was used as the basis of a licensing agreement with the Genetics Institute and Sandoz Pharmaceuticals. The agreement included large licensing fees payable to the patent holders in return for the right to commercial development of the cell line and its

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<sup>1</sup> The Moore case is the only case to directly address the property rights of genetic material; there are other cases which are indirectly related to this issue such as *Davis v. Davis*, *Hecht and the Devises of Sperm and Kass v. Kass*. See Seoney, Erik B. 1998. "Moore 10 years Later-Still Trying to Fill the Cap: Creating a Personal Property Right in Genetic Material". *New England Law Review*. 32:1131-1191.

<sup>2</sup> See Boulier, W. "Sperm, Spleens, and other Valuables: The Need to Recognize Property Rights in Human Body Parts". *Hofstra Law Review*. 23: 693-731(1995).

<sup>3</sup> See *Moore v. Regents of the University of California* (1988) 249 Cal. Rptr, at 495.

<sup>4</sup> *Moore v Regents of the University of California* 793 P. 2d at 481(1990).

<sup>5</sup> See *ibid* at 479

<sup>6</sup> See *ibid* at 479

<sup>7</sup> See Gold, Richard. 1995. "Owning Our Bodies: An Examination of Property Law and Biotechnology". *San Diego Law Review*. 32: 1203(1990).

<sup>8</sup> See David W. Golde & Shirley G. Quan, U.S. Patent No. 4,438,032. (March 20, 1984) (Patenting a unique T-Lymphocyte line and derivative products)

<sup>9</sup> *Moore v. Regents of the University of California* (1988) 249 Cal. Rptr, at 494, 501.

by-products. Undoubtedly, the University of California, Dr Golde and Ms Quan profited from the Mo cell patent.<sup>10</sup>

When Mr Moore realised that a patent had been obtained over a product which originated from his own tissue, he took legal action against the University of California. His action had 13 causes, including conversion, lack of informed consent, breach of fiduciary duty, fraud & deceit, unjust enrichment, quasi-contract, bad faith breach of the implied covenant of good faith & fair dealing, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous economic relationships, slander of title, accounting, and declaratory relief.<sup>11</sup>

The California Superior Court rejected Moore's claim and upheld the defendants' demurrers<sup>12</sup> stating that, "there was no recognized cause of action for the claim ownership] and the court did not intend to create a new cause of action."<sup>13</sup>

Moore appealed to the California Court of Appeal.<sup>14</sup> In this second trial, the Court recognised a "right of commerciality"<sup>15</sup> in human tissues and a patient's property interests in parts of his own body, such as the cornea and bodily wastes. As Moore has not specifically abandoned his spleen by undergoing a splenectomy, he retained a right to the control of his own body and a property interest in his cells. In addition, the appeal court held that the oppositions of the defendants to the claim of conversion were "*improperly sustained because the plaintiff had adequately stated a cause of action for conversion*"<sup>16</sup> and the decision of the Superior Court should be overruled.<sup>17</sup> The patent holder, in turn, appealed this decision.

The decision of the Appeal Court was reversed by the Supreme Court of California.<sup>18</sup> In this final decision, the Supreme Court ruled that a person has no legally protected rights nor any ownership interest in tissue removed from his body and the Court denied Moore's claim for property rights over his own body. In respect of the assertion that Dr. Golde's actions had resulted in conversion (wrongful interference with another person's property), which raised questions of who actually has the right of ownership of the tissue removed from the human body; the Supreme Court of California ruled that:

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<sup>10</sup> According to agreement, Genetics Institute have to pay a number of substantial benefits including the rights to 75,000 shares of Genetics Institute common stock, a three years grant for at least \$444,000. In addition, in 1982, The Regents and Golde received \$110,000 by adding Sandoz to the agreement. See Appelbaum, B. 1992. "Moore V. Regents of the University of California: Now that the California Supreme Court has Spoken, What Has It Really Said?" Journal of Human Rights. 9: 504-505.

<sup>11</sup> Moore v Regents of the University of California (1990) 793 P. 2d at 482.

<sup>12</sup> Moore v. Regents of the University of California (1988) 249 Cal. Rptr, at 494, 502 (summarizing the holding of the trial court) (1988)

<sup>13</sup> See *ibid* (1988)

<sup>14</sup> See *ibid* (1988)

<sup>15</sup> See *ibid*, at 507 (1988)

<sup>16</sup> See *ibid*, at 502 (1988)

<sup>17</sup> See *ibid*, at 500-01 (1988)

<sup>18</sup> Moore v Regents of the University of California (1990) 793 P. 2d at 482.

**"Moore had no property rights in cells taken from his body, but remitted for trial the issue of whether the doctors had been in breach of the duty to obtain Moore's informed consent and of the duty of loyalty to Moore as their patients."<sup>19</sup>**

According to the case report, four main arguments were used by the majority in rejecting Moore's allegation that his property rights had been infringed. The main points of the four arguments were in brief, as follows:<sup>20</sup> Firstly, there was no precedent for the Supreme Court to follow in order to develop the law in this case. Secondly, the issue of who own body parts and any interests in those parts was a matter more appropriate for legislation. Thirdly, the patent granted to the University of California meant that they had an exclusive right to preclude Moore from a share of the profits. The fourth reason is that not all parts of the body should be open to claims of property rights; otherwise scientific progress would come to a halt. The court thought that if medical research could only be conducted after having obtained agreement from the patient, then it would be possible for a patient to bargain for the price of his body tissue until the price satisfied him. If these rights were held to exist then they could act as a barrier to research and the public would cease to benefit from medical research. Because of on this Moore could not succeed in his action. .

A review of these arguments suggests that they are somewhat unconvincing, yet the majority relied upon these four "reasons to doubt" Moore's claim. However, the court decision was not unanimous as Justice Mosk dissented. He argued that though there was a lack of precedent, the Supreme Court possesses the responsibility to make new law where necessary. Secondly, the highest court has a role to play in the development of the law. Thirdly, the patent granted to the University of California which had the effect of completely excluding Moore from enjoying any benefit whatsoever from the use of his cell line, was incorrectly awarded in that it instinctively conflicted with any notion of fairness.

There are two significant features which should be noticed in the decision of the Supreme Court. The first is the Lockean labour-added theory of property. The second is the breach of fiduciary duty and lack of informed consent.

### **III. Lockean Labour-added Theory of Property**

By rejecting Moore's claim to a property right in his body parts the Supreme Court favoured a Lockean theory of property which they used to exclude Moore from a share in the profits from the Mo cell line patent. The Lockean concept of property, simply stated, is that property is viewed as an extension of the individual who created it. The right to that property arising out of the fact that it required some physical or mental labour to create it. In the *Moore* case as it was the medical staff's effort which contributed 'labour' in using their research skills to transfer raw genetic materials of Moore's cells into a useful and medically valuable cell line they had the right to the property resulting from the use of those skills.

The Supreme Court therefore maintained that "Federal law permits the patenting of organisms that represent the product of 'human ingenuity', but not naturally

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<sup>19</sup> See *ibid*, at 481 (1990).

<sup>20</sup> See *ibid*.

occurring”.<sup>21</sup> The Supreme Court focused on the development of the of Mo cell line rather than on the removal of the cells from Moore. It was this focus which leads them to think that Moore could not have a property right in the cell line as he had not intellectually contributed anything to its development. A patent is usually granted to the inventor. The Court considered whether Moore could be regarded as an inventor and decided that as he had not done anything to discover his cells' function or to improve their utility, nor had he helped in the research which transformed his tissues into a patentable cell line.<sup>22</sup> Then he could not be regarded as an inventor. It was for this reason that Moore was excluded from ownership of the patented cell line because a) the cell line was considered new and different from his own natural cells and b) he had contributed nothing to the creation of the new cell line. On one level the reasoning of the Court may appear reasonable where the sole ethical issue is the use of removed or discarded parts of the human body for medical research purposes but this is not the only consideration. There is also an argument that he should have inalienable property rights to the ownership of his own cells.

The decision can also be challenged from the view of the application of the technical criteria and in particular inventive step. These techniques used to developing the Mo cell line were just common techniques of cell culture which most technicians would be expected to possess.<sup>23</sup> Neither specific techniques nor specifically designed machines were involved in the research on Moore's cell line, indeed all the techniques can be found in general cell culture textbooks. For this reason it can be argued that what the researchers did was not sufficiently inventive to justify the granting of a patent. It has been contended that it is wrong to consider a patient who has had cancerous tissue removed like Moore should not be entitled to have any right of his removed body parts even if it is used for research purposes.<sup>24</sup> Even though the material has been removed from body, it could be argued that “the moral significance of body parts remains even when they are separated from their original source.”<sup>25</sup> Notwithstanding, the Supreme Court's ruling, the issue of individual interest of body rights in this case still lacks clear justification. Clarify this point; it could be argued that there should be a clear principle of fundamental equity. It is a matter of personal interest to the patient to protect his fundamental rights. One feasible way to resolve the problem is to design a legally secure form of consent model. A legal agreement of permissible form of consent model could be made in legal framework.

The Court did not consider the profits which Moore could obtain from his own cells, although it did consider that Moore was, to a certain extent, entitled to sue the medical staff who had failed to sufficiently inform him of the proposed use of his removed spleen cell including filing for a patent. Moreover, it should not be forgotten that in this case, a key issue discussed in court was whether Moore was entitled to

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<sup>21</sup> See *ibid*, at 159.

<sup>22</sup> The court held that “the goal and result of defendants' effort has been to manufacture lymphokines. Lymphokines... have the same molecular structure in every human being...; it is no more unique to Moore than the number of vertebrae in the spine or the chemical formula of hemoglobin.” See *ibid*, at 490 (1990).

<sup>23</sup> This is a view based on my personal experience as a cell culture technician and also based on the overall review of the disclosure information of the Moore case.

<sup>24</sup> Laurie, Graeme. 2002. *Genetic Privacy: A Challenge to Medico-Legal Norms*. 317. (Cambridge: Cambridge University press).

<sup>25</sup> See *ibid*, at 318.

participate in the process of pursuing intellectual property rights that derived from his removed cells. The Court, therefore, had to concentrate on the detailed examination of whether or not Moore has given up his control over the removed cells and whether he had done anything to contribute to the invention of the cloned cell line. It has been argued that the U.S. Patent Office has no remit to decide on the consequence of granting a patenting over parts of the human body. Their function is to determine whether the technical granting criteria have been met. It is also

Relevant to note that the U.S. Patent system does not include a specific exclusion of inventions which would be contrary to morality. Hence, in view of the above reasons, it is not difficult to understand why the Court has to concentrate on these criteria to the exclusion of other considerations such as issues of morality. Due to the lack of comprehensive considerations including an assessment of the morality of granting the patent of *Moore* case cannot be used as convincing precedent. The US patent authority lost a great opportunity to set down appropriate criteria by which to determine ethical considerations when patenting biotechnological inventions.

Furthermore, apart from the use of known scientific techniques, there are two arguments which Moore could have used in support of his claim to a right in the patent. The first one is the immortal capability of cancer cells themselves and the second one is the idea that Dr. Golde used the immortal capability<sup>26</sup> to develop a rare cell line. Without the contribution of Moore's cancer cells, it would have been impossible for Dr. Golde to create a new cell line no matter how good the idea to create one is. If this argument is valid, then it follows that the California Supreme Court should not deny that Moore has made a greater contribution than Dr. Golde and should have right to share in the patent.

If a property right can be determined using the principle of contribution in which "distribution" of the right is determined by contribution and that contribution is such as to be taken to be part of the inventive act,<sup>27</sup> then, it is submitted, that Moore by his contribution of the tissue is also qualified to count as one of inventors. This analysis of the decision of the Supreme Court in *Moore* demonstrates why it is possible to argue that the current regime of applying the patent law to biotechnological inventions is not appropriate. The court neither attempted to move beyond a strict property analysis in order to protect Moore's overarching rights and interests. For this reason it is submitted that the Lockean theory of property is not necessarily the appropriate one to use.

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<sup>26</sup> See David W. Golde & Shirley G. Quan, U.S. Patent No. 4,438,032. The main feature describes "Mo cell line" in the text of the patent as: "[a] cell line (Mo) has been established with spleen cells from a patient with a T-cell variant of hairy-cell leukaemia. The cells have been shown to be capable of continuous culture for an indefinite period of time, while maintaining the proteins... The cells provide a continuous source of the above proteins, as naturally modified which can be isolated by conventional ways. In addition, due to the constitutive production of the proteins, the cells provide either directly or indirectly, a source of the genes for the proteins of interest, which by conventional genetic engineering techniques, can be introduced into microorganisms for continuous large scale production of the proteins."

<sup>27</sup> See Gewirth, Alan, *The Community of Rights*. Chicago: the University of Chicago Press 204 (1996).

#### **IV. Breach of Fiduciary Duty and Lack of Informed Consent**

The Supreme Court stated that the spleen tissues had been taken from Moore's body under circumstances in which Dr. Golde was aware that there was tremendous potential research and commercial value in that tissue. "Moore clearly alleges that Golde had developed a research interest in his cells by October 20, 1976, when the splenectomy was performed. Thus, Moore can state a cause of action based upon Golde's alleged failure to disclose that interest before the splenectomy."<sup>28</sup> The decision made by the Supreme Court considered "the patient's informed consent" as follows:

**"First, a person of adult years and in sound mind has the right, in the exercise of control over his own body, to determine whether or not to submit to lawful medical treatment. Second, the patient's consent to treatment, to be effective, must be an informed consent. Third, in soliciting the patient's consent, a physician has fiduciary duty to disclose all information material to the patient's decision... These principles lead to the following conclusions: (1) a physician must disclose personal interests unrelated to the patient's health, whether research or economic, that may affect the physician's professional judgement; and (2) a physician's failure to disclose such interests may give rise to a cause of action for performing medical procedures without informed consent or breach of fiduciary duty."**<sup>29</sup>

The allegations of Moore's claim were not totally forsaken by the court. The court held that Dr. Golde had violated the fiduciary duty of a physician to a patient and he had not fully informed Moore of the financial potential of his tissues. "[A] physician who is seeking a patient's consent for a medical procedure must in order to satisfy his fiduciary duty and to obtain the patient's informed consent, disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his medical judgement."<sup>30</sup>

The decision of the Supreme Court in *Moore* highlights numerous moral concerns about the patenting of human tissue. Many criticisms touched on commercial exploitation of the parts of human body and property rights. The scientific communities and biotechnological industries have studied this case closely. The outcome of the decision by the Supreme Court could have an enormous impact worldwide. "The court's ruling in *Moore* caused the biotech industry to heave a collective sigh of relief.

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<sup>28</sup> See *Moore v Regents of the University of California* (1990) 793 P. 2d at 486 (1990).

<sup>29</sup> See *ibid*, at 483.

<sup>30</sup> See *ibid*, at 485

Their worst nightmare- thousands of tissue donors becoming part-owners in patented cell lines and other biotechnology patents and products- had been avoided.”<sup>31</sup>

In the case of *Moore*, the conclusion of the Supreme Court could be justified if this requirement for fully informed consent had been met.<sup>32</sup> However, the requirement for informed consent may not apply or not be regarded as an important facet of the research process. One could ask whether the removal of human body parts through ‘consent to medical treatment’ equates to ‘abandonment’. In light of the Nuffield Report, the UK position is now that ‘tissue removed from donors is given free of all claims’, and this has been given legislative approval through the Human Tissue Act 1961, the Human Organ Transplants Act 1989 and the Anatomy Act 1984. If the abandonment thesis is officially used (notwithstanding that it is legally recognised) by doctors or scientists in most hospitals, then it would be difficult for patients like John Moore to claim a right over tissue once that tissue has been removed. As a result the abandonment theory has been officially sanctioned by health authorities (including hospital), despite the question marks which remain over the use of the abandonment theory in the context of the protection of inventions involving human genetic material.

A common feature to cases, such as the *Moore* case, is the moral concerns relating to property rights. As has been shown the Lockean theory is not appropriate and in the absence of a properly rigorous patent system there is a need for a more appropriate assessment of morality. It is argued that the Gewirthian theory is more apposite.

## V. Applying Gewirth’s Moral Theory-*PGC*

The chief novelty of Gewirth’s argument is the logical derivation of a substantial normative moral principle from the nature of human action.<sup>33</sup> The connection between human action and normative moral principles has long been recognised. For example, virtue ethics theories emphasize that a virtuous person’s ideas of the virtues connect ethics to action.<sup>34</sup> The role of one’s character and the virtues that one’s character embodies determine an evaluating ethical behavior. In Kant’s categorical imperative maxims, the universal law states that ‘*Act only in accordance with that maxim through which you can at the same time wills that it [should] become a universal law*’.<sup>35</sup> Gewirth’s thesis is that every agent, by the fact of engaging in action, is logically committed to the acceptance of certain evaluative and deontic judgements and ultimately of a supreme moral principle, the Principle of Generic Consistency (*PGC*), which is addressed to every agent: *Act in accord with the generic rights of your recipients as well as of yourself*.<sup>36</sup>

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<sup>31</sup> See Kimbrell, Andrew. *The Human Body Shop: The Cloning, engineering, and Marketing of Life*. Washington: Regnery Publishing, Inc (1997).

<sup>32</sup> The conclusion would be still in favour by the Court of Appeal and the dissenting minority in the Supreme Court.

<sup>33</sup> A. Gewirth, *Reason and Morality* (Chicago: University of Chicago Press, 1978) x.

<sup>34</sup> In western jurisprudence, most virtue ethics theories are derived from Aristotle who declared that a virtuous person is someone who has ideal character traits.

<sup>35</sup> Immanuel Kant, *The Moral Law. Kant’s Groundwork of the Metaphysic of Morals*. Edited and translated by W. Wood (Yale University Press) 37 (2002).

<sup>36</sup> *Reason and Morality*, 135.

The major argument which structured Gewirth's theory is called 'the dialectically necessary method'<sup>37</sup> deducing evaluative statements from the internal viewpoint of a prospective purposive agent (*PPA*). Every rational *PPA* must logically accept that he and all other *PPAs* have rights to freedom and well-being, the generic rights referred to by the *PGC*.

*APPA* is an agent who acts voluntarily for a purpose he has freely chosen and who has the capacity to exercise it and every *PPA* wants to be successful in his actions. Hence, freedom (the agent's ability to control his behaviour in accordance with his unforced choice) and well-being (the agent's ability to act successfully to realize his purposes) will constitute necessary goods for all rational agents. As for well-being, it has three levels: 'basic,' 'nonsubtractive,' and 'additive.' While basic well-being refers to preconditions of agency, such as life, health, and mental equilibrium, nonsubtractive well-being refers to the good of being able to maintain an undiminished capacity for agency (not being stolen from or lied to, for instance) and additive well-being refers to the good of being able to expand one's capacity for agency (for instance, by having education and earning an income).<sup>38</sup> And since no rational agent can accept being deprived of freedom and well-being, every rational agent must also claim rights to these necessary goods of agency.

Because the fundamental principle of the law proposed initially incorporates the *PGC* as a necessary criterion of legal validity in identifying of human rights, it is necessary to also discuss the justification for property rights through the use of the *PGC*. Under the *PGC*, property rights can be justified by reference to their role in protecting rights which are necessary for the advancement of "the work and the needs, the freedom and well-being, of the individuals, especially those who are most deprived and hence most in need of protection."<sup>39</sup> The protection of property rights, in accordance with the *PGC*, cannot be maintained just for the benefit of the rights of the community or the rights of the individual and this should be the main consideration in both the *Bioproperty Right* and patent law. The rights are granted using the principles set down in the *PGC* with human rights as the main consideration rather than the rights of the majority or the minority.

This view is entirely different from that of the utilitarian who dominate much of the current practical thinking on the concept of property rights. For a traditional utilitarian, property rights legislation should have been enacted in the most efficient way in order to enhance the operation of a market economy. However, merely considering the effect and impact of the economy obviously cannot be accepted by the international biotechnology community. This article argues that Gewirthian theory should replace the utilitarian approach to economic theory and property rights. In considering the issues of property rights in the *Moore* case, the question is: were the rights of John Moore compromised when looked from the perspective of the principles set down in the *PGC*?

Did the grant of the property rights to Dr. Golde, without obliging him to share that right with Moore, encroach Moore's human rights, given that the patented tissue

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<sup>37</sup> Gewirth describes the dialectically necessary method as reflecting 'judgments all agents necessarily make on the basis of what is necessarily involved in action'. See *ibid*, at 44.

<sup>38</sup> *Ibid*, at.53-56.

<sup>39</sup> See *ibid*.

and genetic information were taken from his body? It is argued that in applying for, and granting, the patent should the Dr Golde, together with his co-researchers, and the Patent Office should have justified the grant of a property rights using the universal morality proposed by the *PGC*. The *PGC* concerns the rights of the community and the rights of the individual. On conceptual grounds, the distinction between positive rights and negative rights is that negative rights let something happen or refrain from interference whereas positive rights seek to bring something about, or provide, active assistance. The *Moore* case can be analysed from four significant points using the *PGC*. 1) the right to private property 2) sufficient informed consent to a PPA's self-determination, 3) positive rights and 4) negative rights.

### **A. The Right to Private Property by the *PGC***

If Moore has the right to claim his removed tissues and genetic materials as his private property, then he has the right to claim a share in the patented cell line; if this is proved invalid, then will the ownership of his removed tissues belong to those who research into the genetic material, or, just shift the issue away, as the decision made by the Supreme Court appears to be saying?

Gewirth suggests the productive agency is entitled to have a right (both positive and negative) to private property, i.e. "exclusive powers to possess, use, transmit, exchange, or alienate objects."<sup>40</sup> Two arguments for property rights are proposed: the consequentialist and antecedentalist arguments. Gewirth suggests that "*the purposive-labor thesis*" of property rights through the generic rights of agency has its basis in the nature of purposive action itself. Thus, while productive agency develops certain abilities to approach their purposes, private property generated by the use of those abilities would be created. The consequentialist justification is universal and appeals to a "general right" of property, whereas the "antecedentalist" justification is particularist and applies to a "special right" of property.<sup>41</sup> The application of antecedentalist considerations is always under the control of consequentialist considerations as they have to be connected with positive rights.<sup>42</sup> Under the *PGC*, the mutuality and universality of the positive rights should be established under the principle: "everyone has the right to be treated in the appropriate way when she has the need, and when others have the relevant ability."<sup>43</sup>

The key to the concept of property has given agreement to the rule of preclusionary property.<sup>44</sup> The concept of the "rule-preclusionary" is to claim that "A owns P is the claim that A has a right to use *P* in any legitimate way and to exclude others (B) from using *P*, for the reason that A stands in a relation *R* to *P* that precludes A having to account on a case- by-case basis for A's right to use *P* and to exclude B from using *P*."<sup>45</sup> The adaptation of Gewirth's justification to rule preclusionary ownership of body parts by Beyleveld and Brownsword proposes that it is dialectically necessary to

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<sup>40</sup> See *ibid*, at 166.

<sup>41</sup> See *ibid*, at 199.

<sup>42</sup> See *ibid*, at 201

<sup>43</sup> See *ibid*, at 201

<sup>44</sup> Beyleveld, Deryck and Brownsword, Roger. *Human Dignity in Bioethics and Biolaw*. Oxford: Oxford University Press 179-188 (2001).

<sup>45</sup> See *ibid*, at 172.

suppose that we own our bodies under the rule of preclusionary property. The considerations of “consequentialist” and “antecedentalist” of Gewirth purport to show that not to grant property control may have violated the *PGC*, thus property rights are granted by the *PGC*.

Moore’s body and body parts (the Mo cell line) are metaphysically related to him, he acts through his body. It may affect his capacity to pursue his purpose successfully by depriving him of his body parts. It also violates his generic rights to remove his body parts for other purposes, without his consent. In taking Gewirth’s purposive-labor thesis of property, we could argue that Moore’s body parts are products of his labour in some sense. He must be granted rule preclusionary control over his body and body parts. Others (researchers or cancer patients) might need one or more of Moore’s body parts, but they do not have as equal right to these body parts as Moore. Even though the researchers in removing Moore’s body parts, did not cause Moore specific or significant harm, it is presumed that such an action is illegitimate without Moore’s consent because the body parts are attached to Moore and the fact of the attachment is sufficient condition to give him a right to control access to and the use of his body parts. It is dialectically necessary to grant Moore preclusionary control to protect his private body property right.

As property rights are generic rights granted by the *PGC*, the failure to obtain sufficient consent from Moore, together with the Supreme Court’s rejection of Moore’s claim, violates the *PGC*. However the claim that John Moore has a preclusionary right of exclusive use does not entail that he may transfer these rights, let alone that Regents of the University of California can commodify his body parts.

## **B. Sufficient Informed Consent**

Moore as a PPA should have been treated without contradicting his right to have sufficient informed consent to his self-determination of his body because this right has been recognised by the *PGC*. “[Freedom] consists in a person’s abilities to control his actions and his participation in transactions by his own unforced choice or consent and with knowledge of relevant circumstances, so that his behaviour is neither compelled nor prevented by the actions of other persons.”<sup>46</sup> Some outrages, however, may occur under an informed consent form if it is not properly informed. Thus, under any circumstances, any medical treatment offered to a PPA without a fully informed consent, that informs him of all the possibility of the operation, all the facts after the operation, including any purpose that would involve in the medical research and the commercial use of any removed body parts, would amount to depriving his rights to his self-determination. Therefore, it amounts to an invasion of his privacy on his own body.

To avoid an invasion of his privacy, an appropriate alternative which has been a traditional behaviour in most medical treatment and research is to invite Moore to participate in a treatment or research project under Moore’s self-determination. Also he should have been informed of any important progress in the project, e.g. the patenting of Mo cell line in this case. Additionally, the recognition of Moore’s important contribution should have been given to Moore *per se*, who is a layman, lacking sufficient knowledge of this medical research. It would be an absurd reasoning that Moore would not have felt exploited and abused by Golde and his research team

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<sup>46</sup> See Gewirth, Alan. *Human Rights*. Chicago: the University of Chicago Press 56 (1982).

presuming that Moore should have the capacity to consent to everything in the operation. To avoid the risk of the exploitation or commercialisation of their bodies and tissues, a co-combination with an honorarium policy to donors of genetic material should be proposed to respect the patient's autonomy.

Based on such an alternative, the purposes between treatment and research have to be differentiated in a very strict way. In other words, the criteria for establishing informed consent between pre- and post- operation should be laid out. Therefore a second consent should be obtained from Moore providing that he has been given enough information for him to give informed consent if post-operation research is a procedure which needs to be consented to. The applicants have violated human rights in their research and development of Moore's cell line where there is evident the adequacy of the consent not given by John Moore.

### **C. Positive Rights to PPAO<sup>47</sup>**

1. Moore is a cancer patient and he has the right to demand for cancer treatment because it is a basic right for a PPA to survive. However, when he claims his right for the treatment, other people should refrain from interfering with his therapy and furthermore he needs the active intervention of the doctors, nurses and the advanced equipment of the hospital.
2. Other cancer patients have the same right to demand for their cancer treatments because they are also PPA in the same way as Moore and health treatment is a basic right for all PPAs. When they each claim their right for treatment, Moore should refrain from interfering with their therapy and furthermore they need the active intervention of the doctors, nurses and the advanced equipment of the hospital in just the same way as Moore.
3. However, they are still dying even though they have been treated in hospital with the active intervention of the doctors and nurses. They need a special cancer cell line for special treatment and this cell line could only be derived from Moore's spleen cancer cell.
4. Moore's donation of spleen cancer cell would not harm him and it can benefit other patients. He would provide his active assistance to help other PPAs. The positive right to well-being such as helping them to have water, food, housing, education, and health care entails that when they cannot obtain this basic or additive well-being by their own effort, other people have the correlative duty to help them. This correlative duty should be borne not only by individuals but also by the economic and political structures of the whole society.<sup>48</sup> As Moore is the member of the society, he bears the correlative duty to help other patients in just the same way as other people help him.

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<sup>47</sup> PPAO means all PPA except me. Because it is my due or my entitlement to have GF, PPAO are forbidden to interfere with my rights to have the GF. As GF are freedom and well-being, hence, all other persons must at least refrain from removing or interfering with my freedom and well-being. Furthermore, if it is possible, PPAO ought to help me in securing my GF if I have difficulty in securing it by myself.

<sup>48</sup> See Gewirth, Alan. *The Community of Rights*. Chicago: the University of Chicago Press 36 (1996).

5. Therefore, from the view of positive rights, if property right can be proven through the principle of contribution in which “Distribution should be determined by contribution”,<sup>49</sup> then it is submitted that Moore is also qualified as one of inventors of the patent. Without
6. The key cancer cells that grew in Moore’s body who has to suffer the pain caused by cancer, it cannot be denied that Moore did contribute in this invention himself. This suffering, looking at it from the contribution point of view, can be justified as another form of capacity, and therefore, Moore is logically needed to be considered and listed as a co- inventor.

#### **D. Negative Rights to Moore**

1. Moore’s spleen cancer cells have the special function to stimulate different lymphokines in the long term. Usually cells taken from the body after a few hours will die quickly and the cell line has been developed by scientists to continue the cells' life for a longer period. However, it is not always easy to maintain these cell lines. Moore’s spleen cancer cells can survive much longer than other people's cells. They are functional as long-term growth cells and they can be developed into long-term cell lines without it being a laborious and fatiguing task. Hence, these cells are very rare and they are like a needle in a haystack.
2. The University of California found the special function of Moore’s spleen cancer cells and had developed them to become cell-lines for the indefinite reproduction of lymphokines. Furthermore, they applied for a patent for these cell lines as an invention. The potential value of these cell lines is unpredictable. However, these cancer cells are Moore’s private property because they are strongly attached to John Moore. It is dialectically necessary to suppose that Moore owns his body under the rule of preclusionary property. He should have the right to claim some profit from the patenting of these special cell lines. For example, some people are good at music or mathematics or sports and so on. These talents are capacities from God and those properties raised from the capacities should be recognized. These talented people have the “special rights” to claim financial benefit from their capacities. That is to say:
3. Other people have the right to claim financial benefit if they have special property in just the same way as Moore does.
4. Other people are barred from interfering in Moore’s having the right to his financial benefit. The basic right of well-being as regards to property is the right not to be stolen. John Moore “has a negative right to prevent someone

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<sup>49</sup> See *ibid*, at 204. “the contribution principle: distribution should be determined by contribution; or, in comparative terms, how much goods or rewards persons get relative to one another should be determined by, and be proportional to, how much, by their prior work, they have contributed to the total products”.

from doing scientific research on his cells”<sup>50</sup>. The financial benefit of these special cell lines is derived from Moore’s spleen cancer cells. The University of California has no right to patent Moore’s own property without his formal informed consent. This is his freedom to provide his cells to them to develop the cell lines and it is his well-being to claim his financial benefits from these cell lines because the original cells are Moore’s own property. He ought to defend his having the right to the financial benefits of these cell lines. However, when he is defending his negative rights by his own efforts, it is clear he still needs the corrective assistance from the legal structure of society.

From the view of negative rights, Moore has the freedom to provide his cells to the UCLA to develop the cell lines and it is part of his well-being to claim his financial benefits from these cell lines because the original cells are Moore’s own property. Moore’s basic rights cannot be interfered with by other PPAs. While Moore proposes a legal action to defend his basic rights in confronting the difficulty, the other PPAs should provide their assistance to Moore. It is clear that in this case, the judiciary in America should provide the corrective assistance to Moore. The failure of the appellant in this suit implies that the state of John Moore has been denied and this will contradict the *PGC*.

Hence, from the examination of the *Moore* case under the *PGC*, the decision made by the Supreme Court has seriously infringed Moore’s human rights from the above points. Therefore, it is submitted that Moore should be accorded his human right and be rewarded the royalties in accordance with the market value created.

## **VI. Conclusion**

From the discussion thus far, it is clear that the main focus of the *Moore* case is on human rights. It seems that the question of who owns the genetic materials from the human body can only be asked after an analysis of the basic foundations of moral rights has been done. It therefore has to be shown how property rights can be granted via a consideration of the moral rights of ownership rather than by just considering the legal rights. Thus before pursuing the claim for an intellectual property right, the first task must be to clarify the issue of property rights. If Moore has the right to claim the ownership to his removed tissue and genetic material, he has the right to a share of the patented cell line. The ownership of his removed tissues should not only belong in its entirety to those who have explored its utility. Hence, the case needs to be examined in the light of the ethical considerations which the court failed to address fully, this would allow us to give appropriate weight to human rights rather than just to legal criteria. If the argument is true, then this demonstrates that the mere consideration of patent criteria and technical factors in the examination of patent applications will no longer be a sufficient legal examination of the problem in this modern biotechnological age.

Here summarises both the pleadings of John Moore and the concept of invention as viewed from both sides to the case using the *PGC*. From the appellate side, Mr Moore took the legal action against the University of California in 1984 for 13 causes of action. For the defendants the *Moore* patent met the requirements of novelty, non-obviousness

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<sup>50</sup> See Grandolfo, Gina M. “The Human Property Gap”. 32 Santa Clara Law Review. 987 (1992).

and utility. The arguments of the two sides were carefully scrutinised and weighed by the court in the

U.S. and the appeals heard by first the Appeal Court and then the Supreme Court demonstrate the very different approaches taken by the judiciary in the period 1984-1990. The final decision of the Supreme Court of California rejected Moore's claim after weighing the importance of the contribution from the UCLA under California Law. In examining the *Moore* case from the perspective of *PGC* it is imperative to set out that there are four basic rights which John Moore could claim and these rights cannot be overthrown.

The first right is the right to private property that is recognised by the *PGC* after adapting Gewirth's theory to rule preclusionary rights in body parts. The second right is the right of self-determination which has been violated by the insufficient informed consent. The third is that John Moore has a duty to provide positive assistance to help other agents. The third right carries a reciprocal principle, which is the duty is to assist other agents who lack the capacity to defend their basic rights. It is essential that these rights are established and protected to ensure that the holder is not deprived of them. The fourth right is a negative one. The University of California has no right to patent John Moore's own property without his formal consent. In other words Moore had a right to prevent others from acquiring rights over his genetic material. The patenting interfered with his right to freedom and well-being. Moore chose to provide his cells for the purpose of developing the cell lines and it is right that he should be able to claim a benefit from these cell lines because the original material was his property. The lack of sufficient informed consent violated Moore's freedom and the financial benefits from patenting Moore's cell deprived Moore of the right to well-being. The decisions of the Supreme Court contradicted Moore's human rights and these human rights should have been and Moore rewarded with royalties.