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TOWARDS A FEMINIST THEORY OF THE PUBLIC DOMAIN, OR REJECTING THE GENDERED SCOPE OF UNITED STATES COPYRIGHTABLE AND PATENTABLE SUBJECT MATTER

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INTRODUCTION

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INTRODUCTION

Some intangibles can be owned. Some cannot. Decisions about the scope of protection are usually described as the outcomes of economics, special interest politics, or history. Economic relationships, special interest groups, and political power, however, have long been dominated by men. Furthermore, economic efficiency through individual ownership is an inherently male approach to the world, especially when the central prong of ownership is the right to exclude others.

The history of intellectual property is a history of expansion: expansion of both the subjects protectable and the rights given individuals over their property. Nevertheless, a few *res* are not yet protected, at least in the United States. In copyright, the most prominent are clothing, food, and folklore. In patent, the most prominent are one's own body and traditional knowledge. Also unprotected is the general right to share in what shapes the community, the public domain. This article argues that all of these exclusions are gendered in an anti-feminist manner.

One might argue, however, that modern changes to the United States copyright regime are pro-feminist. The Copyright Revision Act of 1976 moved the general line of protection from the point of

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publication to the point of fixation.¹ In combination with the Berne Implementation Act,² it eliminated most of the prior need for copyright formalities. These changes eased individual access to federal copyright protection, including access by women. This increased ease of protection, however, detracts from the feminization of the legal world by undermining the public domain.

The seeming contradictions in this introduction rest on the multiple dimensions of the terms 'gendered' and 'anti-feminist.' Participants in a struggle for betterment commonly differ not only on how to theorize their struggle, but also on whether to focus on the short term goal of improving living conditions or on the long term goal of changing basic social structure. If the long term goal is impossible, following it wastes the possibilities for improvement. If the short term goal is chosen, however, the underclass obtains a stake in the status quo, thus undercutting, perhaps fatally, any possibility of deep change. "Assimilation in an unworthy society is an unworthy goal."³ This article does not assert that all women are interchangeable or live some universalizable 'female' life. Any middle-class feminist should openly acknowledge that more disadvantaged women face much more pressure to prioritize immediate goals.⁴

In the intellectual property wars, however, all so-called consumers⁵ (and many producers) have a stake in the endangered public domain. Women are not alone.⁶ Therefore, the goal of deep

1. Copyright Revision Act of 1976, Pub. L. No. 94-553, 90 Stat. 2544 (1976) (codified as amended in scattered sections of 17 U.S.C.).

2. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (codified in scattered sections of 17 U.S.C. (2006)).

3. MARILYN FRENCH, *BEYOND POWER* 474 (1985).

4. Cf. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1915-17 (1987) (discussing the pros and cons of allowing women to choose to be sex workers).

5. "In conditions of postmodernity, cultural consumption is increasingly understood as an active use rather than a passive dependence . . ." ROSEMARY J. COOMBE, *THE CULTURAL LIFE OF INTELLECTUAL PROPERTIES* 104 (1998). The Internet, furthermore, has notoriously empowered consumers as editors, publishers, and authors. See, e.g., Yochai Benkler, Abstract, *Coase's Penguin, or Linux and the Nature of the Firm*, <http://www.benkler.org/CoasesPenguin.html> (last visited Mar. 8, 2006) (abstract of the article Yochai Benkler, *Coase's Penguin, or, Linux and The Nature of the Firm*, 112 YALE L.J. 369 (2002)) (noting that the Internet allows "commons-based peer-production," in which "groups of individuals successfully collaborate on large-scale projects following a diverse cluster of motivational drives and social signals, rather than either market prices or managerial commands").

6. See, e.g., LAWRENCE LESSIG, *FREE CULTURE* 8 (2004) (objecting to changes in law which have made the United States "less and less a free culture, more and more a permission culture"); James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain*, 66 L. & CONTEMPORARY PROBLEMS 33, 39 (2003) (complaining that "the commons of facts and ideas is being enclosed").

change is sufficiently realistic to warrant choices to forego short term benefits.

This article discusses each of these claims in relation to the type of feminism affronted by its non-protection. Liberal feminism underlies the complaint about the exclusion of clothing and food from copyright protection. Essentialist feminism objects to providing patent protection to medical researchers for inventions derived from patients' body parts, but not recognizing the contributions of the patients. Communitarian versions of feminism object to the requirement of identifiable individual authors or inventors, which makes folklore unprotectable by copyright and traditional knowledge unprotectable by patent. Feminism's most utopian form, humanist feminism (which includes strains of socialist, radical, and Marxist feminism), supports protection and expansion of the public domain.

This article's core claim is that the public domain is inherently feminist, especially for those who recognize that "*both* women and men are oppressed by the 'sex role system'" of western capitalism.⁷ By enlarging and protecting the public domain, society would move towards a more feminine, and therefore more humanist, culture. The final part of this article discusses the difficult relationship between traditional communitarianism and feminism. It suggests that one theory of the public domain may serve as a model for a more acceptable view of community: the owned public domain where each person has a right not to be excluded, as contrasted with a community where individuals are bound by unchosen duties and lack realistic abilities to exit.

I. LIBERAL FEMINISM: CLOTHING AND FOOD

Liberal feminism, the first wave of modern feminist critique, accepts the basic liberal concept of humans as entitled to respect because of their rational nature.⁸ It argues that women, like men, are rational humans and should be allowed full formal rights under the law.⁹ The liberal feminist political agenda is to counter the "poverty [that] makes most women unequal to most men."¹⁰ Liberal feminism was, of course, the theory behind the American Civil Liberty Union's Women's Rights Project, nurtured by now-Associate

7. See ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 8 (1983).

8. *Id.* at 28.

9. See, e.g., *id.* at 28-35.

10. *Id.* at 177.

Justice Ruth Bader Ginsburg.¹¹ These pioneers of feminism deserve respect and thanks for the major legal and social changes they fomented, changes which have given later feminists the ability to ask more deconstructive questions. Within the context of intellectual property, the question posed by liberal feminism is whether United States law denies economic power to women by refusing to grant property rights in types of works that involve traditional women's work: food and clothing.¹²

The original exclusion of these works from protection seems tied to the fantasy hero of early copyright: the author as supersized, individual genius.¹³ This illusionary luminary is triply formed by patriarchal thinking. First, the hero is the autonomous individual who creates without support from his cultural network.¹⁴ Second, the hero is a male in his self-characterization and his claim of dominion over his children.¹⁵ Third, the hero is male in his elevation of creation through rational thought over creation through physical birthing or nurturing during childhood.¹⁶

Not only has the dominant culture denigrated the giving of birth, it has also developed a venerated view of what is taken to be a form of birth-giving: intellectual and artistic creation, and it has associated this kind of creation with the male. The capacity to "give birth to" wisdom, knowledge, and art has long been set beside the mere bodily capacity to give birth to infants.

11. See Morrison Torrey, *Thirty Years*, 22 WOMEN'S RTS. L. REP. 147, 147-48 (2001); Biography of Ruth Bader Ginsburg, <http://www.supremecourtus.gov/about/biographiescurrent.pdf> (last visited Mar. 8, 2006).

12. See generally Malla Pollack, *A Rose Is a Rose Is a Rose — But Is a Costume a Dress? An Alternative Solution in Whimsicality, Inc. v. Rubie's Costume Co.*, 41 J. COPYRIGHT SOC'Y U.S. 1 (1993) (discussing the copyright status of clothing); Malla Pollack, Note, *Intellectual Property Protection for the Creative Chef, or How to Copyright a Cake: A Modest Proposal*, 12 CARDOZO L. REV. 1477 (1991) (discussing the copyright status of food).

13. See, e.g., Martha Woodmansee, *On the Author Effect: Recovering Collectivity*, in THE CONSTRUCTION OF AUTHORSHIP 15, 16 (Martha Woodmansee & Peter Jaszi eds., 1994) (locating origin of the myth of the heroic author in Edward Young's 1759 work *Conjectures on Original Composition*); see also Debora Halbert, *Poaching and Plagiarizing: Property, Plagiarism, and Feminist Futures*, in PERSPECTIVES ON PLAGIARISM AND INTELLECTUAL PROPERTY IN A POST-MODERN WORLD 111, 113 (Lise Buranen & Alice M. Roy eds., 1999) (discussing the masculine gender of the mythical heroic author); Shelley Wright, *A Feminist Exploration of the Legal Protection of Art*, 7 CAN. J. WOMEN & L. 59, 77-82 (1994).

14. See, e.g., ELIZABETH FOX-GENOVESE, FEMINISM WITHOUT ILLUSIONS: A CRITIQUE OF INDIVIDUALISM 1-9 (1991) (discussing the patriarchal core of the theory of humans as autonomous individuals).

15. See Wright, *supra* note 13, at 77-82.

16. Virginia Held, *Birth and Death*, in FEMINISM AND POLITICAL THEORY 87, 110-11 (Cass R. Sunstein ed., 1990).

Not only have such metaphors of creativity suggested that men also can give birth: they have fixed the association of "male" with the former and "higher" type of creativity, "female" with mere propagation of the species.¹⁷

Relatedly, the heroic figure claims a high place on the social scale. The placement of some forms of writing, painting, and sculpture into the joined categories of "high art" and social respect, as opposed to mere craft without social respect, was part of the social politics of Renaissance Europe, not a necessary part of artistic theory.¹⁸

Preparation of food and fabrication of clothing are traditional women's work,¹⁹ hence primary candidates for both lack of respect and the low economic support generally provided women's work in capitalist patriarchal societies.²⁰ Chefs were originally classified by the United States Department of Labor as "domestics."²¹ They were not identified as "professionals" until 1976.²² Repeated studies demonstrate that despite the growing number of hours American women work outside the home, they still perform the "vast majority of housework."²³ Of course, women's actual work has changed over time. With the increase both in relatively inexpensive off-the-rack clothing and women's out-of-home employment, home-made clothing is "more often a labor of love than a matter of economic necessity."²⁴ Similarly, since the 1960s, the United States has seen "a revolution in the mass preparation of food that is roughly comparable to the mass production revolution in manufactured goods that happened a century ago."²⁵ Meal preparation and clean up that once required

17. *Id.* at 110-11.

18. See WHITNEY CHADWICK, WOMEN, ART, AND SOCIETY 37-42 (2002) (noting that artistic hierarchy dates from the Renaissance and is tied to the sexual division of labor); Monroe C. Beardsely, *History of Aesthetics*, in 1 THE ENCYCLOPEDIA OF PHILOSOPHY 18, 24 (Paul Edwards ed., 1972).

19. "Women grow much of the world's food, and everywhere women prepare food for those they live with." FRENCH, *supra* note 3, at 483. Despite historical and geographical variations, "a surprising number of men and women, over time and space, have organized their activities in recognizably similar ways. . . . Women have tended to work in and around households, to feed, and to clothe." Alice Kessler-Harris, *Gender and Work*, in WOMEN'S HISTORY IN GLOBAL PERSPECTIVE 145, 145-46 (2004).

20. See, e.g., JAGGAR, *supra* note 7, at 173-85 (discussing chronic underpayment of work done traditionally by women).

21. See Nancy Backas, *The Newest Profession: Culinary Arts Comes of Age in America*, RESTAURANTS & INSTS., Oct. 15, 1986, at 205.

22. *Id.*

23. NAT'L RESEARCH COUNCIL, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 16 (Barbara F. Reskin & Heidi I. Hartman eds., 1986).

24. *A Rags to Riches Tale*, LEDGER (Fed. Reserve Bank of Boston), Winter 2003-04, at 8-9, available at <http://www.bos.frb.org/education/ledger/ledger04/winter/win0304.pdf>.

25. David M. Cutler et al., *Why Have Americans Become More Obese?*, 17 J. ECON. PERSPECTIVES 93, 93-94 (2003).

two hours can now be duplicated in under one.²⁶ These changes, however, do not negate the sticky social perception of food and clothing preparation as women's work, nor the fact that the supermajority of such work is performed by females. The choice not to protect food and clothing under copyright law is gendered and anti-feminine.

Although clothing and food are not protectable by copyright in the United States, they are protectable through utility and design patents.²⁷ However, such protection differs from copyright in three very important ways. First, United States copyright ownership vests on the mere creation of an object, an action technically known as fixation.²⁸ Although registration is required for some copyright law suits, registration information is readily obtainable, the fees are low, and the paperwork can be done by a layperson.²⁹ Patent rights, in contrast, must be obtained by negotiation with the government, involve high fees, and require the intermediation of a patent agent.³⁰ Patents have a much shorter term than copyrights, but provide more robust rights.³¹ For copyrights, but not for patents, independent creation is a defense to infringement.³² Copyright requires only a minimal level of creativity, while patents are granted only for innovations that would not be obvious to a person of ordinary skill

26. *See id.*

27. Protection through trademark and related doctrines, while also possible, requires that the *res* function as an indicia of the origin of the product, not merely as the desired attribute of the product. *See Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 216 (2000) ("We hold that, in an action for infringement of unregistered trade dress under § 43(a) of the Lanham Act, a product's design is distinctive, and therefore protectable, only upon a showing of secondary meaning," i.e. that it has acquired the ability to serve as an indicia of origin.); *Knitwaves Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1006 (2d Cir. 1995) ("[S]ince the primary purpose of Knitwaves' [leaf and squirrel] sweater designs is aesthetic rather than source-identifying, Knitwaves' sweater designs do not meet the first requirement of an action under § 43(a) of the Lanham Act — that they be used as a mark to identify or distinguish the source.").

28. *See* 17 U.S.C. § 102(a) (2005) ("Copyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression.").

29. *See id.* § 411; U.S. Copyright Office, Registration, <http://www.copyright.gov/register/> (last visited Mar. 8, 2006).

30. *See* 35 U.S.C. §§ 32-33 (2005) (regulating persons allowed to practice before the Patent and Trademark Office (USPTO)); 35 U.S.C. §§ 151-53 (2005) (regulating issuance of patents by USPTO); U.S. PATENT & TRADEMARK OFFICE, USPTO FEE SCHEDULE, <http://www.uspto.gov/web/offices/ac/qs/ope/> (last visited Mar. 8, 2006).

31. *Compare* 35 U.S.C. §§ 154-56 (2005) (regulating length of patent term with standard term set at twenty years), *with* 17 U.S.C. §§ 302-305 (2005) (regulating length of copyright term with standard term set at life of the author plus seventy years).

32. *See Eldred v. Ashcroft*, 537 U.S. 186, 216-17 (2003) (recognizing that patents provide more power to exclude than do copyrights); *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 477-78 (1974) (recognizing that independent creation is a defense to copyright infringement but not to patent infringement).

in the relevant art.³³ In sum, the availability of utility and design patents dampens the problem, but copyrights would be a valuable addition to the economic power of creative chefs and clothing designers.

The United States' exclusion of needlework from the protection of copyright law is not as extensive as commonwealth exclusions reported by Shelly Wright in her groundbreaking feminist indictment of commonwealth copyright law.³⁴ According to Wright, in the commonwealth system, women's needleworks are protectable as "works of artistic craftsmanship"; therefore, they are unprotectable unless meeting some heightened, yet unclear level of artistic merit.³⁵ She does leave open a slight possibility that factory-created items may find a warmer home in industrial design law.³⁶ She also suggests that three-dimensional articles made from patterns might be considered infringements of the patterns, but the only case she discusses refused such protection.³⁷

In contrast to commonwealth law, the United States has no separate industrial design law. The design of works of "artistic craftsmanship" are protected by copyright as "[p]ictorial, graphic, and sculptural works," but only "insofar as their form but not their mechanical or utilitarian aspects are concerned."³⁸ Designs of "useful articles" are protectable "if, and to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article."³⁹ Quilt designs, fabric designs, and lace designs are routinely protected; they need only the same minimal creativity required of other copyrightable subject matter.⁴⁰ The shape of clothing itself is not protected,⁴¹ but

33. *Compare* Feist Publ'ns v. Rural Tel. Serv. Co., 499 U.S. 340, 358 (1991) (holding that the originality requirement for copyright protection is not stringent and requires only a "minimal level of creativity") with *Graham v. John Deere Co.*, 383 U.S. 1, 14-17 (1966) (citing 35 U.S.C. § 103 to require non-obviousness for a patent).

34. *See* Wright, *supra* note 13, at 90-94.

35. *Id.* at 91.

36. *Id.* at 91-94.

37. *See id.* at 94 (discussing *Brigid Foley Ltd. v. Elliott* [1982] R.P.C. 433).

38. 17 U.S.C. § 101 (2005).

39. *Id.*

40. *See, e.g.*, *Boisson v. Banian Ltd.*, 273 F.3d 262 (2d Cir. 2001) (protecting quilt design); *Hamil Am. Inc. v. GFI*, 193 F.3d 92 (2d Cir. 1999) (protecting floral pattern on textiles); *Thomas Wilson & Co. v. Irving J. Dorfman, Co.*, 433 F.2d 409 (2d Cir. 1970) (protecting lace design); *see also* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08(H)(2) (2005) [hereinafter NIMMER ON COPYRIGHT] (asserting that designs on fabric are copyrightable).

41. *See* NIMMER ON COPYRIGHT, *supra* note 40, at § 2.08(H)(3) (asserting that the design of clothing, as opposed to a design on clothing, is not copyrightable).

certain cases protected uncomfortable aspects of several dress-up costumes.⁴² Three dimensional soft sculptures created by sewing fabric, including dolls with clothing, are protected by copyright; doll clothing is also protectable.⁴³ The few cases that discuss making clothing for humans from two-dimensional, copyright-protected drawings have held such action not to infringe any copyright in the drawings.⁴⁴

Food is less protected than clothing. Food is patterned by recipes, which are copyrightable literary works.⁴⁵ In the United States, however, one may legally reuse a copyright-protected recipe provided one rewrites the explanatory words.⁴⁶ The copyright protection of such a literary work does not extend to "any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work,"⁴⁷ i.e., how to prepare

42. See *Chosun Int'l, Inc. v. Chrisha Creations Ltd.*, 413 F.3d 324 (2d Cir. 2005) (vacating 12(b)(6) dismissal of complaint alleging copyright infringement of Halloween costumes and remanding for consideration of whether separable copyrightable elements exist); *Nat'l Theme Prods. v. Jerry B. Beck, Inc.*, 696 F. Supp. 1348 (S.D. Cal. 1988) (protecting some aspects of Rabbit in Hat, Tigress, Magic Dragon, and Pampered Pup costumes); see also *Celebration Int'l Inc. v. Chosun Int'l, Inc.*, 234 F. Supp. 2d 905 (S.D. Ind. 2002) (refusing preliminary injunction despite probable copyrightable elements of tiger and giraffe costumes). But see *Whimsicality, Inc. v. Rubie's Costume Co.*, 791 F. Supp. 1566 (E.D.N.Y. 1989) (holding multiple costumes uncopyrightable), *aff'd in relevant part on other grounds*, 891 F.2d 452 (2d Cir. 1989).

43. See *Original Appalachian Artworks, Inc. v. McCall Pattern Co.*, 649 F. Supp. 832 (N.D. Ga. 1986) (recognizing copyright protection of dressed, soft cloth dolls); see also *Boyds Collection Ltd. v. Bearington Collection, Inc.*, 365 F. Supp. 2d 612 (M.D. Pa. 2005) (denying summary judgment to defendant in copyright action on ground that clothing for dolls and other toys is copyrightable, though clothing for people is not).

44. See *Russell v. Trimfit, Inc.*, 428 F. Supp. 91 (E.D. Pa. 1977), *aff'd* 568 F.2d 770 (3d Cir. 1978) (regarding toe socks); *Jack Adelman, Inc. v. Sonners & Gordon, Inc.*, 112 F. Supp. 187 (S.D.N.Y. 1934) (regarding dresses). In *Galiano v. Harrah's Operating Co.*, 416 F.3d 411 (5th Cir. 2005), a designer of employee uniforms sued on the ground that clothing constituted derivative works infringing two-dimensional drawings. *Id.* The Fifth Circuit affirmed summary judgment for the defendant on the ground that the clothing designs were useful articles without conceptually separable copyrightable elements. *Id.* at 422. The court declined to address the derivative work jump from pictures to clothing because it was "under-theorized" in plaintiff's briefs, adding, "we also note that to find infringement based on a derivative works right (the artwork itself is protected) would be to usurp a fairly developed (albeit hotly contested) applied-art jurisprudence that takes the difference between the drawings and the objects depicted in them into full consideration." *Id.* at 415 n.8.

45. 17 U.S.C. § 102(b) (2005).

46. *Id.*

47. *Id.*; accord *Baker v. Seldon*, 101 U.S. 99 (1879) (holding that copyright in book describing accounting system does not prevent others from practicing the accounting system). But see Pollack, *Intellectual Property Protection for the Creative Chef*, *supra* note 12, at 1476-88 (arguing that food could be protected under the statute by recognizing an unlisted category, as opposed to considering food items as embodiments of the recipes).

the food. The food itself would likely be unprotectable as a useful item without any separable pictorial, graphic, or sculptural elements. Of course, if one formed an icing rose, the shape of the rose would be as protectable as if it had been sculptured in marble.

II. ESSENTIALIST FEMINISM: BODY PARTS

Essentialist feminism, one form of radical feminism, celebrates the fecundity of motherhood, denying the relative value of disembodied mental creation as typified by the genius author or inventor.⁴⁸ This branch of feminism celebrates one patriarchal claim denied by liberal feminists: that women are closer to nature than are men.⁴⁹ In the classic formulation, *Gyn / Ecology*, Mary Daly urges women to embark on journeys of self discovery to reclaim their vitality as mother goddesses.⁵⁰ Male-created culture is woman's enemy, the "Male Maze,"⁵¹ the "Tower of Babel."⁵²

From the essentialist perspective, the patriarchy inverts natural order in the treatment of valuable body parts, such as the cell line at issue in *Moore v. Regents of the University of California*.⁵³ John Moore went to a university hospital for treatment of hairy-cell leukemia.⁵⁴ His medical caretakers, however, were also researchers.⁵⁵ Without informing Moore, they harvested parts of his body to generate a cell line.⁵⁶ The researchers obtained a multi-claim patent based on the Moore-generated cell line.⁵⁷ The patent was assigned to the University, which executed a potentially lucrative contract with a biotechnology corporation.⁵⁸ Neither profits nor control were shared with John Moore.⁵⁹ Moore sued on various claims, including conversion of his body parts.⁶⁰ The California Supreme Court refused to allow Moore either any property interest in the patent or

48. See ANNE CAMPBELL, A MIND OF HER OWN: THE EVOLUTIONARY PSYCHOLOGY OF WOMEN 30-31 (2002).

49. See, e.g., JAGGAR, *supra* note 7, at 93-98.

50. See MARY DALY, GYN/ECOLOGY 1-2 (1978) ("All mother goddesses spin and weave This book is about a journey of women becoming Breaking through the Male Maze is both exorcism and ecstasy. It is spinning" (quotation marks and internal citation omitted)).

51. *Id.* at 2.

52. *Id.* at 4.

53. 793 P.2d 479 (Cal. 1990).

54. *Id.* at 480.

55. *Id.* at 480-81.

56. *Id.* at 481-82.

57. *Id.* at 482.

58. *Id.*

59. *Id.*

60. *Id.* at 480-84.

any property interest in the cell line descended from his body parts.⁶¹ The court did allow Moore the right to litigate a claim that the doctors failed to give him full information when requesting his consent to medical procedures.⁶² However, the court based this on the possibility that a doctor's "personal [research and financial] interests may affect [his] professional judgment [about risks to the patient]," rather than "because he has a duty to protect his patient's financial interests" in his own body.⁶³ The *Moore* case has no later reported history. According to Professor Hank Greely of Stanford University, who has done extensive research on the case, Moore "received a cash settlement, before deduction of attorneys' fees and court expenses, that seems likely to have been between \$200,000 and \$600,000 and a share of [one doctor's] interest in the patent royalties, which turned out to be worthless."⁶⁴

Moore is a quintessential case of valorizing mental creation and devaluing natural physical creation. Under the rules of U.S. patent law, the cell generator is not an inventor, and therefore not eligible to obtain a patent because the generator has not mentally conceived the invention.⁶⁵ The California Supreme Court did not have the power to change patent law, but it could have allowed Moore a state property right in the proceeds of the cell line. It declined to do so. Like women and the children to whom they give birth, or dying patients and the organs they can no longer use,⁶⁶ Moore was held entitled to donate or not to donate.⁶⁷ He was confined, however, to

61. *Id.* at 497.

62. *Id.*

63. *Id.* at 485 n.10. The majority did not clarify what Moore would have to show at trial to succeed on his claim. See *id.* at 500 (disagreeing with dissent's view that "defendants will be able to avoid all liability under [informed consent theory] simply by showing that plaintiff would have proceeded with the surgical removal of his diseased spleen even if defendants had disclosed their research and commercial interest in his cells") (Broussard, J., dissenting in part as to the conversion claim and concurring in part as to the informed consent claim). The standard Judge Broussard rejects is the accepted rule. See PROSSER & KEETON, THE LAW OF TORTS § 32 at 191 (5th ed. 1984); see also *Moore*, 793 P.2d at 519 (recognizing that under California precedent Moore would have to prove that he personally and a hypothetical reasonable person would have refused to have the operation) (Mosk, J., dissenting).

64. Email from Hank Greely to Malla Pollack (May 26, 2005) (on file with author).

65. See *Moore*, 793 P.2d at 512 ("Neither John Moore nor any other patient whose cells become the basis for a patentable cell line qualifies as a 'joint inventor' [under federal patent law] because he or she did not further the development of the product in any intellectual or conceptual sense.") (Mosk, J., dissenting); see also Cynthia M. Ho, *Who Deserves the Patent Pot of Gold?: An Inquiry into the Proper Inventorship of Patient-Based Discoveries*, 7 DEPAUL J. HEALTH CARE L. 185, 210-11 (2004).

66. See Uniform Anatomical Gift Act (1987) § 10 (allowing donation but not allowing receipt of "valuable consideration").

67. *Moore*, 793 P.2d at 489-93.

the private world of gift.⁶⁸ Only the mentally valiant inventors (and their employers) were allowed the option of choosing the male, public sphere of economic gain.⁶⁹

The property rights of human donors of body parts used in commercially valuable research still raise a contentious issue in academic and professional literature, but no case seems to have recognized such a right.⁷⁰ To prevent legal challenges, standard donation forms sometimes advise donors that they will not be compensated or that any property rights in the biological material belongs to the research institution.⁷¹ A few states have passed statutes recognizing property rights in donated genetic information.⁷² Some research groups have issued ethical statements calling for sharing of benefits,⁷³ including one call for a small percentage of profits to be donated to humanitarian efforts in the community where the genetic material was collected.⁷⁴ Neither these state statutes nor the ethics statements have yielded any financial return to the creators of the genetic material.⁷⁵

One factually unusual case did result in a somewhat positive settlement. At the petition of the Greenberg family, Dr. Robert Matalon began research on a rare, fatal genetic disorder, Canavan disease.⁷⁶ Matalon received significant ongoing support from the Greenbergs, other families of affected children, the Canavan Foundation, and the National Tay-Sachs and Allied Disease Association.⁷⁷ Matalon and his team, working from the Miami Children's Hospital, located the carrier gene and developed a screening test.⁷⁸ The Hospital obtained a patent on the technology.⁷⁹ In response to royalty demands by the Hospital, the Canavan

68. *Id.*

69. The body part is market-inalienable with regard to the person growing it, but not with regard to researchers. See Radin, *supra* note 4, at 1854 (arguing that market-inalienability does not "render something inseparable from the person, but rather specifies that market trading may not be used as a social mechanism of separation" and noting that "preclusion of sales often coexists with encouragement of gifts").

70. See Gary E. Marchant, *Property Rights and Benefit-Sharing for DNA Donors?*, 45 JURIMETRICS J. 153, 157 (2005).

71. See *id.* at 155-56; see also Daniel S. Strouse, *Informed Consent to Genetic Research on Banked Human Tissues*, 45 JURIMETRICS J. 135 (2005) (discussing existing and proposed models of informed consent).

72. Marchant, *supra* note 70, at 160.

73. *Id.*

74. *Id.*

75. See *id.* at 159-62.

76. *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064, 1066 (S.D. Fla. 2003).

77. *Id.* at 1067.

78. *Id.*

79. *Id.*

Foundation terminated its free testing program.⁸⁰ The two nonprofit organizations and the families of two genetic donors sued the Hospital.⁸¹ While the court dismissed most theories as legally insufficient, including a claim for conversion, it did allow continued litigation of unjust enrichment, recognizing that the donated genetic material might have conferred some compensable benefit on the Hospital.⁸² In other words, this court accepted the importance of the donated human physical material to the mental creativity of the researchers.⁸³ The case ended with a confidential settlement recognizing the Hospital's patent rights but providing for some unspecified, royalty-free use of the patented invention.⁸⁴

Learning from the Canavan disease litigation, a nonprofit association to help victims of another rare genetic disorder, Pseudoxanthoma Elasticum (PXE), contracted with interested researchers for part ownership of any resulting patents.⁸⁵ Other groups and some scholars are arguing for expansion of the PXE model on various grounds, but none of them seems to have tied the claim to essentialist feminism.⁸⁶

III. COMMUNITARIAN FEMINISM: FOLKLORE AND TRADITIONAL KNOWLEDGE

An attack on the individual as constructed by social contract theorists is central to many forms of feminism.⁸⁷ According to

80. *Id.*

81. *Id.* at 1068.

82. *Id.* at 1068-77 (dismissing all causes of action except unjust enrichment for failure to state a cause of action on which relief may be granted).

83. *See id.*; *see also* Marchant, *supra* note 70, at 161-63 (providing factual background).

84. Press Release, Canavan Foundation (Sept. 29, 2003), *available at* http://www.canavanfoundation.org/news/09-03_miami.php. Plaintiffs did file a Motion and Memorandum of Law for Reconsideration, *Greenberg v. Miami Children's Hosp. Research Inst., Inc.*, 264 F. Supp. 2d 1064 (S.D. Fla. 2004), 2004 WL 2247051, but settlement occurred afterward, rendering the motion moot. Telephone Interview by Malla Pollack with Lori Andrews, Attorney for Plaintiffs and Prof. Chicago-Kent School of Law (May 31, 2005).

85. *See* Marchant, *supra* note 70, at 164 (discussing the contract as a positive development). *But see* Ho, *supra* note 65, at 225-26 (discussing the PXE contract in more negative terms). The Havasupai Tribe of Arizona recently filed a law suit in Arizona objecting to the use, for other research purposes, of tissue samples donated for diabetes research. The causes of action include failure of informed consent but not conversion. *See* Lori Andrews, *Havasupai Tribe Sues Genetic Researchers*, 4 LAW & BIOETHICS REP. 10, 10-11 (2004), *available at* <http://www.louisville.edu/medschool/ibhpl/images/pdf/Lab%20Report%20win%2004.pdf>.

86. *See* Marchant, *supra* note 70, at 164-65 (collecting materials).

87. *See, e.g.*, FOX-GENOVESE, *supra* note 14, at 7; CAROLE PATEMAN, *THE SEXUAL CONTRACT* 2 (1988).

Elizabeth Fox-Genovese, "individualism actually perverts the idea of the socially obligated and personally responsible freedom that constitutes the only freedom worthy of the name or indeed historically possible."⁸⁸ Such refusal to notice the social formation of persons ignores that all persons are birthed and nurtured inside the private sphere (usually by women); this tunnel vision leaves the family, the private sphere to which women traditionally are relegated, untouched by the political reforms of social contract theory. As the myth of the social contract is retold by Carole Pateman: "Civil freedom is a masculine attribute and depends upon patriarchal right. The sons overturn paternal rule not merely to gain their liberty but to secure women for themselves. . . . Contract is far from being opposed to patriarchy; contract is the means through which modern patriarchy is constituted."⁸⁹ Pateman further writes:

Paternal right is only one, and not the original, dimension of patriarchal power. A man's power as a father comes after he has exercised the patriarchal right of a man (a husband) over a woman (wife). The contract theorists had no wish to challenge the original patriarchal right in their onslaught on paternal right. Instead, they incorporated conjugal right into their theories and, in so doing, transformed the law of male sex-right into its modern contractual form. . . . The original contract takes place after the defeat of the father and creates modern *fraternal patriarchy*.⁹⁰

Even John Rawls's discussion of the hypothetical contract made in the original position describes the parties as individual heads of their respective households, i.e. patriarchs who do not recognize intra-family relationships to be regulated by the justice-requiring social contract.⁹¹

This atomization of persons, with society demoted to something formed by human will (as opposed to humans as beings birthed into cultures and formed by nurturing), supports the valorization of

88. FOX-GENOVESE, *supra* note 14, at 7.

89. PATEMAN, *supra* note 87, at 2.

90. *Id.* at 3.

91. JOHN RAWLS, A THEORY OF JUSTICE 128 (1971) (identifying persons in the original position as heads of their respective families); *see also* PATEMAN, *supra* note 87, at 41-43 (explaining the anti-feminist gendering of Rawls's construct). *But see* Susan Moller Okin, *Reason and Feeling in Thinking About Justice*, 99 ETHICS 229, 246 (1989) ("Rawls' theory is much better interpreted as a theory founded upon the notion of equal concern for others than as a theory in which 'mutual disinterest' has any significance.").

'male' mental creativity and the myth of author or inventor as individual genius.

In U.S. intellectual property law, this recognition of creation only by autonomous individuals leads to an untheorized need to find one or more *individual* authors or inventors for any copyright or patent right to exist. Copyright vests automatically in the author, a single human, or in the employer of that human author.⁹² Individuals can be joint authors, but they are still authors because of their individual contributions.⁹³ Patents also require individual human inventors.⁹⁴

Since community creation is not legally recognized, folklore and traditional knowledge are not only uncompensated, but also may be appropriated by alien individuals. A patent hypothetical is useful to illustrate this point. Dr. Western visits a tribal society in the Amazon basin that teaches him its use of the Local Vine, in combination with sugar and various rituals, for healing wounds. Dr. Western takes cuttings back to his laboratory and analyzes the chemical composition of Local Vine. Dr. Western obtains a patent on (1) the use of sugar in combination with the chemical found within Local Vine to heal wounds, (2) the process of extracting a strong version of the chemical from Local Vine, and (3) the extracted substance. Patent law requires that a patent seeker have himself invented the subject matter sought to be patented,⁹⁵ but since the knowledge taught to Dr. Western did not cover healing by use of sugar and Local Vine but without ritual, Dr. Western is not barred from obtaining a patent. Since the teaching was not practiced in the United States, never written down, and no one has applied for a patent or inventor's certificate in any country, Dr. Western's patent is not barred by the other provisions of 35 U.S.C. § 102.⁹⁶ Nor is the patent barred for lack of nonobviousness, under 35 U.S.C. § 103, because such non-obviousness is judged only by reference to *res* covered by § 102, "prior art," so the possible obviousness of using the traditional procedure without the ritual does not bar the patent.⁹⁷

92. 17 U.S.C. § 201(a) (2005).

93. *See id.* ("The authors of a joint work are co-owners of copyright in the work.").

94. 35 U.S.C. §§ 115-18 (2005).

95. *Id.* § 102(f) (2005).

96. *See id.* § 102(a)-(g).

97. *See* 25 U.S.C. § 103 (2005). In contrast, earlier oral description bars patent grant under the European Patent Convention. *See* Administrative Council of the European Patent Organisation, Convention on the Grant of European Patents art. 54, ¶ 2 (revised Oct. 27, 2005) ("[S]tate of the art," the European Patent Convention equivalent of "prior art," is defined to include "everything made available to the public by means of a written or oral description, by use or in any other way, before the date of the filing of the European patent application."). A U.S. utility patent on the use of turmeric to heal

Under the technicalities of the U.S. patent code, the oral teachings of the tribe do not exist. The tribal society gets no remuneration or control.⁹⁸ Continuing the hypothetical, a member of the tribe who takes a trip to the United States packs cuttings of Local Vine in her first aid kit. When she uses that Local Vine with sugar and the appropriate ritual to treat a wound during her visit, she infringes Dr. Western's patent. Using the ritual does not protect her because adding an element is not a defense to patent infringement.⁹⁹ Her membership in a tribe that used this process before Dr. Western's 'invention' is not a defense to infringement in the United States, though it would be in many other countries.¹⁰⁰

United States copyright protection operates analogously, though less drastically. Another hypothetical provides helpful illustration. Dr. Northern visits a tribal society in Africa. She attends the weekly community gatherings where the tribe's myths are recited. She records them in her own language and words on paper. Provided she has not transcribed verbatim, she has a copyright in her work. Since the recitation has never been written down, Dr. Northern does not need permission from the community to obtain copyright in her modifications.¹⁰¹ Again, the tribal society gets no remuneration or control. A member of the tribe visits the United States and buys a copy of Dr. Northern's book, paying copyright royalties. She writes out a literal translation of Dr. Northern's book into her native

wounds, a folk remedy in India, was cancelled only because written descriptions were provided to the U.S. Patent Office by the Council of Scientific and Industrial Research of India. See Matthais Leistner, *Analysis of Different Areas of Indigenous Resources, in* INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY 49, 77 (Silke van Lewinski ed., 2004). India has begun construction of a freely accessible online database of traditional knowledge for the specific purpose of providing legally relevant prior art to prevent grant of such patents. See Kinjal Mehta, *India's Fight Against Biopiracy to Focus on Protecting Traditional Knowledge*, 71 BNA PATENT, TRADEMARK & COPYRIGHT J. 251, 251 (2006).

98. Several international groups are discussing proposals to provide control (and hence remuneration) to indigenous groups by requiring patent applications to indicate the origin of genetic resources used in the research leading to the patent application and the existence of informed consent to use of these materials. See generally, Dominic Keating, *Access to Genetic Resources and Equitable Benefit Sharing Through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum*, 87 J. PAT. TRADEMARK OFFICE SOC'Y 525 (2005) (arguing that any inequities in use of genetic material from the developing world should be addressed outside the patent system because they are in tension with the patent system's goal of inducing technological advancement).

99. See DONALD S. CHISUM, CHISUM ON PATENTS § 16.02(1)(a) & n.11 (2003).

100. Except for business method patents, prior use is not a defense to patent infringement in the United States, although it is in many other countries. See 35 U.S.C. § 273; see also Leistner, *supra* note 97, at 59 n.63 (reporting that many countries recognize a general prior use defense to patent infringement).

101. 17 U.S.C. §§ 102-103 (2005).

language, the original language of the tales. She has infringed Dr. Northern's copyright. Dr. Northern's copyright, however, does not prevent the visiting tribal member from writing down the stories herself provided she either does not consult Dr. Northern's written version or uses nothing added to the traditional recitals by Dr. Northern.

Criticism of such exploitation is becoming more common,¹⁰² but the criticisms generally have not been tied to feminist theory.¹⁰³ Many feminists assert, however, that gender subordination is the archetype of all subordination.¹⁰⁴ This wide claim should be understood to include the subordination of indigenous understandings and resources by western intellectual property systems.

IV. HUMANIST FEMINISM: THE PUBLIC DOMAIN

The preceding feminist critiques are seriously flawed because they overlook the rampant overprotection of so-called intellectual property.¹⁰⁵ Food and clothing should be protected if one takes the purported logic of United States copyright law seriously.¹⁰⁶ The humor inherent in such arguments demonstrates the problems with the common justifications for expanding protection. Modifying patent protection downwards while increasing patients' autonomy rights is more supportable than classifying tissue donors as joint inventors. Similarly, Michael H. Davis presents persuasive arguments that extending intellectual property rights would not solve indigenous groups' problems, which are primarily rooted in lack of

102. See, e.g., MICHAEL F. BROWN, WHO OWNS NATIVE CULTURE? (2003); INDIGENOUS HERITAGE AND INTELLECTUAL PROPERTY (Silke van Lewinski ed., 2004).

103. See Dan L. Burk, *Copyright and Feminism in Digital Media* 1-2 (Minnesota Legal Studies Res. Paper No. 05-12, 2003), available at <http://ssrn.com/abstract=692029> (commenting on paucity of feminist analyses of intellectual property).

104. See, e.g., ROSEMARIE TONG, FEMINIST THOUGHT 65 (1989) (reporting that in the 1970s feminists were asserting that the male/female divide was the paradigm for all power relationships).

105. The author has presented this argument previously. See generally Malla Pollack, *Dealing with Old Father William, or Moving from Constitutional Text to Constitutional Doctrine: Progress Clause Review of the Copyright Term Extension Act*, 36 LOY. L.A. L. REV. 337 (2002); Malla Pollack, *The Democratic Public Domain: Reconnecting the Modern First Amendment and the Original Progress Clause (a.k.a. Copyright and Patent Clause)*, 45 JURIMETRICS J. 23 (2004); Malla Pollack, *The Multiple Unconstitutionality of Business Method Patents: Common Sense, Congressional Consideration, and Constitutional History*, 28 RUTGERS COMPUTER & TECH. L.J. 61 (2002); Malla Pollack, *What Is Congress Supposed to Promote?: Defining "Progress" in Article I, Section 8, Clause 8 of the United States Constitution, or Introducing the Progress Clause*, 80 NEB. L. REV. 754 (2001).

106. See generally Pollack, *A Rose Is a Rose*, *supra* note 12; Pollack, *Intellectual Property Protection for the Creative Chef*, *supra* note 12.

economic and political power.¹⁰⁷ As Davis suggests, cutting back on intellectual property protection for outsiders is more appropriate.¹⁰⁸ This article will now address the stronger feminist arguments in favor of revitalizing the public domain.

The public domain in the United States is ailing. Since 1976, Congress has massively enlarged private ownership rights.¹⁰⁹ In 2003, the U.S. Supreme Court upheld the Copyright Term Extension Act with an opinion that unnecessarily sucked most meaning from its earlier pro-public domain pronouncements.¹¹⁰ Relying on that opinion, a federal mid-level review court upheld a statute that actually restored copyright protection on certain works that had entered the public domain.¹¹¹ Working to heal the public domain should be a feminist project.

The public domain is inherently feminist; by enlarging and protecting the public domain, society would move towards a more feminine, i.e., a more humanist, culture. The argument takes several paths, but all reject the Enlightenment-born liberal concept of humanity, and all converge in one coherent feminist view of human society. For purposes of these arguments, this article posits the simplistic definition of the public domain as consisting of those aspects of culture that someone may use without permission from or payment to some owner. This article also employs a very broad definition of humanist feminism that includes any theory looking to improve society by blending currently under-included female aspects with the best aspects of the existing male culture.

107. See generally Michael H. Davis, *Some Realism About Indigenism*, 11 CARDOZO J. INT'L & COMP. L. 815 (2003).

108. See *id.* at 824 ("IP is a major source of indigenous poverty. Surely, TRIPS [Trade Related Aspects of Intellectual Property Rights] is the biggest disaster faced by the Third World since the end of the territorial-based colonial era."); accord Leistner, *supra* note 97, at 113 (quoting Final Statement from the South Pacific Regional Consultation on Indigenous Peoples Knowledge and Intellectual Property Rights (1995)) ("[I]mperialism is perpetuated through intellectual property rights systems . . ."). For more information on TRIPS, see World Trade Organization, Agreement on Trade Related Aspects of Intellectual Property Rights, http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm (last visited Mar. 8, 2006).

109. See 17 U.S.C. § 302(a) (1998). Under the Copyright Revision Act of 1976, copyright protection generally lasted from a work's creation until fifty years after the author's death; under the Copyright Term Extension Act (CTEA), most copyrights now run from creation until seventy years after the author's death. Copyright Term Extension Act, Pub. L. No. 105-298, §§ 102(b), (d), 112 Stat. 2827-28 (amending 17 U.S.C. §§ 302, 304); see also *Eldred v. Ashcroft*, 537 U.S. 186, 193 (2003).

110. See *Eldred v. Ashcroft*, 537 U.S. 187, 194 (2003).

111. See *Luck's Music Library, Inc. v. Gonzales*, 407 F.3d 1262, 1263 (D.C. Cir. 2005) (upholding the constitutionality of 17 U.S.C. § 104(a), which restored United States copyright protection to certain foreign works).

First, the public domain is feminine because it is not commodified. The human of classic liberal theory is a disembodied individual.¹¹² According to this theory, society is formed by an agreement among such individuals, a contract.¹¹³ Contract is the paradigmatic social relationship.¹¹⁴ Contract is market exchange.¹¹⁵ All exchanges are for money or money equivalents.¹¹⁶ All exchangers (according to this unrealistic theory) are formally equal in the power to refuse any particular exchange.¹¹⁷ Therefore, all contracts are entered into voluntarily.¹¹⁸ The ideal of freedom is market alienability with each exchanger maximizing his own self-centered, personal, idiosyncratic, independently chosen goals.¹¹⁹ Individual, alienable, money-exchangeable property is the core requirement of freedom.¹²⁰ Money is needed to buy; therefore, money is the prime motivation of behavior.¹²¹ Unless something is freely alienable for money, it will not be produced to the extent desirable. Inventions and cultural works, therefore, will be created only if their individualist potential authors and inventors are guaranteed the ability to control their sale. The inability to sell something is counterproductive.¹²² According to this theory, the public domain should not exist except for minimal corrections necessary to prevent market failure. Since feminism denies this entire story, the plundering of the public domain is inherently anti-feminist. The public domain is feminine.

Second, the public domain is feminine because it recognizes the communal roots of creation. The independent individual of liberalism is not created by his society; he creates his society.¹²³ Existing independently, he has the power to create independently.¹²⁴ As

112. See, e.g., Virginia Held, *Non-Contractual Society: A Feminist View*, in SCIENCE, MORALITY, AND FEMINIST THEORY 111, 111 (Marsha Hanen & Kai Nielson eds., 1987).

113. See, e.g., *id.*

114. See, e.g., *id.*

115. See, e.g., NANCY C. HARTSOCK, MONEY, SEX AND POWER: TOWARD FEMINIST HISTORICAL MATERIALISM 39 (1983).

116. See, e.g., *id.*

117. See, e.g., *id.* at 42-43, 50.

118. See, e.g., *id.*

119. See, e.g., Held, *supra* note 112, at 111-12.

120. See, e.g., HARTSOCK, *supra* note 115, at 39.

121. See, e.g., *id.* at 41.

122. Word use illustrates the tie between commodification of cultural works and patriarchy. Lawyers commonly say that works "fall into the public domain" when their copyright terms expire, whereas "fallen women" are those who have outraged patriarchal concepts of proper sexual behavior. The author thanks Laura N. Gasaway for this point.

123. Marilyn Friedman, *Feminism and Modern Friendship: Dislocating the Community*, in FEMINISM & POLITICAL THEORY 143, 143 (Cass R. Sunstein ed., 1982).

124. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 287-88 (Peter Laslett ed., 1988) (1690).

Locke argues, each man owns his own body and, therefore, has the moral right to what his body creates.¹²⁵ Authors and inventors are divinities who create from nothing and do not owe free access to their independent creations to other members of society. To use my work, you are required to buy it in contract. Feminism, however, points to the reality that each human develops her individuality inside some specific society, as part of that society, and subject to the imprint of that society.¹²⁶ The author or inventor, therefore, is not self-created and does not have the power to create from nothing. Mental 'creation' involves reprocessing communal material. Sharing with the community, including placing part of 'your' creation in the public domain, is morally appropriate. The public domain is feminine.

Third, the public domain is feminine because it instantiates nurturing. Independent individuals fear each other, as Hobbes has explicated most clearly.¹²⁷ The community they form to contain their fear is shallow, fragile, and limited to the contracts they choose to form.¹²⁸ Each acts for his own self-interest and has no motive or need to give away "his" sustenance, "his" property.¹²⁹ To the contrary, his property is part of his defense against the always-invading others.¹³⁰ Feminism, however, recognizes a more robust community, one where the prototypical relationship may be that between mother and child.¹³¹ Such a community includes love and gifts. "It is the cardinal difference between gift and commodity exchange that a gift establishes a feeling-bond between two people, while the sale of a commodity leaves no necessary connection."¹³² Mothers' response to their infants' vulnerability is to protect, nurture, love, give, and nudge the child towards independence, not charge a higher price for their breast milk. In western society, "gift exchange is a 'female' commerce and gifts [are] a 'female' property."¹³³ The free sharing that constitutes the public domain is, therefore, feminine.

Fourth, the public domain is feminine because it provides essential nourishment; it is the birthing and lactating mother. As

125. *Id.*

126. *See, e.g.,* Friedman, *supra* note 123, at 143-45 (collecting sources on communitarian aspects of feminism); *see also* CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 187-210 (1996) (explaining cultural embeddedness of human individuals).

127. *See* THOMAS HOBBS, LEVIATHAN xiii, 101, 104 (Penguin Books 1950) (1651).

128. *Id.* at 106-118.

129. *Id.*

130. *Id.* at 107.

131. *See, e.g.,* Held, *supra* note 112, at 114-15.

132. LEWIS HYDE, THE GIFT 56 (1983).

133. *Id.* at 103.

one seed becomes a plant due to the fecundity of the earth goddess, so one human sprouts poems due to the fecundity of the public domain, the *daemon*, the muse.¹³⁴

An essential portion of any artist's labor is not creation so much as invocation. Part of the work cannot be made, it must be received; and we cannot have this gift except, perhaps, by supplication, by courting, by creating within ourselves that 'begging bowl' to which the gift is drawn. . . . [T]here are few artists who have not had this sense that some element of their work comes to them from a source they do not control.¹³⁵

Furthermore, the warmth that is creativity dies if it is not shared, given back to the outside power through giving forward to an audience.¹³⁶ The love, gift, nurturing, inherent in living, human-crafted articles survives as human only if shared freely, at least partially.¹³⁷ Otherwise, as Marxists recognize, the object is alienated

134. See *id.* at 53 (discussing the power of the *daemon*).

135. *Id.* at 143-44.

136. Regarding the humanity of commodified culture:
The Oklahoma Lingo and Lithograph Co
Of Maine doing business in Delaware Tennessee
Missouri Montana Ohio and Idaho
With a corporate existence distinct from that of the
Secretary Treasurer President Directors or
Majority stockholder being empowered to acquire
As principal agent trustee licensee licensor
Any or all in part or in parts or entire

Etchings impressions engravings engravures prints
Paintings oil-paintings canvases portraits vignettes
Tableaux ceramics relievos insculptures tints
Art-treasures or masterpieces complete or in sets

The Oklahoma Lingo and Lithograph Co
Weeps at a nude by Michael Angelo.

Archibald MacLeish, *Corporate Entity*, in COLLECTED POEMS 88 (1985).

137. See HYDE, *supra* note 132, at 151 ("Once an inner gift has been realized, it may be passed along, communicated to the audience. And sometimes this embodied gift — the work — can reproduce the gifted state in the audience that receives it."). Hyde also writes:

The destruction of the spirit of the gift is nothing new or particular to capitalism. All cultures and all artists have felt the tension between gift exchange and the market . . . how that tension is to be resolved has been a subject of debate since before Aristotle.

And yet some aspects of the problem are modern. *Eros* and *logos* have a distinctly new relationship in a mass society. . . . The more we allow such commodity art [as TV, radio, mass print media] to define and control our gifts, the less gifted we will become as individuals and as a society. The true commerce of art is a gift exchange, and where that commerce can proceed

from its maker and brings only alienation to its consumers.¹³⁸ The public domain is, therefore, feminine.

In terms of humanist feminism's valuing of the public domain, the United States acceptance of the Berne Convention is a disaster. It has harmed the public's ability to use commercially nonviable copyrightable materials by optionalizing the "©" mark.¹³⁹ Not only is copyright easier for authors to acquire, looking at a work no longer allows one to discover whether someone claims copyright.¹⁴⁰ Furthermore, an author obtains the full term of possible U.S. copyright protection without the previously-required filing of renewal paperwork.¹⁴¹

Liberal feminism may approve of these changes. Simplifying legal formalities required to obtain and sustain property interests helps those who are less likely to abide by formalities, such as persons of lower education, less sophistication, and reduced access to legal advice. Such persons presumably include many socially and economically marginalized women. Although women are as likely to be artistic as men, they are much less likely to obtain payment for their art.¹⁴²

on its own terms we shall be heirs to the fruits of gift exchange . . . to a creative spirit whose fertility is not exhausted in use . . .

Id. at 158. Hyde, however, concluded that art could survive some commodification. *See id.* at 274 ("Put generally, within certain limits what has been given us as a gift may be sold in the marketplace and what has been earned in the marketplace may be given as gift. Within certain limits, gift wealth may be rationalized and market wealth may be eroticized."). The question, of course, is where the limits fall. *See, e.g.,* MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 119-23 (1983) (recognizing the problem of preventing money exchange from invading inappropriate spheres, such as political power); Radin, *supra* note 4, at 1909-17 (discussing three possible negative interactions between commodified and non-commodified versions of the "same" *res*).

138. *See, e.g.,* Radin, *supra* note 4, at 1871-75.

139. *See* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 7(a), 102 Stat. 2853, 2857 (1988) (codified at 17 U.S.C. § 101 note (2006)).

140. *See id.*; Berne Convention for the Protection of Literary and Artistic Works, Paris Act, July 24, 1971, 25 U.S.T. 1341; *see also* 17 U.S.C. § 401(a) (2000) (making notice optional); Chris Sprigman, *Reform(aliz)ing Copyright*, 57 STAN. L. REV. 485 (2004) (recognizing the practical importance of formalities and suggesting implementation of an updated formality system). During discussion, Jessica Litman made this point forcefully at the Duke Public Domain Conference in November 2001. *See* Webcast Archive, Phase I: Framing the Issues, <http://www.law.duke.edu/pd/mpgcast.html> (last visited Mar. 8, 2006).

141. *See* 17 U.S.C. §§ 302-304 (2005). The need to file for renewal was eliminated by the Copyright Revision Act of 1976. *See* Pub. L. No. 94-1553, §§ 302-304, 90 Stat. 2544, 2572-76 (1976) (codified as amended in 17 U.S.C. §§ 302-304 (2006)).

142. *See* MARY MADDEN, PEW INTERNET & AMERICAN LIFE PROJECT, ARTISTS, MUSICIANS, AND THE INTERNET 6 (2004), available at http://www.pewinternet.org/pdfs/PIP_Artists.Musicians_Report.pdf (showing that a disproportionate number of artists who receive payment for their art are male).

Liberal and humanist versions of feminism disagree on this issue. Humanist feminism has the stronger claim because reinvigorating the public domain may be an attainable goal and, therefore, is worth the possible cost to some women. More women presumably are not, rather than are, authors or inventors. However, feminist support for the public domain has an additional tension to negotiate: the partial opposition of feminism with communitarianism.

V. ADAPTING COMMUNITARIANISM TO COHERE WITH FEMINISM: THE OWNED PUBLIC DOMAIN

Communitarianism, not just feminism, claims the public domain. The public domain is that which is shared by the community, the property held in common. Community, however, may be incompatible with feminism if feminism requires the flourishing of women.

Community is not an unqualified good from feminist perspectives. First, historically, societies organized through status overwhelmingly have given women low status, low power, and low freedom of choice. Second, theories of community generally focus on the duties individuals owe to the community.¹⁴³ Communitarianism undermines the autonomy craved by women as well as by men.¹⁴⁴

When social relationships are organized through money, i.e., market exchange, individuals are less constrained, i.e., they have more available choices:

Naturally, every obligation is generally resolved through the personal actions of the human subject, but it makes a great deal of difference as to whether the rights of the person entitled to some service extend directly to the person under obligation himself or simply to the product of [one's] labor or, finally, to the product in itself — regardless of whether the person under obligation acquired the product through his own labor or not.¹⁴⁵

“On the one hand, money makes possible the plurality of economic dependencies through its infinite flexibility and divisibility, while

143. See Friedman, *supra* note 123, at 144-53 (criticizing these aspects of communitarianism).

144. See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts, and Possibilities*, 1 YALE J.L. & FEMINISM 7, 7 (1989) (“The basic value of autonomy is, however, central to feminism. Feminist theory must retain the value, while rejecting its liberal incarnation.”).

145. GEORG SIMMEL, *THE PHILOSOPHY OF MONEY* 284 (Tom Bottomore & David Frisby trans., 1978).

on the other it is conducive to the removal of the personal element from human relationships through its indifferent and objective nature.”¹⁴⁶ The liberty that money provides is the ability to choose how to earn a living and then to take fungible money so earned and give it to someone so that the other may buy whatever they choose, including their pick of food items, instead of being required to spend specific days working on a specific plot of ground and hand delivering a specified portion of the resulting corn to the person holding a specified family relationship.

Unfortunately, money economies have not proven supportive of women either. Money economies tend to deny women adequate labor choices or labor compensation.¹⁴⁷ They undermine the availability of the personal support from others which could cushion a lack of money. Finally, when tied emotionally to a person in need of caring, women are still likely to give up the ‘freedom’ of work to stay home to provide personal care, both because personal care is more loving and because paid substitutes may be unavailable or unaffordable.¹⁴⁸

Women want power inside social groups and the ability to choose other communities when uncomfortable within their current connections.¹⁴⁹ In Elizabeth Anderson’s terminology, women want both voice and exit.¹⁵⁰ How can we combine the autonomy gains of money with the embeddedness gains of community? The public domain of intellectual non-property theory fuses both and should be used as a template for other such domains.

A feminist-friendly public domain can be theorized as an owned public domain where the “ownership” interest each community member holds is the right not to be excluded.¹⁵¹ This insight grows

146. *Id.* at 297.

147. See, e.g., Int’l Labour Office Geneva, Employment and Training Dep’t, *The International Labour Organization and the Promotion of Full, Productive and Freely Chosen Employment, International Consultation Concerning Follow-up to the World Summit for Social Development*, (Nov. 2-4, 1999), available at <http://www-ilo-mirror.cornell.edu/public/english/employment/strat/publ/fwsd.htm> (“[G]ender inequality is built into labour market functioning and even into the common view of what is considered productive work.”).

148. See, e.g., ROBIN WEST, *RE-IMAGINING JUSTICE: PROGRESSIVE INTERPRETATIONS OF FORMAL EQUALITY RIGHTS AND THE RULE OF LAW* 74 (2003) (arguing for “a right of care givers to give care to dependents without incurring the risk of severe impoverishment or subordination”).

149. See Friedman, *supra* note 123, at 154-55 (contrasting urban friendship communities formed voluntarily by idiosyncratic, unconventional, and deviant persons with the negative pressure commonly placed on such persons by their birth communities).

150. See generally ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* (1993).

151. Malla Pollack, *The Owned Public Domain: The Constitutional Right Not to Be Excluded — or the Supreme Court Chose the Right Breakfast Cereal in Kellogg v. National Biscuit Co.*, 22 HASTINGS COMM. & ENT. L.J. 265, 286-87 (2000).

from Locke's description of property as something "[t]he nature of [which] is, that without a Man's [or Woman's] own consent it cannot be taken from him [or her]."¹⁵² This feminist-friendly public domain has two elements: first, no individual has a right to exclude other members of the community from the public domain; second, each member of the community has a right not to be excluded from use of the public domain.

This public domain does not have the oppressive features of duty-driven communities because no one has a duty to add to the public domain. Of course, certain things on which individuals labor are placed in the public domain, thus limiting the economic benefits of authorship and inventorship. However, no one is forced to labor on such *res*, while many persons freely would choose to do so.

How do we fill such a public domain? Primarily, we limit what may be individually owned within so-called intellectual property law.¹⁵³ Ending the derivative work right would be one major improvement.¹⁵⁴ Such a change would mirror the difference between the mythic patriarch (who seeks to rule children tyrannically) and the mythic matriarch (who nurtures children towards independent creation).

CONCLUSION

The public domain is inherently feminine. While some short term goals are sufficient reason to work within the patriarchal framework of existing western capitalist society, an invigorated public domain is not merely a feminist project. Feminists should, therefore, resist the temptation to call for propertization of clothing, food, body parts, folklore, and traditional knowledge, even though the lack of property in these *res* is gendered. Instead, feminists should make common-cause with the other supporters of the public domain.

152. LOCKE, *supra* note 124, at 395.

153. *See supra* note 105.

154. *See* Pollack, *Democratic Public Domain*, *supra* note 105, at 35-36.