1997

Body parts of one's own: a moral argument for the ownership of human body parts

Nicole Gerrand

University of Wollongong

Recommended Citation
NOTE

This online version of the thesis may have different page formatting and pagination from the paper copy held in the University of Wollongong Library.

UNIVERSITY OF WOLLONGONG

COPYRIGHT WARNING

You may print or download ONE copy of this document for the purpose of your own research or study. The University does not authorise you to copy, communicate or otherwise make available electronically to any other person any copyright material contained on this site. You are reminded of the following:

Copyright owners are entitled to take legal action against persons who infringe their copyright. A reproduction of material that is protected by copyright may be a copyright infringement. A court may impose penalties and award damages in relation to offences and infringements relating to copyright material. Higher penalties may apply, and higher damages may be awarded, for offences and infringements involving the conversion of material into digital or electronic form.
BODY PARTS OF ONE'S OWN

A Moral Argument for the Ownership of Human Body Parts

A thesis submitted in fulfilment of the requirements for the award of the degree

DOCTOR OF PHILOSOPHY

from

UNIVERSITY OF WOLLONGONG

by

NICOLE GERRAND,
B.A. (Hons), M.A., A.N.U.

DEPARTMENT OF PHILOSOPHY

1997
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Statement Of Authorship</strong></td>
<td>i</td>
</tr>
<tr>
<td><strong>Acknowledgements</strong></td>
<td>ii</td>
</tr>
<tr>
<td><strong>Abstract</strong></td>
<td>iii</td>
</tr>
<tr>
<td><strong>Chapter One:</strong> Introduction</td>
<td>1</td>
</tr>
<tr>
<td><strong>Chapter Two:</strong> The Current Status of, and Uses for, Human Body Parts</td>
<td>7</td>
</tr>
<tr>
<td>I General Constraints on Removing and Using Human Body Parts</td>
<td>7</td>
</tr>
<tr>
<td>II Uses, Policies and Practices Regarding Human Body Parts from Living Persons</td>
<td>13</td>
</tr>
<tr>
<td>III Uses, Policies and Practices Regarding Human Body Parts from Cadavers</td>
<td>28</td>
</tr>
<tr>
<td><strong>Chapter Three:</strong> A Person's Interests and Prerogatives Concerning Her Excised Body Parts</td>
<td>41</td>
</tr>
<tr>
<td>I A Person's Interest in Her Body Parts</td>
<td>41</td>
</tr>
<tr>
<td>II Self-determination, Dignity and Human Body Parts</td>
<td>57</td>
</tr>
<tr>
<td><strong>Chapter Four:</strong> A Person's Interests and Prerogatives Concerning the Treatment of Her Body Parts After Death</td>
<td>71</td>
</tr>
<tr>
<td>I Are Parts from Cadavers Simply Resources for the Living?</td>
<td>72</td>
</tr>
<tr>
<td>II Respecting Deceased Persons</td>
<td>92</td>
</tr>
<tr>
<td><strong>Chapter Five:</strong> A Conceptual Defence of the Ownership of Human Body Parts</td>
<td>109</td>
</tr>
<tr>
<td>I Property Systems and Human Body Parts</td>
<td>109</td>
</tr>
<tr>
<td>II Ownership, Bodies and Body Parts</td>
<td>118</td>
</tr>
<tr>
<td>III Owning Alienable Body Parts</td>
<td>127</td>
</tr>
<tr>
<td><strong>Chapter Six:</strong> Why It Should be Recognised that a Person Owns Her Body Parts?</td>
<td>135</td>
</tr>
<tr>
<td>I Alternative Proposals to a Person's Owning her Body Parts</td>
<td>136</td>
</tr>
<tr>
<td>II Owning Things Considered Unownable</td>
<td>147</td>
</tr>
<tr>
<td>III Ownership and a Person's Prerogatives Concerning Her Body Parts</td>
<td>164</td>
</tr>
<tr>
<td><strong>Chapter Seven:</strong> Ownership and Commodification of Human Body Parts</td>
<td>178</td>
</tr>
<tr>
<td>I A Moral Objection to a Person's Owning Her Body Parts</td>
<td>178</td>
</tr>
<tr>
<td>II Philosophical Arguments Against the Commodification of Human Body Parts</td>
<td>185</td>
</tr>
<tr>
<td>III Meeting the Commodification Objection</td>
<td>204</td>
</tr>
<tr>
<td><strong>Conclusion</strong></td>
<td>209</td>
</tr>
<tr>
<td><strong>Bibliography</strong></td>
<td>212</td>
</tr>
</tbody>
</table>
STATEMENT

I certify the work for this thesis has not been submitted for a degree to any other university or institution.

Nicole Gérranď
30 January 1997
ACKNOWLEDGEMENTS

In the course of writing this thesis I have received support from many sources, for which I am very grateful. For their unwavering belief in my abilities and encouragement I wish to thank my parents, Barbara Moo and Nick Gerrand, and my brother Mark. I am also grateful for the interest shown by and support from my late step-mother Frances and my half-brothers Gareth, Gregory and Rohan. My step-father, Clarry, deserves special mention, not only for his constant encouragement, but because of his interest in my work which included reading draft material and discussing the issues.

My greatest philosophical debt is to my supervisors Dr Suzanne Uniacke, who assisted in development of my philosophical skills and in defining the topic, and Dr Susan Dodds, whose own interest in, and knowledge of, the relevant issues forced me to think more deeply about the arguments for my position. I would also like to thank Dr John Burgess for his comments on preliminary material, Dr Adrian Walsh for his comments on material included in chapter seven, and the other members of the Department of Philosophy at the University of Wollongong for their support and encouragement.

Parts of this thesis were presented as conference papers at the Australian Association of Philosophy Conferences in 1994 and 1996, and the Australian Bioethics Association Conference in 1995, and as seminar presentations at the University of Wollongong, the University of Newcastle, the University of New South Wales and the Australian National University. In all cases I benefited from the helpful comments and suggestions of those attending. I have also profited from informal discussions with, and received additional encouragement from friends and colleagues, including Karen van den Broek, Andrew Gleeson, Bethne Hart, Barry Hodges, Michael Shepanski and Colin Wilks, who also proof-read the thesis.

I would like to thank my cat Mica who was my constant companion during the writing of this thesis. With the exception of myself, she had the most physical contact with the earlier drafts.

Finally, my debts to my partner, Joe Mintoff, are too numerous to mention. Suffice to say that without him, this thesis would have taken much longer, been written in far less conducive surroundings, and would not have benefited from his philosophical insights and editorial skills.
ABSTRACT

The possibility of transplanting human body parts from one person to another, and the increasing and varied use for such parts in medical experimentation, means that human body parts can now reasonably be described as medical resources. Like many medical resources, body parts suitable for transplantation or experimentation are in short supply. Unlike other medical resources, however, such parts are significant for another reason: namely, because they had previously been functional parts of a person's body. Although the relevant policies require a person's consent before her body parts are used in either of these ways, in practice such consent is not always sought, or may be overridden by what are believed to be more important considerations. One reason for this may be a lack of certainty about the nature of a person's claim to determine what happens to any of her body parts removed for therapeutic reasons or all of them after her death. This lack of certainty, I contend, is a result of a more fundamental uncertainty about whether a person has any interest in what happens to her body parts in either of these circumstances. The task of this thesis is to determine whether there is such an interest, its nature and significance, and what, if any, implications it has for the various medical uses of human body parts.
CHAPTER ONE
INTRODUCTION

Excised human body parts and extracted bodily substances¹ are no longer simply surgical waste but potential medical resources, since they can be used for a variety of diagnostic, therapeutic and experimental purposes. They are, however, in virtue of being from the bodies of persons, unlike other medical resources. The primary significance of intact body parts, then, is not as potential medical resources, but rather as part of the functioning bodies of particular persons. Further, even after being excised, a body part may still be significant to the person from whose body it was removed.

The significance of a body part to the person from whose body it has been removed has been recognised in some contexts. In Moore v. Regents of the University of California, hereafter the Moore case, the Californian Court of Appeals argued that when a patient had a body part removed during a medical procedure, that person '... must have the ultimate power to control what becomes of his or her tissues.'² In a similar vein, the various policies for procuring parts from cadavers for transplantation, and the corresponding legislation or regulations, give '... paramount authority to individuals to control postmortem organ removal and transfer from their bodies.'³ So, at least in some relevant areas of public policy, it is recognised that the

¹ In chapter two, I specifically identify those body parts and substances my discussion and arguments will be concerned with. For convenience, though, throughout the thesis the phrase 'human body parts', and related phrases, will include bodily substances as well as solid organs.

² Moore v. Regents of the University of California, 1988, 249 Cal Rptr. 494 (Court of Appeals), p. 508.

person from whose body a part is to be, or has been, removed should have the primary role in determining what happens to it.

However, whilst in theory there is such recognition, in practice someone else may actually determine what happens to that part. The escalating demand for human body parts for medical purposes has resulted in increased uncertainty about who has claims to such parts, what those claims are, and how they can be accommodated whilst still obtaining an adequate supply of such parts. This uncertainty is, I contend, a result of some fundamental questions about the relationship between persons and their body parts remaining unanswered—usually because they have not been asked.

The purpose of this thesis is to determine the nature and significance of a person's interest in and claims to her body parts, and, further, to determine how best to protect and promote such interests and claims. Two instances of procuring human body parts for medical purposes illustrate many of the fundamental issues concerning a person's interests in and claims to her body parts: first, the use in recent forms of medical experimentation of parts removed for therapeutic reasons, and, second, the use of parts from cadavers for transplantation. In addition, some of these issues also arise in relation to destroying human body parts that have been removed for therapeutic reasons. These are the main examples in relation to the treatment of human body parts I focus on in this thesis. I undertake a closer examination of the various issues raised by such treatment, and conclude that at least some of the present uncertainty in relation to the use of excised human body parts or parts from cadavers would be resolved if it were recognised that a person owns her body parts.
In chapter two I identify and discuss some discrepancies between the relevant *policies* and procurement *practices*. First, the relevant discrepancies in relation to the use in medical experimentation of human body parts removed for therapeutic reasons are clearly illustrated by the circumstances that gave rise to, and the subsequent deliberations in, the *Moore* case. Second, with regard to using parts from cadavers for transplantation, discrepancies seem to arise from a tension between the requirements of current policies and either the wishes of the deceased person's relatives, or (to a lesser extent) the needs of potential organ recipients.

It should not be automatically assumed, though, that the procurement policies are sound and that these discrepancies result from a failure to implement them correctly. There has been only superficial justification of these policies, and so it is not exactly clear why a person should be consulted before an excised part of her body is used for experimentation, or why a deceased person's prior consent is required before her body parts are used for transplantation. The argument given in chapters three through six seeks to clarify the basis for, and strength of, a person's claim to determine what happens to her body parts in these circumstances.

Chapters three and four identify and discuss specific interests a person may have in her body part. In chapter three, I investigate whether a person would have an interest in what happens to a part of her body removed for therapeutic reasons, what the basis for such an interest would be, and whether it would be morally significant. In chapter four, I determine whether, and to what extent, a person would be concerned about what happens to her body parts after her death. Further, given that other people may have significant interests in how parts from a cadaver may be treated or used, I seek to determine the significance of a deceased person's prior interest, and what (if any) implications there are of a person having such an interest.
Having argued a person may have a morally significant interest in what happens to a part of her body removed for therapeutic reasons, or some or all her body parts after her death, I conclude chapters three and four by suggesting that, in both these circumstances, a person has certain prerogatives in relation to her body parts.

In chapters five and six, I continue by arguing the best way of ensuring recognition of these prerogatives is to recognise that a person owns her body parts.

In chapter five, I provide a conceptual defence of a person's owning her body parts, arguing that it is possible (contrary to some suggestions) for a person to exercise many property rights or incidents of ownership over her body parts. In order to strengthen this defence, I argue that the various determinations a person will typically make if she chooses to exercise her prerogatives over her body parts can plausibly be described as that person exercising various property rights over her body parts.

In chapter six, after investigating and dismissing other suggestions about how to ensure recognition of a person's prerogatives in relation to her body parts, I argue it should be recognised that a person owns her body parts. This is because, in western democratic societies, ownership is the main institution for determining who has access to and control of particular things. Further, when a person owns an object, she is usually recognised as having the strongest claim to it. This, I contend, is the type of claim a person needs to have in relation to her body parts in order to best ensure recognition of the prerogatives she has over them.

In chapter seven, I evaluate an important (potential) objection to my proposal. This objection is a specific version of the 'commodification objection', which argues that
some things, simply because of the type of things they are, should not be sold. Such an objection is relevant to my proposal because typically (although not necessarily) a person is morally and legally permitted to sell something she owns. So if (as I argue) a person were recognised as the owner of her body parts then she would be permitted to sell them, but, according to the proponents of this objection, human body parts should not be treated as commodities. I provide a two-pronged response to this objection. As it is currently formulated, the objection does not undermine my proposal, since it is not clear why human body parts should not be sold. Further, even if a more plausible version of the commodification objection were given, my proposal could accommodate such concerns, since the sense in which a person owned her body parts could be restricted so that she was not permitted to sell them. Either way, I conclude this objection does not undermine my argument.

Before commencing on this argument in detail, I need to issue some caveats. I am not concerned in this thesis with whether it is in general morally acceptable to use human body parts for medical purposes. Neither will I argue for the superiority of a particular policy to regulate the procurement of human body parts for these purposes. A further limitation of my discussion relates to the body parts the following arguments and subsequent conclusions pertain to. Although specific details will be given in the following chapters, it is worth mentioning here that, unless stated otherwise, the following discussion and arguments do not pertain to reproductive tissues. Ownership of, or even having property rights in, one's reproductive tissues raises the problematic issue of when does a person (and this is perhaps more uncertain for females and males) stop owning such tissues—when it becomes an embryo, a fetus, a neonate, and so on. Nevertheless, since people do seem to exercise property rights over their

---

4 This, and related, issues are discussed by S. Dodds, Property and Persons: Arguments for Property Rights in the Liberal Tradition, PhD thesis, La Trobe University, 1993, pp. 77-81.
gametes, for example, by donating or selling them, it would be worth investigating the implications of my arguments and conclusions for these practices at some later time.

If I am right, and the best way of ensuring recognition of a person's prerogatives concerning her body parts is to recognise that she owns them, then this may provide at least part of the rationale needed for the various policies for procuring human body parts to be used. This in turn will make it clearer what is required by way of consultation with, and obtaining consent from, the person from whose body the part(s) are to be removed. More importantly, establishing whether a person has a morally significant interest in what happens to her body parts after being removed from her body, or after her death, will serve to clarify the nature and significance of the relationship between a person and her body parts.
CHAPTER TWO
THE CURRENT STATUS OF, AND USES FOR, HUMAN BODY PARTS

The best known source of human body parts for medical purposes is cadavers, but it is also possible, and sometimes necessary, for one or more of a person's body parts to be removed while that person remains alive and in good health. The removal and use of human body parts are, however, subject to various constraints. Whilst some of these are practical, cultural or social, others are required by current policies regulating the procurement and use of human body parts, and so have legislative authority. There are, though, discrepancies between what is required by these policies and what happens in practice when parts are removed from either the bodies of living persons or cadavers.

The purpose of this chapter is twofold: first, to provide some background information necessary for the forthcoming argument, and, second, to motivate that argument. In the first section, I discuss various general constraints on the removal and use of human body parts. In the second and third sections, I describe the various medical uses of, policies for, and practices relating to the procurement of body parts, first from living persons, and second from cadavers. In both cases, I attempt to identify reasons for the discrepancies between the relevant policies and what happens in practice.

SECTION I: GENERAL CONSTRAINTS ON REMOVING AND USING HUMAN BODY PARTS

As mentioned above, there are various general constraints on removing and using human body parts, and these provide a framework for determining the acceptability of
any proposed use for such parts, including medical ones. Whilst some of these constraints may be moral, or have a moral aspect to them, for the purposes of this discussion they should be distinguished from any moral constraints that arise if it is established a person has a significant interest in what happens to any of her body parts removed for therapeutic reasons or all of them after her death. One of the central aims of this thesis is to identify any of the second type of constraints on the removal and use of human body parts. My purpose in identifying and describing some of these more general constraints is, then, to set some broad parameters for the argument I give in the following chapters.

i. General Constraints on Removing Human Body Parts

Whilst there are constraints on removing human body parts from both living persons and cadavers, those relating to the former are more significant, since the removal of particular body parts may impair or even kill a person. It is possible, though, for parts of a person's body to be removed as a preventive measure, or because they are needed for diagnostic procedures, or one of a number of other possible therapeutic uses. Some parts may also be removed and used for the therapeutic benefit of someone else.¹

The general constraints on removing body parts from living persons relate to the nature and function of a particular part. Theoretically, any of a person's body parts can be removed whilst she is alive, but, in practice, very few can be removed and that person remain alive, continue to be in good health and be able to perform the various activities necessary for a worthwhile life. The effect of removing a particular body part is

¹ Specific examples of each of these medical reasons for removing a person's body parts will be given in the following section.
contingent on whether the part is vital or non-vital, regenerative or non-regenerative. A person cannot have any of her vital body parts removed and remain alive unless, in the short term, she has access to an artificial mechanism to perform that part's function or, in the long term, she has received a replacement body part of that type via transplantation. For this reason, unless a vital part were diseased or had ceased to function, a person would be legally and morally prohibited from having such parts removed whilst she was alive.

The same is not true of some bodily substances, such as blood and sperm, since these substances regenerate. Part of a person's liver or some of her bone marrow can also be removed, since what remains will regenerate. Typically, a person's non-vital, non-regenerative body parts will only be removed if they are diseased, or present some other threat to her health, and in such cases only the diseased or impaired section is removed. There is, though, one exception: it is possible for a person to have a functional kidney removed and continue living without being seriously debilitated.

There are at least three general constraints on removing any of a living person's non-vital or regenerative body parts. First, the removal of solid organs as well as other body parts, for example bone marrow and ova, necessitates a person's undergoing, and so taking the risks of, surgery or other invasive procedures. Second, after having a non-vital body part removed, a person could be impaired in some way or be more vulnerable to certain health problems. For this reason, unless such parts were

2 At least two thirds of the liver has to be left in a person's body for it to regenerate.

3 Though problems would arise if the person's other kidney failed or became diseased. A person could also have a cornea removed and continue to function adequately, although their eyesight would be impaired.

4 In order for ova to be removed a woman has to undergo a laparoscopy which, whilst not strictly surgery (since no major incision is made), is still invasive.
diseased, a person would be prevented from having them removed, since she would probably become dependent on, and so a burden to, other people or society. A comparable constraint on removing some regenerative body parts, notably blood, is that a person can only relinquish a certain amount of such parts within a given time period and remain healthy. Third, a person would be disfigured if, for example, some of her teeth were removed. Whilst disfigurement may not seem as significant as physical harm, the possibility of a person's being psychologically or socially harmed would seem sufficient to prevent removal of particular body parts.

There is only one general constraint on removing parts from cadavers—namely, the parts are suitable for the proposed purpose. Human body parts begin to deteriorate shortly after a person stops breathing, and so become unsuitable for many of their possible uses. So if it proposed that parts from a cadaver be used in some way, they have to be removed shortly after the person has died. Other reasons why parts from cadavers may not be suitable for particular uses include the age the person dies, the condition of the part, and whether the part meets certain physiological criteria.

There are also constraints on using excised human body parts. Although one of my main concerns is to identify any moral constraints on using such parts which would arise if a person had a morally significant interests in what happens to any of her body parts removed for therapeutic reasons or all of them after her death, these other types of constraints assist further in establishing a general framework for determining whether particular uses for human body parts are acceptable. Again some of these more general constraints on using human body parts may have a moral aspect to them.
ii. General Constraints on using Human Body Parts

There are at least three general constraints which partially determine the acceptability of using excised human body parts in particular ways. First, and perhaps most importantly, human body parts must be treated in accord with public health standards, which primarily are concerned with storage and disposal of such parts. Second, it must be practical to use a body part for the proposed purpose, for example, it would be impractical to transfuse with O⁻ blood a person whose blood type was A⁺. Third, the acceptability of treating human body parts in particular ways may change over time, for example earlier this century the transplantation of body parts would have probably been an abhorrent, as well as a fictional, idea.

There are also cultural constraints. The disposal of cadavers and perhaps parts thereof, and the associated ceremonies, vary significantly between different cultures. For example, the practices and ceremonies of Australian Aboriginal culture concerning the disposal of bodies also includes body parts. For this reason, Aboriginal people object to their ancestors’ body parts being exhibited in museums, and, further, have gone to great lengths to retrieve such parts for reburial. The policies for procuring body parts for transplantation also vary between societies, and even between groups within the same society, and may be partially determined by religious beliefs, and other cultural or social norms. For example, Singapore has legislation governing the procurement of body parts which provides different policies for the Muslim and non-

---

5 After being shot in Western Australia in 1833, an aboriginal leader's head was severed and sent to London, where it remained on display at the Liverpool Royal Institute until 1964 when it was buried in a public grave. In 1995, members of the Noongar Aboriginal tribe requested the head be returned to Australia so it could be buried in accord with aboriginal custom, but British authorities refused on the basis that a similar request from the parents of a stillborn child, the body of which was buried in the same public grave as the head, had been rejected. G. Duncan, 'Britain refuses to return Aboriginal hero's head', Sydney Morning Herald, 30 August 1995, p. 8.
Muslim populations. Finally, the significance of particular body parts may vary. In many societies, the heart is considered to be the most important body part, although a part's having primary status seems to be associated with what is believed to be the function of a particular body part. In ancient Greece, for example, the brain had primary status because it was believed to be the centre of human intelligence.

There are also what could loosely be described as social constraints on using human body parts. In relation to determining the acceptability of a particular use for human body parts the relevant consideration would be whether the proposed use would offend other people. The type of offence caused by a particular use of human body parts may, however, be difficult to determine. Some women, for example, choose to bury their child's afterbirth in their gardens. Whilst some neighbours may find this offensive, it does not become morally dubious until the afterbirth is buried on, or close to, a property line. Alternatively, if the afterbirth was not buried but rather spread over a garden bed it may be considered offensive because the neighbours would be more directly exposed to it. Clearly, a person's putting her child's afterbirth in the neighbour's garden or on their front doorstep would constitute a moral offense.

Finally, there is an overarching moral principle encompassing most, if not all, of the specific moral concerns relating to the use of human body parts; namely, that such parts should be treated with respect and dignity. Both this general principle and the specific concerns will be discussed in detail in later chapters. It is worth mentioning

---


7 C. Singer & A. Wasserstein, 'Anatomy and Physiology', in The Oxford Classical Dictionary. ed. N. Hammond & H. Scullard, Oxford, Oxford University Press, 1979, pp. 58-61. A notable exception was Aristotle who attached little importance to the brain, believing its only function to be to cool the blood.
here, though, that when this principle is invoked, it is usually implicit that such parts should be treated with respect and dignity because they are human body parts. A comparison of the treatment of human body parts with animal body parts supports this claim, the obvious difference being the widespread practice of eating animal body parts, compared with the general condemnation of cannibalism.

Human body parts are typically used for one of the medical purposes to be identified below, but may also be used for forensic and cosmetic purposes. These different types of what could loosely be described as medical or scientific uses of excised human body parts are generally agreed to be both socially and morally acceptable, and so are within the various constraints discussed above. As already indicated, I will primarily be concerned with two specific medical uses of human body parts throughout the thesis, and these will be discussed further in the following two sections.

SECTION II: USES, POLICIES AND PRACTICES REGARDING HUMAN BODY PARTS FROM LIVING PERSONS

Despite the various constraints on a person's body parts being removed whilst she is still alive, it is possible, and sometimes necessary, for her to have a body part, or parts, removed. Below, I give several specific examples of why a person would need

---

8 Cosmetic uses for human body parts include the use of hair to make wigs, the use of skin or fat cells from one part of the body to modify (usually enhance) another part, and the use of cells from the human placenta to develop cosmetic creams. Forensic uses for human body parts include identification techniques using blood or other bodily substances. A semi-medical use of human body parts is the identification of genetic predispositions for debilitating conditions which may have implications for various aspects of a person's life, such as employment or the ability to get insurance. Unless explicitly stated, I will not be concerned with these uses of human body parts in the rest of the thesis. For a description of the medical and non-medical uses of human body parts, see B. Dickens, 'The Control of Living Body Materials', University of Toronto Law Journal, vol. 26, 1977, pp. 150-163.
to have a body part removed, and, where relevant, explain how it would be used. I
then discuss the Australian policies for regulating the removal and subsequent use of
human body parts from living persons. I conclude with a discussion of the actual
practice in relation to the procurement of body parts for experimental purposes,
focusing in particular on the Moore Case, a US legal case which resulted from a
person's excised body part being used for medical experimentation without his
consent. This recent case demonstrates the inadequacies of the current policies
regulating the procurement of body parts for experimentation and, more
fundamentally, the need to resolve the nature and significance of the relationship
between a person and excised parts of her body.

i. Medical Uses of Body Parts from Living Persons

Just as a person may have a body part removed for therapeutic or non-therapeutic
reasons, the medical purposes for which such parts could be used can also be divided
into therapeutic and non-therapeutic. The therapeutic uses includes diagnosis,
treatment and post-treatment monitoring. A body part could also be used for the
therapeutic benefit of someone other than the person from whose body it has been
removed. Non-therapeutic uses for excised human body parts include experimental or
educational uses.

First, there are a number of ways a person's excised body part could be used for her
own therapeutic benefit. Any human body part has potential diagnostic value,

---

9 There is no comparable Australian case. However, the implication of the Moore case for
Australian policy have been discussed. See, for example, D. Mortimer, 'Proprietary Rights in
16, no. 2, 1993, pp. 217-255; and R. S. Magnusson, 'The Recognition of Proprietary Rights in
Human Tissue in Common Law Jurisdiction', Melbourne University Law Review, vol. 18,
although typically only regenerative bodily substances, such as blood or saliva, are used. Where particular body parts, such as organs, are diseased or there is a foreign substance, such as cancerous tissue, a biopsy could be performed whereby a section of the diseased body part or foreign substance is removed and analysed. Finally (although it only occurs in one set of circumstances) one person's body parts can be used to diagnose possible diseases or other medical conditions in another human entity. Prenatal screening procedures involve using parts of the pregnant woman's placenta to diagnose genetic or congenital defects of the foetus.

Further, if it is predicted that part of a person's body may become diseased or have some other adverse affect, she may have it removed as a preventive measure. Some women, for example, who have a significant family history of breast cancer may choose to have a mastectomy in order to decrease the probability of getting that disease. More often, if a body part has become diseased or is already having an adverse effect, it will simply be removed. There are circumstances, though, where a person's excised body part can itself be used for her therapeutic benefit. For example, somatic gene therapy roughly involves some of a person's tissue being removed, treated with a virus that will destroy or alter the affected gene, and then transplanted back into the person's body. The virus then spreads through the person's body thus eliminating the defective gene.

Second, another important medical use of human body parts is for the therapeutic benefit of someone other than the person from whose body the part has been removed, the best known example being transplantation. This involves a body part, typically a solid organ, being removed from one person's body and placed in another person's body whose own body part of that type has failed, or soon will fail. When the donor is still alive, the organ recipient will be designated and will usually be a close family
member. Further, the donation will only be permitted after it has been determined there is minimum risk to the donor and the requirements of physiological compatibility have been met. A kidney is the only whole non-vital, non-regenerative body part a person is legally and morally permitted to relinquish for this purpose, since it is a paired solid organ (a person can continue living and remain in good health with only one kidney). Corneas are also paired solid organs but '... they are not ordinarily considered appropriate material for non-therapeutic removal'.

It is possible for part of a person's liver to be transplanted into the body of another person's body, since not only will what remains of the liver in the person's body regenerate, but so will the part that is transplanted. Similarly, one person's blood can be transfused into another person's body, but, again, the donor and recipient must be physiologically compatible. Other examples of one person's body parts or substances being of therapeutic value to someone else are gametes donated to infertile couples, foetal tissue used to treat Parkinson's disease, and placental material to treat burns.

Third, human body parts are increasingly being used in medical experimentation. One of the more recent developments in this area is the development of cell-lines which '... are derived from primary cultures and are capable of continuous and indefinite growth', distinguishing them from normal human cells which have a limited life span. Cell-lines can be used for a variety of therapeutic purposes including testing drug toxicities, providing a permanent supply of proteins and genetic material, and manufacturing large quantities of naturally occurring products. Other experimental uses of human body parts include analysing diseased body parts to determine the cause

---


12 Lavoie, p. 1368.
and progress of a disease, determining the effect of various substances on a body part with a view to developing new therapeutic products, and the testing of such products and other forms of treatment on body parts.

There is, then, the potential for some interrelation between the various medical uses of human body parts. For example, diagnostic or therapeutic uses may lead to experimentation, which may lead to the development of new therapeutic techniques. Finally, excised human body parts, particularly those diseased or malformed in some way, may be used in medical education, involving some form of manipulation or dissection.  

Unless explicitly stated, the following discussion and arguments do not apply to acts of living organ donation, since the use of the particular body parts will be determined prior to its removal. Rather, in relation to living persons, I will focus on the experimental use of those body parts removed for therapeutic reasons, since in these circumstances it is not clear who may determine what happens to such parts. As discussed below, the policies for procuring excised body parts for experimental purposes require the consent from the person from whose body the part has been removed. However, there are reasons for suspecting that such consent is not always, or even usually, sought.

---

13 Arguments relating to the experimental use of human body parts also apply to the educational use of such parts since when human body parts are used in either of these ways they are either preserved, dissected or manipulated.
ii. *Current Policies for Procuring Human Body Parts from Living Persons*

Each Australian State and Territory has its own Act regulating the procurement of human body parts for medical purposes, based on model legislation drafted by the Australian Law Reform Commission. In their report, the Commission distinguishes between live and cadaver donors. The recommendations relating to cadaver donations will be discussed below; with respect to live donors, the Commission further distinguished between the removal and use of regenerative and non-regenerative tissue.

The Commission recognised a person's regenerative tissue could be used '... for transplant or other therapeutic purposes or for medical or scientific purposes expressly approved of by the legislation', but the only use of a person's non-regenerative excised tissue discussed by the Commission was transplantation. As discussed above, a non-regenerative part of a person's body removed because it was diseased could be used for experimental purposes. The Commission recommended that a person of sound mind and over the age of 18 should give her consent in writing to any proposed use of her body parts before they were removed, and that she had the power to revoke her consent up till the time the part was removed. Further, in relation to non-regenerative tissue it was specified that '... in order to provide a 'cooling off' period, removal of non-regenerative body parts [for transplantation purposes] should be forbidden until 14 hours have elapsed from consent'.

---


15 ALRC, p. 50.

16 ALRC, p. 50.
The Commission's recommendations relating to the removal and use of body parts from living persons were adopted in the NSW Human Tissue Act (1983), which was concerned with '... the donation of tissue by living persons, the removal of tissue from deceased persons, the conduct of post-mortem examination of deceased persons, and certain other matters'. Though, there are some minor differences between individual State and Territory Acts, and significant differences with the comparable legislation in other countries, I shall use this Act in this and the following section as an example of the relevant Australian policies.

Following the Commission's recommendation, Section 7(b) of the NSW Human Tissue Act states that a person's consent is required if regenerative tissue from her body is to be used '... for other therapeutic purposes [than donation] or for medical purposes or scientific purposes'. In line with the scope of the Commission's deliberations, the Act does not address the possibility of using non-regenerative body parts, that have been removed because they are diseased, in medical experimentation.

Requiring a person's consent before the removal and, in some cases, the subsequent use of her body parts is consistent with the widespread practice of obtaining a person's consent when she is a patient. In neither the Commission's report nor the NSW Act is an explanation given why this consent is required. It may be, however, this requirement has a similar basis to requiring a person's consent before she undergoes medical treatment, namely that it displays respect for the patient's autonomy. If this is the case, though, an explanation is needed of how consulting a person about the use of a part of her body that has been removed respects her autonomy.

18 Human Tissue Act 1983 (NSW), No. 16, p. 6.
Various provisions of the National Health and Medical Research Council's (NHMRC)\(^\text{19}\) statement on Human Experimentation (1992) are concerned with ensuring that the autonomy of a person participating in any form of medical experimentation is respected. Of particular interest is the following provision: '[i]n the conduct of research, the investigator must at all times respect the personality, rights, wishes, beliefs, consent and freedom of the individual subject.'\(^\text{20}\) It is questionable whether that person becomes an experimental subject just by consenting to her excised part of her body being used in an experiment. Moreover, if it is assumed a person no longer has an interest in a part of her body removed for therapeutic reasons, then it may not occur to the researcher that a person's beliefs, values and so on need to be taken into consideration. As will be described below, and discussed in more detail in the following chapter, there is evidence which undermines such an assumption, and therefore reasons for consulting a person about the use of a part removed from her body out of respect for her autonomy.

The relevant provision of the NSW Human Tissue Act requires that a person's fully informed consent be obtained before any of her body parts are used for transplantation or experimentation. Some indication why such consent is required may be given by the provision of the NHMRC's statement of Human Experimentation cited above. Although it may not be immediately obvious how this provision relates to the experimental use of human body parts, once it is acknowledged that all body parts used in this way are from the bodies of particular persons then its relevance may be

\(^{19}\) The NHMRC is Australia's main Commonwealth body for regulating and funding medical research.

\(^{20}\) NHMRC Statement on Experimentation and Supplementary Notes, AGPS, Canberra, 1989, p. 2.
clearer. Further, if it can be established that a person retains a morally significant interest in an excised part of her body, then such an interest may justify both the requirement of consent by the relevant Acts and the NHMRC's provision requiring that a person and significant aspects of her life be respected when she is participating in a medical experiment. In the following chapter I argue a person may have such an interest in a part of her body removed for therapeutic reasons.

The importance of obtaining a person's consent to the use of her excised body parts is perhaps clearest when she has a non-regenerative body part removed for non-therapeutic reasons—that is to donate it for transplantation—since that person will be giving up a functioning part of her body. Yet there may be other reasons for obtaining such consent in relation to the use of excised body parts (both regenerative and non-regenerative), which, although not suitable for transplantation, could be used in experimentation. There is evidence, though, that it may be assumed a person would not be concerned about what happens to such a part, and so the person's consent for its subsequent use may not be sought. Such assumptions are evident in the Moore case.

iii. Current Practices when Procuring Body Parts from Living Persons—The Moore Case as an Example

During the course of his treatment for hairy cell leukemia, John Moore was referred to Dr David Golde at the University of California (UCLA) who recommended the removal of his enlarged spleen. Moore gave his '... consent to the operation, but there is no indication he consented to arrangements about the disposal or use of his spleen'. It is unclear when Golde became interested in Moore's spleen for research
purposes—prior to the surgery or after Moore made an unexpected recovery—but at some stage he became aware that Moore's cells were unusual, perhaps even unique, and, further, might be of scientific and commercial value. Of particular interest was a T-lymphocyte cell (a type of white blood cell) containing lymphokines (proteins which have a role in orchestrating a complete and efficient immune response, and so may be useful in treating diseases which attack the immune system such as HIV/AIDS and some cancers). In Moore's body the cell was malignant and so over-produced, which made '... the genetic material responsible for producing the lymphokines easier to identify than it would be in other people's cells'.

After the removal of his spleen in 1976, Golde requested Moore return to the UCLA medical centre for post-operative treatment, which included taking blood and tissues samples. Moore made twelve such visits over the next seven years. On the second last visit, Moore requested the samples be taken at his local hospital in Seattle because he could no longer afford the travel and associated expenses. Golde then offered to pay his expenses for that and a subsequent trip. During the court proceedings it was revealed these samples were needed for Golde’s research and not for Moore's therapeutic benefit, as Moore claimed he had been led to believe.

Golde's research resulted in the development of a cell line that '... would continue to reproduce these lymphokines indefinitely'. In January 1983, Golde applied for a patent for the cell-line, which he called the Mo-cell line, on behalf of the University of California, listing himself and his research assistant Shirley Quan as the inventors. At

---


22 Mortimer, p. 218.

23 Mortimer, p. 218.
this time, Golde asked Moore to sign a consent form indicating he understood '... that information from research on his blood and bone might not benefit him directly [and that] he voluntarily granted to the University of California any and all rights [he and his] heirs may have in any cell line or any other potential product which might be developed from [his] blood or bone marrow'. Moore signed this form in April 1983, but later claimed in court he was not aware of '... the defendant's true research and commercial interests, and that if he had known, he would not have consented'.

In September 1983, Moore was asked to sign another consent form identical to the previous one. This time he gave permission for blood and other tissue samples to be removed from his body, but did not relinquish his rights to any cell-line or other by-products resulting from any research. When Golde suggested Moore had mis-signed the form and requested he sign another one correctly, Moore sought legal advice. His lawyers reviewed Golde's scientific articles from 1978 onwards, which described the development of the 'Mo-cell line' from the spleen of a patient with 'hairy-cell' leukemia, and also learnt of Golde's patent-application. A law suit was initiated in 1984, with Moore as plaintiff, and Golde, Quan, the Regents of the University of California, the Genetics Institute and a pharmaceutical company Sandoz as defendants.

The main cause of action Moore brought against the defendants was the conversion of his property. A valid claim under the tort of conversion is proven by showing someone uses or deals with another person's property in a way not authorised by that


25 Daniels, p. 215.
person. Specifically, Moore claimed he only consented to the removal of his spleen, blood and tissue as part of the treatment for leukemia, and not to their use in the development of the cell-line. Moore also brought twelve other causes of actions: lack of informed consent, breach of fiduciary duty, fraud and deceit, unjust enrichment, quasi-contract bad faith, breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent misrepresentation, intentional interference with prospective advantageous economic relationships, slander of title, accounting, and declaratory relief. The Superior Court of California agreed with the defendant's argument that the claim of conversion incorporated these other causes of action, and only ruled on that claim. It found Moore did not have a valid claim for conversion of his property concerning the use of his spleen and other body parts in the development of the Mo-cell line.

After investigating some definitions of, and arguments as to what constitutes, property, the Californian Court of Appeal reversed the Superior Court's ruling in Moore on the basis that they:

... have been cited to no legal authority, public policy, nor universally known fact in biological science concerning the particular tissues referred to in this pleading ... which compels a conclusion that this plaintiff cannot have sufficient legal interest in his own bodily tissues amounting to personal property.


27 Moore v. Regents of the University of California et al., 1985, C.A. Superior Court, Los Angeles County.

28 Moore v. Regents of the University of California et al., 1988, 249 Cal. Rptr. 494, Court of Appeals, 1988, p. 503.
Since the question of the basis for a person's owning or having property rights in her body parts are two of the central issues in my thesis, it is worth briefly describing the Court of Appeal's rationale for recognising that a person has some property rights over tissue from her body.

Reflecting previous recognition by US courts that a person has a right to determine what is done with her own body in a medical context, the Court of Appeal argued that:

[a] patient must have the ultimate power to control what becomes of his or her tissues. To hold otherwise would open the door to a massive invasion of human privacy and dignity in the name of medical progress.

A subsequent criticism of the Court of Appeal's judgement relevant here is that it '... lacks a firm conceptual basis for its decision on the property issue', since nowhere in the ruling was a connection made between property, property rights or proprietary interests, and the notion of control. The Court ruled Moore did have a valid cause of action for conversion and remanded the case back to the Superior Court for a ruling on this and the other causes of action which had not been considered. The

29 Perhaps the most famous of these cases is Schloendoerff vs Society of New York Hospital, (1914) cited in T. L. Beauchamp & F. C. Childress, Principles of Biomedical Ethics, Oxford University Press, New York, 1989, p. 114.

30 Moore v. Regents of the University of California et al., 1988, p. 508.

defendants appealed the Court of Appeals' decision to the Supreme Court of California.

The Supreme Court upheld the Superior Court's decision that Moore did not have a claim for conversion of property in relation to his spleen and other body parts, thus overturning the Court of Appeal's ruling. Four of the reasons the Supreme Court gave for rejecting Moore's claim of conversion are worth mentioning here. First, the Court argued there was no precedent for recognising a person had the necessary property rights in a part of his body required for him to bring a valid claim of conversion. Second, and related, is that the restrictions the Californian Health and Safety Code places on a patient's ability to deal with his body parts or tissues would '... eliminate so many rights ordinarily attached to property'. The Court argued this meant Moore (legally) could not have the necessary rights over his spleen, blood or other tissues after they had been removed from his body to claim conversion of his property. Third, under patent law, biologically engineered living organisms can be patented but naturally occurring organisms cannot. The court argued that since the cell-line was 'factually and legally distinct from the cells taken from Moore's body', it, rather than Moore's cells, were the subject of the patent, and further Moore had no claim to the cell-line. Fourth, the Supreme Court '... rejected Moore's claim to a "proprietary interest" in all products that might ever be developed from his cells or the patented cell

32 The Supreme Court argued that the rulings in the cases referred to by the Court of Appeal were based on privacy rather than property. See Mortimer, 'Proprietary rights in Body Parts: The Relevance of Moore's Case in Australia', p. 223.

33 Mortimer, p. 224.

34 Moore v. Regents of the University of California et al., 1990, 793, P 2d 479 (Supreme Court), p. 491. It has been suggested that these restrictions on the rights a person has in relation to her body rights does not necessarily remove those rights. See Mortimer, pp. 224-225.

35 Moore v. Regents of the University of California et al., 1990, p. 492.
line ... [since] ... allowing patients property rights in tissues would ... result in reduced research activity due to greater administrative duties'\textsuperscript{36}.

In contrast to the previous court rulings, the Supreme Court considered the other causes of actions brought by Moore and found he had valid grounds for claiming a breach of fiduciary duty and lack of informed consent against Golde, and so awarded him compensation. On the basis that '... the law already recognises that a reasonable patient would want to know whether a physician has an economic interest that might affect the physician's professional judgement',\textsuperscript{37} the Court argued that by failing to disclose all the relevant information—in particular his research interests and the possible economic gains—Golde had breach his fiduciary duty. Specifically, Moore was not in a position to make a decision, and so consent, in a fully informed manner. Whilst this does not necessarily invalidate Moore's consent, he did later claim that had he been given all the relevant information, he would have made a different decision. This part of the Supreme Court's ruling will be discussed in detail in chapter six. It is worth noting here, though, that it is based on previous US court rulings which recognised that obtaining a patient's fully informed consent is an important part of respecting and promoting a patient's autonomy.

The Supreme Court's ruling has been criticised in a number of ways. These include the failure to explain clearly why cells and tissue cannot be the property of the person from whose body they have been removed, particularly when researchers can claim the parts and any subsequent products as their property, as Golde and his collaborators did; whether the biological information cited in the judgement was accurate, since


\textsuperscript{37} Moore v. Regents of the University of California et al., 1990, p. 483.
'[t]he cell-line could not exist without Moore's primary cells';³⁸ and whether the current doctrine of informed consent is sufficient to deal with the issues raised in the case.³⁹

As the circumstances resulting in the Moore case demonstrate, the relevant personnel may assume a person no longer has an interest in such parts and so would not care whether they were used for experimental purposes. Related to this is another possible assumption: that if such parts can be used in some way, particularly in ways that will benefit other people, then they should be. The Moore case, then, provides a detailed example of the failure to obtain a person's consent before his body parts are used for experimental purposes. Further, this case, and subsequent analysis of it, provides motivation for part of the argument I will be developing in subsequent chapters—specifically that concerning a person's relationship to and interests in a part of her body removed for therapeutic reasons.

SECTION III: USES, POLICIES AND PRACTICES REGARDING HUMAN BODY PARTS FROM CADAVERS

Although it is possible for body parts removed from living persons to be used for medical purposes, very few types of body parts are available from that source. A greater variety of body parts are available from cadavers, but, as discussed above, there are also constraints on their removal and use. Examples of the uses of cadavers, and parts thereof, will be given below, followed by a discussion of the Australian

---

³⁸ This criticism was made by one of the dissenting judges. For detailed criticisms of different aspects the Supreme Court's judgment in Moore see D. Mortimer, 'Proprietary Rights in Body Parts: The Relevance of Moore's Case in Australia', p. 225.

³⁹ Daniels, 'Commercialisation of Human Tissues: Has Biotechnology Created the Need for an Expanded Scope of Informed Consent?', pp. 209-240.
policies regulating the procurement of human body parts from this source. Finally, I identify what seems to be the main cause of discrepancies between the relevant policies and what happens in practice when procuring body parts from cadavers.

i. Medical Uses of Body Parts from Cadavers

Perhaps the best known medical use of parts from cadavers is transplantation, and most body parts used in this way are from this source. Although the procedure is the same as in living organ donation, there is an important difference. In most cases, the donor will have been declared brain-dead, the criteria for which are often incorporated in organ procurement policies, or less frequently his heart would have ceased to function. It is possible to transplant all major human organs, with the exception of the brain, as well as many other body parts, for example, skin, bones and bone marrow, but the time between removing the parts from a cadaver and transplanting them must be kept to a minimum since once a body part begins to deteriorate it is unsuitable for transplantation. Usually a number of body parts will be removed from a cadaver and the different parts will be transplanted into different recipients.

Cadavers, or parts thereof, may also be used in medical education or experimentation. Perhaps the main educative use of cadavers is practicing dissection and surgery techniques, after which the individual body parts may be preserved for further examination in the course of medical education. Parts from cadavers could be used for a similar range of medical experiments as parts removed from living bodies, although for some experiments the time constraint may be particularly important. These other medical uses for cadavers are, at least in theory, governed by the same policies which govern the procurement of parts from cadavers for transplantation.
Finally, cadavers and parts thereof are used in autopsies. This procedure, which determines the cause of death, is performed in specific circumstances: when the person has died in criminal or suspicious circumstances; when the person dies within twenty-four hours of surgery or when there is some reason to suspect malpractice, or the cause of death is unknown. If the circumstances of a person's death require that an autopsy be performed then neither the prior permission of the (now) deceased person nor the permission of the deceased person's relatives is required. Rather, all that is necessary is that the designated official deem the circumstances of a person's death makes an autopsy necessary. Since there is no uncertainty in relation to who determines this use of parts from cadavers, autopsies will be excluded from subsequent discussion.

ii. Current Policies for Procuring Human Body Parts from Cadavers

In addition to discussing the procurement and use of body parts from living persons, the Australian Law Reform Commission's report into Human Tissue Transplants also discussed, and made recommendations for regulating, the removal and use of parts from cadavers for medical purposes. The Commission identified '[t]he principal issue for lawmaking on cadaver tissue donation is whether the community had a sufficient interest or 'right' in dead bodies to support a claim to human tissues which can be used for the public benefit and, if so, in what circumstances and with what restrictions'.

The Commission also evaluated the significance of the wishes of the relatives compared with any prior wishes of the deceased person. Whilst acknowledging the deceased person may have herself wanted her relatives involved in decisions concerning the use of her body parts after her death, the Commission recommended that the donor's prior wishes be considered paramount and that '[n]o person (except

40 ALRC, Human Tissue Transplants, p. 64.
for the coroner in a case falling within his jurisdiction) should have the power to overrule the decision. The Commission made the following recommendation in relation to the procurement of parts from cadavers:

[w]here a person dies in hospital or his body is brought to the hospital, the hospital itself, by a designated officer, should have the power to authorise removal of tissue for transplant ... after first making enquires for the existence of consent and objection by the deceased, or, if none exists or can be ascertained, objections by the relatives.

Finally, the Commission established an order of priority between the relatives for consultation regarding the procurement of body parts from a deceased person.

Although not directly relevant to the issues under discussion in this thesis, 'brain-death' is one of the more problematic aspects of the organ procurement procedure. The criteria for brain-death that have become generally accepted were originally proposed by a Committee from the Harvard Medical School. Whilst acknowledging the general acceptance of the concept of brain death, the Australian Law Reform Commission recommended that in any legislation regulating the removal of human

41 ALRC, p. 65.
42 ALRC, p. 66.
44 ALRC, Human Tissue Transplants, pp. 55-57.
tissue from cadavers '... detailed criteria [for brain-death] should not be included ... [but rather] ... [flexibility to allow adoption of criteria to accord with the best current profession standard is preferable to verbose legislation'.\textsuperscript{45} Rather, the Commission recommended that 'a person has died where there has occurred (a) irreversible cessation of all functions of the brain of the person; or (b) irreversible cessation of circulation of blood in the body of the person'.\textsuperscript{46}

Finally, the Commission sought to determine which of the two organ procurement policies operating in different parts of the world at the time of their deliberations—voluntary donation or presumed consent—would be most suited to Australia. Under a voluntary donation procurement policy (also known as opting-in or contracting-in), parts from a cadaver can be used for transplantation only with the prior consent of the person whose body it had been. There are various mechanisms for recording a person's consent: including some form of central registry for potential organ donors, a provision in a person's will, carrying an organ donor card or an indication on her driver's license.\textsuperscript{47} The alternative policy is presumed consent (also known as opting-out or contracting out). Under this policy, parts from cadavers are removed for transplantation purposes unless the person whose body it was had lodged an objection during her lifetime to this occurring. There are a similar range of mechanisms for recording an objection as there is for giving consent under the voluntary donation policy. The Commission seemed to combine aspects of both policies in its recommendation that '... public interest and the respect for individual autonomy will

\textsuperscript{45} ALRC, p. 63.

\textsuperscript{46} ALRC, p. 63.

\textsuperscript{47} These last two mechanisms are the most common in Australia, although neither are specified by the legislation.
be adequately served if the deceased indicates consent or non-objection in his lifetime or if the relatives indicate at death that they do not object to the tissue removal.\textsuperscript{48}

Most of the Commission's conclusions in relation to the removal and use of parts from cadavers are reflected in the relevant provisions of the NSW Human Tissue Act, specifically sections 23 and 24. A person's prior and unrevoked consent is required before any of her parts can be removed after her death and used for transplantation purposes. Further, if this consent has been given, this is sufficient for the removal of the body parts by a designated officer. Only if there is uncertainty as to how a person wanted her body parts treated after her death is there a requirement to consult with the deceased person's relatives. Finally, section 33 of the Act adopts \textit{verbatim} the Commission's recommended criteria for the point of death.

There is, however, a significant difference between the provisions of the NSW Human Tissue Act and the Commission's recommendations. The Act regulates the procurement of body parts from cadavers for transplantation purposes solely by a voluntary donation policy, whereas (as mentioned above) the Commission seemed to recommend a combination of both voluntary donation and presumed consent. A voluntary donation policy gives a person an active, and so perhaps a more significant, role in determining what happens to her body parts after her death, since it requires her explicit consent before any parts from her body can be used for transplantation purposes. However, at best, only a general rationale has been given for this role and it is not entirely clear why a person's prior consent is required before any of her body parts are removed and used for transplantation purposes after her death. This, I contend, may in part be because of uncertainty about the nature and significance of a

\textsuperscript{48} ALRC, p. 68.
person's claim to determine what happens to her body parts after her death. Further, this uncertainty has resulted in practices contravening these policies.

iii. Current Practices when Procuring Body Parts from Cadavers

The practices that seem contrary to policies for removing parts from cadavers do not necessarily ignore the relevant prior directives of the deceased person. Rather, they enhance the role of the deceased person's relatives by routinely consulting them about the use of that person's body parts, and not just when the policies require such consultation. The main reason for this consultation with the deceased person's relatives, or other people closely associated with that person, is that, in the absence of signed documentation (such as an organ donor card or drivers licenses) this is perhaps the best way of finding out how that person wanted her body and it parts treated after her death. Further, such consultation would be one way of ensuring the person had not revoked her decision to make her body parts available for transplantation prior to her death. In light of such considerations '... the decedent may be viewed as the donor and the family as the instrument of that donation'.\(^{49}\) In addition, surveys indicate a general perception that the involvement of the relatives provides a '... protective buffer or barriers between the untrustworthy system and the potential source of organs'.\(^{50}\) There are problems, however, with this enhanced role for the deceased person's relatives.

The rationale for asking the deceased person's relatives before removing that person's body parts and using them for transplantation—that the relatives would know if the


\(^{50}\) Childress, p. 94.
person wanted her body parts to be treated in that way—assuming she would have told them. There is, however, evidence to the contrary, for example, 'despite the fact that 93% of Americans have heard or read about transplants no more than 30% have discussed donating their organs with their families'.

There is also conflicting evidence as to what relatives would decide when asked whether they would object to a deceased person's organs being used for transplantation purposes. The results of one telephone survey indicates 'over 90 per-cent would quite likely donate kins' organs if they knew that their relative's favour donation'. Other evidence suggests that, in practice, the deceased person's relatives are reluctant to consent to the removal of a deceased person's body parts to be used for transplantation purposes, perhaps even when that person had already consented.

In particular, throughout the United States during the 1980's organ procurement legislation was amended to incorporate a proposal addressing the shortage of organs available for transplantation. It was assumed that one reason for the shortage was that the relatives' permission to retrieve body parts from potential donors was not being sought. These amendments made it mandatory for medical personnel to 'ask families of brain-dead potential donors about the possibility of organ removal from these individuals before disconnecting them from respirators and issuing death certificates'. This revised policy, known as required request, was expected to


increase the supply of organs since it was assumed, on the basis of survey data such as the one mentioned above, that most people supported organ donation and further would donate their relatives' body parts for this purpose. Preliminary data from a survey of twenty-two hospitals that had implemented required request policies show that 'the families of most eligible donors are asked to donate, but many of the families refused'.

It has been suggested that the voluntary donation policy has inadvertently given rise to the practice of consulting and adhering to the wishes of the deceased person's relatives even when they are in conflict with the deceased person's prior wishes, because '[p]rocurement personnel approach surviving families of declared donors in the same way they approach families of potential donors who have not signed donor cards'. This may give the relatives 'the impression that they have final legal authority to control and transfer body parts from dead relatives, even when the latter have expressly authorised this in writing before death'. This impression may have been strengthened by the adoption of the required request amendment, described above, since it 'lends increased authority to the view that surviving families do have this legal power' to override the deceased person's prior directives.

Various aspects of the organ procurement procedure indicate why it is thought necessary to consult the deceased person's relatives prior to the removal of that person's body parts, and more significantly why the relatives' wishes usually prevail,


55 D. A. Peters, p. 249.

56 Peters, p. 250.

57 Peters, p. 251 (author's emphasis).
even if they conflict with the prior directives of the person from whose body the parts are to be removed. As mentioned above, for human body parts to be suitable for transplantation, they must be removed before they begin to deteriorate, and so ideally the parts should be removed when a person’s heart is still beating even though she has been declared brain-dead. As a consequence, the most suitable body parts for transplantation are from formerly healthy people who have been declared brain-dead, usually as result of car accidents. This means the relatives of potential donors are usually distressed at the time when the body parts need to be removed. Further, they may have difficulty comprehending the concept of ‘brain death’, since the brain-dead person is still breathing, the body is still warm, and so the relatives may believe she is just sleeping and will soon wake up. For these reasons, consultation with the relatives may be a result of the desire to avoid exacerbating their distress. Given this rationale, it is easy to see why in any conflict the wishes of the relatives, rather than the prior directives of a deceased person, determines whether the body parts are used for transplantation.58

Fear of further distressing the deceased person’s relatives could be a reason for not consulting them about the removal of that person’s body parts for transplantation after her death, particularly if it was clear the person had wanted her body parts to be used in this way. Given their distressed state, it has been suggested that it may be more sensitive to simply inform the relatives the deceased person had given permission for her body parts to be used for transplantation after her death, and in such circumstances that it is routine procedure for organ retrieval to occur.59 This is because when a

58 It has been suggested that not wanting to add to the distress of the relatives often means that nothing is done about retrieving the organs, even if the deceased person had given prior permission. See A. Caplan, ‘Organ Procurement: Its Not In The Cards’, Hastings Center Report, vol. 14, no. 5, 1984, pp. 9-12.
person is in a distressed state it may be easier for them to agree with a routine procedure rather than make a decision.

There is, however, a reluctance to minimise the role of the deceased person's relatives, despite the fact that doing so would be to strictly adhere to the relevant policies. First, it has been argued that such an approach would not accord the relatives appropriate respect and fails to be sensitive to their distress. Second, the removal of body parts may be perceived as a form of violation and failure to respect the corpse. Certainly the actual removal of body parts involves cutting into the corpse which causes scaring, and there may be the perception that the cadaver is nothing but a source of spare parts. Finally, it has been suggested that such procedures are coercive since the retrieval of the deceased person's body parts is presented as a fait accompli, or, even worse, the relatives are told that this is what will, and perhaps even should, be how their deceased relative's body will be treated.

The practices contravening the relevant policies regulating the procurement of body parts differ depending on whether the parts have been removed for therapeutic reasons or from a cadaver. In the latter case, the directives of the person from whose body the

---

59 This suggestion has been made in the literature, and includes the provision that the relatives be given the opportunity to object. It is though, often unclear whether such an objection would prevent the retrieval of the body parts. See A. J. Matas, J. Arras, J Muskyen, V. Tellis & F. J. Veith, 'A Proposal for Cadaver Organ: Routine Removal with Right of Informed Refusal', *Journal of Health Politics, Policy and Law*, vol. 10 no. 2, 1985, pp. 231-244.


61 If the relatives viewed the procurement of parts from a cadaver as a form of violation, or as failing to accord the corpse appropriate respect, then removing the deceased person's body parts without their permission would further exacerbate the relative's distress. Under such circumstances the relatives may pursue some form of litigation to seek compensation, and fear of such litigation may be a further reason for seeking their permission.
parts are to be removed may be overruled or ignored by what is seen as a more morally significant concern, that of not wanting to exacerbate the distress of the deceased person's relatives. In the former, the consent of the person who is having a part of her body removed may not be sought because it is assumed the person from whose body the part has been removed no longer has an interest in it or how it may be used. Just because these practices are at odds with the relevant policies does not necessarily mean there is something wrong with them—the policies themselves may be at fault. What is needed, then, is an explanation why the person from whose body the part is to be, or has been, removed should have a role in determining what happens to that part.

CONCLUSION

The use of human body parts in medicine for therapeutic and experimentation raises new and perplexing issues. One of the more important is who determines whether and how such parts are to be used. In the current climate of respect for, and promotion of, a patient's or experimental subject's autonomy it would seem the person from whose body a part is to be, or has been, removed would have a strong claim to determine what happens to that part. I have suggested above that the policies for procuring body parts for various purposes give a primary role to the person from whose body a part is to be, or has been, removed. Despite this some practices have developed where someone other than the person from whose body the part is to be removed determining what happens to that part. It is my contention that such practices result uncertainty about the nature of the relationship between a person and her body parts. Specifically, it is unclear exactly what claims or rights a person has in relation to her body parts, or even whether she will be at all concerned about what happens to that part. Establishing the exact nature of this relationship will clarify what sort of rights and claims a person may have in relation to a part, including her role in determining what
happens to her body parts in these circumstances. This is my task in the following two chapters.
Whilst excised human body parts are potential medical resources, this may not be the only consideration in determining how such parts are to be used. The focus of this chapter is the possibility and implications of a person’s having an interest in a part of her body removed for therapeutic reasons. In the first section, I investigate the basis for and content of such an interest, and determine whether it would be included amongst a person’s significant interests. In the second section, I argue that, in addition to such an interest being significant for that person, it may also be significant in a way that warrants acknowledgement and respect from other people.

SECTION I: A PERSON’S INTEREST IN HER BODY PARTS

My primary concern is whether a person has an interest in any excised parts of her body. However, if a person had an interest in her body parts whilst still part of her body, then this may provide the basis for any interest she may have in one of her body parts after it has been removed. Prior to determining whether a person has either of these interests and investigating why and how they would be significant, it is important to clarify my use of 'interest' in this and the next chapter.

1 Unless otherwise indicated in this chapter, it will be implicit in phrases such as 'excised body parts' or 'body parts after they have been removed' that the reason the part was removed was it was diseased or defective.
The Type of 'Interest' a Person May Have in Her Body Parts

The sense in which I use 'interest' is not perhaps the most common one, that of person Y being interested in object X. A person could have this type of interest in a variety of things, including current political affairs, the latest movies, stamp collecting, different sporting activities, or eighteenth-century French literature and so on. When a person is interested in something, be it an object, issue or whatever, she will typically not be deeply affected by what happens to it. When a person is deeply affected, it follows that, in addition to being interested in an object, a person has an interest in, in the sense of having a stake, in that object.

Joel Feinberg characterises an interest in the sense of having a stake as follows: '[a] person has an interest in Y when he has a stake in Y, that is, when he stands to gain or lose depending on the condition or outcome of Y'. Examples of such interests are career choices, lifestyle changes and company investments. Further, interests in this sense are not limited to the object of the interest, but also may be concerned with the circumstances relating to that object. For example, when a person has this type of interest in a company, that interest would extend to, or perhaps even be primarily about, the success or failure of that company. Another concern of those who have this type of interest is how the object of a particular interest is treated.

The central aspect of this type of interest is the notion of having a stake. When a person has a stake in something, its success or failure has a significant affect on his well-being. Some of the more obvious things in which a person has a stake are health, education and employment. Feinberg describes such interests as welfare interests,

---

which concern '... the continuance for a foreseeable interval of one's own life, and the interest in one's own physical health and vigour'. A person's welfare interests are contrasted with her ulterior interests, which concern '... a person's ultimate goals and aspirations'. Both welfare and ulterior interests are distinguishable from a person's passing interests, which whilst intense will usually be insignificant. Such an interest would be a person's desire for a particular type of food when she already has sufficient food to meet her needs. Generally, the fulfilment of a person's welfare interests is necessary before the person's ulterior interests can be met. For this reason, the fulfilment of a person's welfare interests may seem more important than fulfilment of any of her ulterior interests. This is not to say that a person's ulterior interests, which Feinberg suggests are integral to a person's having a complete and fulfilling life, are unimportant, since, while a person's welfare interests are the '... basic requisite of a man's well-being ... [they are] ... by no means the whole of that well-being itself.'

The fulfilment of an interest, in the sense of having a stake, will favourably affect the interest-bearer and so be to her advantage, whereas the thwarting of an interest of this type will be to the interest-bearer's detriment and she will be adversely affected. What constitutes an interest being fulfilled or thwarted depends on the particular interest. There may be a number of different ways an interest could be fulfilled or thwarted.

---

3 J. Feinberg, *Harm to Others, The Moral Limits of Criminal Law*, Vol I, Oxford University Press, New York, 1984, p. 37. As well as concerns directly to do with a person's health, such as the integrity and normal functioning of one's body, Feinberg includes other concerns which may appear to be only indirectly related to a person's health, such as the maintenance of social relations and ability to engage in social intercourse.

4 Feinberg, p. 37.

5 Feinberg, p. 37.
Alternatively, there may only be one set of conditions required for the fulfilment of a specific interest, and unless these conditions are met that interest will be thwarted.

Feinberg seems to assume that if a person has an interest in the sense of having a stake, then it is a reasonable and even an appropriate interest for him to have. It is, however, possible for a person to believe he has a stake in something that turns out to be none of his business. He may even be favourably or adversely affected by the fulfilment or thwarting of that interest, and if the interest is thwarted, may feel aggrieved enough to take some remedial action. Suppose one of my neighbours believes the study of bioethics encourages abortion and euthanasia, and since he is a staunch member of the Right to Life Association, strongly believes it is his duty to rid the world of anything leading to such practices. So he plans to burn my book collection. Despite the strength of my neighbour's beliefs, few would disagree I have a right to my books and, further, a right my neighbour not burn them. It is, in short, none of my neighbour's business what I read even if he considers himself, and perhaps society in general, to be adversely affected.

Another more significant problem is that two or more people may have a morally legitimate interest, in the sense of having a stake, in the same object. These would usually, although not necessarily, be competing interests. For example, if two people have a stake in the success of a business venture, both people's interest have been fulfilled when the venture succeeds. Where two or more people have competing interests, each person may have an equal claim to having their interest fulfilled. It is more likely, though, that one person's interest will outweigh those of others by giving that person a stronger claim, in some sense, to having his interest fulfilled. Whilst what constitutes a 'stronger claim' is mainly determined by the relevant interests, one general consideration may be how the fulfilment of a particular interest would affect
other aspects of the interest-bearer's life, for example, his ability to keep his job, feed his family or pursue other goals. It is also possible for the same person to have conflicting interests in relation to a particular object. Such conflicts may be easy to resolve if one interest is obviously more significance that the other, but if the competing interests are of similar intensity or concern objects of similar importance, it may not be clear which should be the determining interest. In the following discussion, I adopt Feinberg's characterisation of an interest in the sense of having a stake, and attempt to show how these difficulties can be met in relation to the interests different persons may have in excised human body parts.

ii. A Person's Interest in Her Body Parts when Still Part Of Her Body

Although few would disagree that a person's interest in her body parts is significant, different reasons may be given for this significance. When in situ, a person's individual body parts are part of a functioning whole and so their significance may be derivative from the significance that person places on her whole body. Any significance a person places on her body would, in turn, be contingent on her view of the relationship between herself and her body. Broadly speaking, there are two possibilities: either a person is her body, or, alternatively, a person's body in some sense belongs to her. Those who advocate this second view emphasise the importance of a person's having sovereignty over her body. Although, in some contexts 'sovereignty' incorporates, and may even be synonymous with, ownership, this is not so when it is argued a person's has sovereignty over her body. As I argue in a later chapter, the concept of ownership seems intentionally omitted from discussions of the

nature of a person's relationship to or her control over her body or its parts in favour of her having exclusive control over her body and, by extension, its parts. This, then, is what 'sovereignty' seems to entail concerning the relationship between a person and her body.

Whatever description of the relationship between a person and her body is endorsed, there is no denying there is such a relationship, and, moreover, that it is an intimate one. For any person a particular body is '... amongst the conditions for being ... [that] ... very person,' and so '[t]he body is always some-body, somebody's body, some body in particular'. More than this, human persons are necessarily embodied, '... meaning not merely that we have bodies but that we are bodies'. This does not mean that all there is to a person is her body, but rather that having a body is one aspect, albeit an essential one, of being a person.

Whilst embodiment has been the topic of much philosophical discourse from varying perspectives, its use here is purely descriptive. I am not suggesting that all there is to a person is her body, and neither am I endorsing any form of dualism. On the relationship between a person's body and her mind, I remain agnostic except to say that it is indisputable that human persons need bodies. Through her body, a person

9 Computers and higher primates are sometimes described as 'persons' or the characteristics of being a person are attributed to them.
11 Included amongst these perspectives are metaphysics, epistemology and more recently feminist philosophy, ethics and the philosophy of mind.
interacts with other people, expresses her ideas or beliefs, and act accordingly. In many instances, then, a person's body is an instrument, and so the value that a person places on it will partly be instrumental. In some instances, though, a person's body may be the central focus of her beliefs or ideas. For example, some religious beliefs require a person to treat her body in certain ways, and so, in those particular contexts, a person may place intrinsic value on her body. More generally, once the essential nature of a body is acknowledged, then the value a person places on her own body would, at least in part, be intrinsic.

A person's interest in her body parts when in situ, is because they constitute parts of a functioning whole body upon which she is dependent for her existence and through which she operates the world. Further, a person would have an interest, perhaps a more significant one, in the various parts of her body remaining intact as a whole body. This is because for a body to function properly, each of the various individual body parts need to be intact and functioning. For this reason, a person's interest in her body parts when they are still part of her body is an interest in the sense of having a stake since '[w]hatever goals or values we have are tied up with the fate of our bodies'. Further, with the exception of diseased or defective body parts, a person will usually be favourably affected if her body parts remain intact as part of a whole, and adversely affected if any of her body parts are removed. More than this, maintaining bodily integrity fulfils the requirements of being what John Rawls has

---

12 This is true even in the case of severely physically disabled people, such as the British cosmologist Stephen Hawkins. Any mechanical devices are adapted so as to maximise the limited use such people have of their body.

13 An exception may be the appendix, but even though this body part's function is no longer necessary, its routine removal is usually avoided because of the risks of surgery.

defined as a *primary good*—that is something '... every rational man is presumed to want'.\(^{15}\)

The importance most people would place on bodily integrity can be demonstrated by a variation of the 'survival lottery'\(^ {16}\) proposed by John Harris to alleviate the chronic shortage of organs available for transplantation. The original version of this proposal was that:

... everyone should be given a sort of lottery number. Wherever doctors have two or more patients who could be saved by transplants, and no suitable organs come to hand through 'natural' deaths, they could ask a central computer to supply a suitable donor. The computer will then pick a number of a suitable donor at random and he will be killed so the lives of two or more others may be saved.\(^ {17}\)

Harris amended his proposal so that participants in the lottery were limited to people with a terminal illness but had one or more healthy organs. Even with this amendment the 'survival lottery' proposal is generally considered abhorrent, since it involves killing one person in order to save two or more other lives.

Consider, as a variation of Harris' proposal, a lottery for redistributing *non-vital* or *non-regenerative* body parts from healthy people to those in need of transplants or transfusions. Whilst this second lottery would not necessarily result in the death of the 'donors' it is still problematic. Like Harris' proposal, such a lottery gives other people


\(^{16}\) J. Harris, 'The Survival Lottery', *Philosophy*, vol. 50, 1975, pp. 81-87. An extended version of this paper is in J. Harris, *Violence and Responsibility*, Routledge Kegan & Paul, London, 1980, pp. 66-84. All references are to this reprinted version.

\(^{17}\) Harris, p. 69.
a claim to a person's body parts. Whilst it may, as Harris suggests, be a matter of luck that one person's body parts remain functional whilst another's fail (although in some instances the failure could result from a person's lifestyle), we are not inclined to think a healthy person with fully functioning body parts has to surrender any of them, even those she could do without, to save other people whose own body parts have failed. Rather, she has a prior and stronger claim to her body parts, and this is precisely in virtue of them being part of her body.

The importance most people would place on bodily integrity is not solely because of their interest in remaining healthy. It is also to protect them from proposals such as the variation on the 'survival lottery' described above. That is, once it is recognised that a person has a fundamental, and the strongest, claim to her body parts when they are still part of her body, then the removal of such parts will be contingent on her having given her consent. At least part of the reason why a person would continue to have an interest in part of her body removed for therapeutic reasons is because it had been part of the functioning body through which she operates in the world. It is, however, precisely because such parts are no longer a part of her body that any interest a person may have in such parts will be of a different kind.

iii. A Person's Interest in a Part of Her Body Removed for Therapeutic Reasons

If a person's interests in her body parts derived solely from because of their functions and their remaining intact as part of her whole body, then once a part had been removed for therapeutic reasons she would no longer have an interest in it. Further, a particular body part may impair a person's body's functioning and, by extension, her capacity to act, and so she would have an interest in having it removed. Nevertheless she may continue to have an interest in her excised body parts, particularly given the
increase of possible uses for such parts. This is not to say a person will be concerned about what happens to every excised part of her body. Most people assume that after being cut, their hair or fingernails will be disposed of. There may be exceptions, however, where a person wants certain things to happen to, or not to happen to, even these body parts. For example, a person may want to keep his hair after it has been cut, or ensure that it not be used to make a wig.

A number of factors determine whether, and to what extent, a person has an interest in part of her body after it has been removed. First, as argued above, a person's interest in her body parts whilst in situ, relates, partially, to their function. So there may be a correlation between a person's interest in one of her excised body parts and its previous function as part of her body. Solid vital organs are generally considered more important than non-vital, non-regenerative organs which in turn are considered more important than regenerative body parts. Within each of these groups there may be a further graduations of significance due to specific concerns such as uniqueness of blood type, or the prior loss of one of a non-regenerative paired solid organ such as a kidney or cornea. Although it is unlikely a person would have more than one or two body parts removed at any one time, or indeed over a period of time, she may be more concerned what happens to, for example, a diseased part of a vital organs, than some of her blood, more of which would regenerate.

Second, the reason a person had a body part removed may influence any interest she has in it. If the part was diseased then the person may not care what happens to it, and may even take the understandable view she is well rid of it. Alternatively, a person may specify she wants a diseased part of her body treated in a particular way. A further consideration could be whether and what type of value a part removed from a person's body for therapeutic reasons could have to other people.
example, claimed that had he known of Golde's proposed research, he would not have
given his consent. More generally, the possibility of using a person's excised body
parts for experiments may influence the types of interests she has in it, particularly
when, as in the Moore case, there may be some remuneration.

Third, if a person continues to identify with an excised part of her body, then her
interest in it may be particularly significant. One explanation of what identifying with
an excised body part would entail is that a person may still regards the excised part as
being 'hers' in some sense. However, such a view may seem inconsistent with what I
argued would be a person's primary interest in her body parts, that is as functioning
parts of her body. Further, once part of a person's body had been removed at least
one of the senses in which it was her body part, perhaps the most important sense,
would no longer obtain. That is, even though a person would differentiate parts of her
body, such as her arm, leg and so on, she would also think of the various parts as
being part of something larger, namely her whole body. So when a part of a person's
body has been removed, it presents the novel situation of one of a person's body parts
no longer being part of her body.

A person may continue to regard an excised part of her body as having particular
significance because of its previous status as part of her body. This, I suggest, means
that a person would differentiate between excised parts of her body and other human
body parts. Suppose a person whose arm had been amputated asked to see the arm
before it was incinerated. She is taken into a room where there are a variety of
different body parts waiting to be incinerated. Among them are several amputated
arms. Once her own arm is identified, the person will have a different reaction to her
arm than she would to the other arms. One reason for this difference may be that she
had previously done certain things with that particular arm, had certain experiences (as it were), and so she associates those experiences with her now excised arm, as well as feeling the loss of the capacity to have those experiences. Compare this to a person's reaction to being shown a close friend's amputated arm. In addition to being sympathetic to her friend, a person's reaction in one sense may be similar to the one she would have to her own amputated arm, particularly if that friend has, for example, been her tennis partner. That is, a person may feel some loss of her own, if some of the activities she had shared with her friend were no longer possible.

A person's reaction to, and subsequent interest in, her own excised body part will, however, be different in kind to that she may have to a friend's body part. If such an interest was derived *solely* from the loss of capacities, then it would differ only in degree from the kind of interest she would have if her regular tennis partner's loses her arm. However, because a person's own arm had previously been part of her body and had only ever been part of her body it will remain uniquely identifiable as hers. For this reason a person may continue to consider a part of her body significant even after it has been removed and no longer has any instrumental value for that person.

Examining some of the objections a person may have to her excised body parts being treated in particular ways may assist further in explaining how a person may continue to identify such parts. It would be tedious and not particularly useful to attempt some division of those ways of treating human body parts that are acceptable and those that are not. A more successful strategy is to identify the underlying reasons why a person

---

18 The same could also be true of internal organs, although they would be more difficult, if not impossible, for the person to identify by herself.

19 An exception would be if a person had a part that had previously been transplanted removed. Whilst a person would probably value a transplanted organ particularly highly, if a transplanted organ later failed a person may not place as much value on it after it is removed as she would her own body parts.
may want, or not want, a part of her body removed for therapeutic reasons to be treated in a particular way, and then determine whether such reasons are morally significant and why.

Some objections may just seem to the result of squeamishness—for example, a person objecting to an excised part of her body being preserved for scientific reasons because she did not want other people to look at it. This type of objection may seem insignificant, and so would probably be ignored or overridden in light of more important considerations. In some instances, however, squeamishness may indicate a person has more significant reason for not wanting an excised part of her body to be treated in a particular way. If, for example, a person knew her body part would be processed for petfood, she would have a stronger reaction than just the general abhorrence most people would have to that use of human body parts. She would have a more specific concern, namely, that her body parts should not be treated in that way. She may even draw the conclusion that this practice is indicative of the (low) value placed on her by other people. Thus, the treatment of a person's excised body part may influence, and perhaps even change, a person's perception of herself, or even other people's perceptions of her.

It is possible a person may object to a part of her body being treated in a way generally agreed to be acceptable. Typically, if a person instructs that part of her body removed for therapeutic reasons be destroyed, it would be incinerated. There may be circumstances, though, where a person would not want her body part to be disposed of in this way. In *Browning v. Norton Children Hospital* the plaintiff, who had a phobia about fire, sought damages for nervous shock after finding out his amputated

20 In many instances this is considered implicit in a person's consent to undergo surgery.
leg had been incinerated.\textsuperscript{21} It is not necessary that a phobia or some other type of fear

determine how a person wants her body parts to be treated—it may simply be a matter

of preference. That is, just as a person may prefer being buried rather than cremated, a

person may have a preference concerning the manner of disposal for a part of her body.

A person's preference about how a part of her body should be disposed of may be
determined by her deeply held convictions, such as religious beliefs. Alternatively, a

person's concerns about the treatment of a part of her body removed for therapeutic

reasons may be based on significant cultural practices, such as those of Australian

Aboriginal people discussed in the previous chapter. Whilst I have not the space here
to explore the relationship between a person's deeply held beliefs and her behaviour, I

suggest that where certain behaviour is prescribed by religious or cultural beliefs, and

a person acts accordingly, this indicates the person holds those particular beliefs
deply. Further, if a person were forced to act in contravention of those beliefs she

may be deeply distressed, and perhaps inconsolable. Consider, for example, a person

being forced to eat food which, according to his religious beliefs, he is forbidden to
eat. Such a person may believe he had been defiled, and so have to undergo some sort
of cleansing ritual before he could participate in any religious ceremonies. A person

may be similarly affected if a part of her body was treated in a way that conflicted with
her deeply held religious or moral conviction. Moreover, the distress may be greater
than some other conflicts of that type, since the person may not be able to rectify the

situation.

\textsuperscript{21} \textit{Browning v. Norton Children Hospital}, 1974, cited in B. Dickens, 'The Control of Living Body


were not awarded in this US legal case was due to the plaintiff's delay of four weeks before
giving instructions for the disposal of the body part, rather than anything to do with the
instructions themselves. It was argued that this delay indicated that the issue could not have been
very important to the plaintiff.
In sum, a person's interest in a part of her body removed for therapeutic reasons is an interest in the sense of having a stake. This is because fulfilling or thwarting this interest, and the correlative favourable or adverse affects, depends on the way the body part is treated, for example by affecting a person's self-perception, the way she is perceived by others, or by contravening her deeply held beliefs or values. If a person's instructions concerning what should happen to her body part are adhered to, then the person's interest in how that part is treated, has been fulfilled and this will have a favourable affect on that person. What these affects will be is contingent on the reason(s) why a person wants her body part treated in a particular way. For example, if it was simply a matter of preference, she may have a passing satisfaction if her body part is treated accordingly, whereas if a person's beliefs or values dictated how she wanted that part treated, then she may have a deeper sense of contentment. The converse is also true: the extent to which a person would be adversely affected if her excised body part was treated in a way she objected to, depends on the depth of the reasons for her objections.

As mentioned above, it is possible for two people to have conflicting interests in the same object, although both interests need not be legitimate. For example, if a person's concerns about the treatment of human body parts are influenced by deeply held convictions, she may believe that all human body parts should be treated in a particular way, not just those from her body. This I suggest would be an instance of a person's believing he has legitimate concerns about something that is actually none of his business. That is, a person cannot reasonably expect other people to treat their body parts according to beliefs which they do not share. It would be different if the person had public health concerns about how someone else intended to treat her body parts. In
that case, the possible effect on other people (who presumably also have health concerns) would legitimize such concerns.

Another person's interest in a body part removed for therapeutic reasons may be both reasonable and of similar significance to that of the person from whose body the part was removed. For example, if a researcher required specific types of body parts for his research program to continue, he would have an interest in body parts of that type. It is also possible for the same person to have conflicting interests in relation to the treatment of an excised part of her body. For example, a person's religious beliefs may dictate that the part not be used for medical experimentation, but the part may have unusual properties making it particularly suitable for experiments which could have implications for a disease her relative is suffering from. The resolution of such conflicts will be discussed at the end of the next section.

Thomas Murray argues '[t]here is something very special about human organs and tissues, even when removed from the body. We do retain moral interests in them, so that at the very least they are not misused or treated in an undignified manner'. Elsewhere he elaborates, saying a human '... organ, however diseased and distant now, was once a part of a particular human individual ... [and this] .... means that that individual has some stake in it being treated respectfully'. Whilst I agree with Murray's sentiments, he does not indicate why the interest a person has in her body parts may be significant. In this section I argued a person may continue to have an interest in a part of her body removed for therapeutic reasons. Specifically, she may

---


23 Murray, p. 213.
be concerned that it should be treated in accord with her belief and values. In the next section I establish that such a concern makes a person's interest in her body parts morally significant.

**SECTION II: SELF-DETERMINATION, DIGNITY AND HUMAN BODY PARTS**

If there were no further uses for human body parts, the views or preferences of the person from whose body a part has been removed would be a reasonable criterion for determining how that part should be treated. However, there are other possible uses for such parts, and it might be that the relevant interests of other people who may benefit from such uses outweigh those of the person from whose body a part has been removed. It is not sufficient, then, simply to demonstrate a person continues to have an interest in an excised part of her body for that interest to determine how that part is treated. It also needs to be established that such interests are significant in a way that merits acknowledgement and respect from other people. I argue in this section that a person's interest in what happens to an excised part of her body may be of such significance, and, further, that respecting such interests may be part of respecting a person's autonomy.

*i. Self-determination, Bodies and Excised Body Parts*

One possible justification for requiring a person's consent to a proposed use for a part removed from her body is that it is consistent with the general principle of respecting and promoting a person's autonomy. An important aspect of such respect is the recognition of a person's right to determine what happens to her body, a right particularly important in medical contexts. This provides a reasonable starting place for investigating whether respecting a person's interest in part of her body removed for
therapeutic reasons is also part of respecting her autonomy. In his essay *On Liberty*, Mill recognises both a person's capacity and right to be self-determining in relation to his body, arguing that '[o]ver himself, over his body and mind, the individual is sovereign'. Mill qualifies this by saying it is permissible for a person to act so as to benefit others, and, conversely, impermissible for a person to act so as to harm others—thus there are limits to a person's liberty. After specifying the aspects of a person's life where liberty is relevant, Mill concludes that each person '... is the proper guardian of his own health, whether bodily, or mental and spiritual'.

Whilst Mill's principle of negative liberty, and discussion of liberty in general, is not without its critics, it provides a plausible account why a person should have control over her body. The specific aspect of Mill's account of individual liberty relevant here is that as long as a person has the necessary capacities, and her actions do not harm other people, what a person does with, or allows others to do with or to her body, is for that person to determine. This idea has legal recognition; for example in his ruling on *Scholendoerff vs Society of New York Hospital*, Justice Cardozo's states

25 Mill, p. 138 (author's emphasis).
27 There are people who cannot act autonomously, including infants, the senile and the comatosed. There are other groups such as the mentally ill and intellectually disabled who may have limited autonomy, or may be autonomous in some circumstances but not others. For the purposes of this chapter, my discussion will be limited to those who have the capacity to be autonomous.
'every human being of adult years and sound mind has a right to determine what
shall be done with his body'.

Whilst Cardozo's statement is often cited in discussions advocating respect for a patient's autonomy, it is important to acknowledge there are particular impediments to a person's determining what happens to her body in medical contexts, whether as a patient or an experimental subject.

When a person becomes a patient she is necessarily reliant on the physician to give her the relevant information to enable her to determine what happens to her body. This places the patient in a subordinate position to the physician in respect of knowledge and skills, thus making her potentially vulnerable. The patient's vulnerability may be increased further depending on the nature of the procedure. If the patient is taking medication or receiving some type of physical treatment, her capacity to be self-determining may only be slightly impaired, and, moreover, she could regain this capacity by deciding not to take the drugs or to discontinue the treatment. Alternatively, if a patient has surgery, her capacity to be self-determining will be severely diminished, because she will be unconscious. In such cases it is clear why obtaining a person's informed consent is so important, although this is not to detract from its importance where a person's capacity to be autonomous may only be slightly impaired.

When participating in medical experiments there are different impediments to a person's being self-determining. In such situations a person may be asked to consent to certain things being done to her, but not be told exactly or even generally what those things are. This may be because in some experiments only a limited amount of information can be given to the subjects without ruining the experiment. Alternatively,

the researchers an experimental subject has contact with may not themselves know everything about the experiment. For example, in international drug trials, those administering the drug are not necessarily the principal researchers, and so may not be aware of all its direct or side effects, or whether an individual participant is given the trial drug or a placebo. So whilst the experimental subject's capacity for self-determination may not appear diminished to the same extent as a patient undergoing surgery, the information provided to the experimental subject concerning what will be done to her during the course of the experiment may be less detailed than the information the patient receives. Thus, for some experimental protocols, it may be misleading to say the consent an experimental subject gives is *fully informed*. This, however, does not necessarily make such experiments unethical; such a determination would be contingent on how and to what extent the experiment would be jeopardised if the necessary information was given (so that the person's fully informed consent could be obtained), how important the experiment was, and other such factors.

Both the physician and medical experimenter have a duty to obtain a patient's or experimental subject's informed consent before carrying out any therapeutic or experimental procedures. A broad definition of informed consent appropriate for this discussion is the '... *autonomous authorisation* of a medical intervention or involvement in research by individual persons'.\(^{30}\) The usual justification for requiring a person's fully informed consent before anything is done to her body is because of her body's instrumental importance. In some instances, though, a person may have specific beliefs or values that determine how she would prefer her body to be treated. For example, a person may not consent to certain types of treatment which would be

\(^{30}\) T. L. Beauchamp & F. C. Childress, p. 76 (authors' emphasis). It has been argued this is only one of at least two senses of informed consent. The other relates to the institutional rules and need not concern us here.
contrary to her religious beliefs. For example, Jehovah's Witnesses refuse blood transfusions even as a life-saving procedure. A person's preference for natural remedies rather than drugs or interventionist treatment may reflect her values relating to the environment or her body. Where a person's beliefs determine how she wants her body to be treated, then this may indicate she may have other reasons for valuing it than because of its instrumental value. More than this, as suggested in the previous section, the integral nature of a person's body would make it intrinsically valuable to that person.

Many definitions of autonomy incorporate the idea of a person's being self-determining. For example, according to Mill, the autonomous person '... chooses his plan for himself.' 31 Robert Young gives a more detailed explanation of self-determination when he says an 'autonomous person's capacities, beliefs and values will be identifiable as integral to him and be the source from which his actions spring'. 32 Elsewhere, Young explains that, in practice, this means '[i]n a fulfilled life, the individual's largely inherited skills and capacities will be developed in ways that sit well with that individual's interests, values and taste'. 33 This suggests a person's beliefs and values are not independent from other aspects of her life, but rather are central to them.

According to Ronald Dworkin '[p]eople think it important not just that their life contain a variety of the right experiences, achievements and connections but that it have a structure that expresses a coherent choice amongst these—for some, that it displays a

33 Young, p. 14.
steady self-defining commitment to a vision of character or achievement that the life as a whole ... illustrates and expresses.\textsuperscript{34} Whilst such integrity does not define a life's character—rather, this is done by a person's specific beliefs, values, achievements, and so on—it is still important. This is because it demonstrates that once a person's life has been '... established as one kind of life ... it should go on being that kind of life'.\textsuperscript{35} Implicit in Dworkin's discussion is that a person may want to ensure consistency between significant aspects of her life, and I contend that ensuring such consistency is one way in which a person exercises self-determination.

There are various contexts in which a person may act to ensure consistency between significant aspects of her life. If, for example, a person were a pacifist then she would probably become a conscientious objector if conscription was introduced. Also, an advocate of freedom of speech would probably protest against a specific instance of censorship, such as a book's being banned or a film's audience being restricted. Finally, a person with strong religious beliefs may refuse to undertake an occupation requiring her to act in contravention of those beliefs. Alternatively, a person may sometimes choose to act in ways that are inconsistent with significant aspect of her life. Such inconsistency could be viewed as aberrant, or could indicate a major shift in a person's beliefs or values, and in some instances may result in changes to many, perhaps even all, aspects of a person's life. One way of interpreting such change may be that this person was seeking to make other significant aspects of her life consistent with that aspect that has changed or shifted so dramatically.


\textsuperscript{35} Dworkin, p. 206.
It is my contention that a person's wanting her excised body parts to be treated in accord with her beliefs and values is an instance of a person's seeking to achieve consistency between various significant aspects of her life. Sharon Perley has a similar view, arguing that a person has a 'dignitary interest'—that is, an interest that relates to the maintenance of a person's dignity—in her body parts.\textsuperscript{36} Prior to discussing Perley's argument in detail, however, a short digression is required to discuss the notion of dignity and its relation to self-determination.

\textit{ii. Dignity, Self-determination and Body Parts}

Various writers have discussed the concept of dignity in relation to a person's humanity,\textsuperscript{37} individuality,\textsuperscript{38} or identity.\textsuperscript{39} It has been suggested that where a person's dignity is not protected, or respected, she is no longer an individual.\textsuperscript{40} Further, for most people an affront to their dignity, as Dworkin succinctly puts it, is '... not a matter of indifference, but something bad for them'.\textsuperscript{41} Perhaps the most common explanation given in moral philosophy of a person's having dignity is that she has value or worth, typically taken to be \textit{intrinsic} value or worth, simply in virtue of being a person.

\textsuperscript{39} Perley, p. 356.
\textsuperscript{40} Bloustein, p. 971.
By failing to be self-determining in the majority of, or in particularly important, aspects of her life, a person fails to maintain her dignity. That is, by not making her own choices or determining her own beliefs and actions, but instead following the dictates of others, she fails to be 'her own person'. This in turn would amount to a person's failure to maintain her uniqueness, in virtue of which she has intrinsic value, and hence, dignity. Conversely, when a person *does* exercise self-determination—that is she chooses her beliefs, actions and values, and further seeks to establish consistency between these and other significant aspects of her life—then this maintains and promotes her dignity.

One reason often given why a person should be respected is because she has dignity, that is, intrinsic value or worth.\(^{42}\) Such respect may be exhibited in a number of ways. Of particular interest here is that things closely associated with that person, and in which she may have a dignitary interest, should also be treated with respect. Examples of such things would be representations of the person such as photographs, the outcome or results of her projects, and other things identifiable as being that person's. Perhaps the best way of explaining why things closely associated with a person should be treated with respect is to briefly describe some of the ways mistreating such things would be an affront to her dignity.

One indicator that the deliberate destruction of representations of a person may constitute an affront to that person's dignity, is that burning effigies of political figures is regarded as an extreme form of protest. A similar type of occurs if something a person has created is intentionally destroyed, such as burning a book she had written.

---

\(^{42}\) See, for example, Kant, *The Metaphysics of Morals*, p. 255; Dworkin, *Life's Dominion*, p. 205; and for the connection between a person being autonomous and deserving respect specifically in relation to the body, see G. Dworkin, *The Theory and Practice of Autonomy*, p. 113.
A person's dignity may also be affronted if the results or outcome of one of her projects is used for an unintended, perhaps abhorrent purpose, such as a person's discovery of the cure for a particular disease being used to develop biological weapons. In all these instances, something closely associated with that person is treated in a way she would not approve of, in some way contrary to her beliefs or values, or in a way which denigrates her achievements. Further, it is because such things are closely associated with a person that mis-treating them not only negatively affects that particular thing, but may also have an adverse affect on the person by affronting her dignity.

Returning to excised human body parts, I want to suggest that the interest a person may have in a part of her body removed for therapeutic reasons may fulfil the requirements of being a dignitary interest, and so warrant the appropriate acknowledgment and respect from other people. As discussed in the previous section, the basis for such an interest is that the part had previously been part of her body, and so was certainly closely associated with her. This association is not necessarily extinguished by a person's body part being removed, since she may continue to identify that part as in some sense still being hers. Further, she may be concerned that it be treated in accord with her beliefs and values. It is just such concerns that would make the interest a person had in a part of her body that had been removed a dignitary interest.

Perley argues that a person's interests in her body parts '... extend beyond the physical integrity of the body itself to the values an individual holds', and so '[a]lthough the excised body part is no longer a part of the individual, she retains an

---

43 Perley, p. 349.
interest in knowing that it will not be used in a way that is contrary to her personal beliefs. Perley draws the following analogy between a legally protected dignitary interest, a person's interest in the exclusive right to her own identity, and the interest a person has in part of her body removed for therapeutic reasons:

Just as an individual retains an interest in knowing that her name or likeness will not be used for purposes with which she disagrees, she also retains an interest in knowing that her excised body parts will not be used in a manner offensive to her personal beliefs. Moreover, an individual whose consent to the use of her body parts has not been solicited feels the same violation as an individual whose name or likeness has been used without her consent.

According to Perley, a person's dignitary interest in her body parts has already been legally recognised in several ways. First, a person's permission is required before any of her body parts can be removed for transplantation, whether the parts are removed whilst the person is alive or after she has died. Whilst such consent is required partially because of a person's right to bodily integrity, Perley suggests it is also a recognition of '... a person's dignitary interest in controlling what happens to her body parts.' Second, the court's have ruled that '... a person's expressed wishes as to the disposal of her parts are entitled to respectful consideration and should be carried out to the fullest extent possible'. Perley argues that these and other forms of recognition of a person's dignitary interest in her body and its parts—the main aspect being a person's having a right to control what happens to her body parts—lays the

44 Perley, p. 349.
45 Perley, p. 351.
46 Perley, p. 353.
47 Perley, p. 355. A person's interest in the treatment of her body parts after her death is the subject of the next chapter.
foundations for similar recognition of a person's interest in a part of her body removed for therapeutic reasons. Perley argues that the grounds for recognising and protecting such interests is '... that a person's individuality—the values, morals and beliefs which shape her unique personal identity',\footnote{Perley, p. 356.} are worthy of protection.

Whilst endorsing Perley's position, further clarification is needed why a person determining what happens to her body parts is an act of self-determination, and how it relates to her dignity. She argues that '... the right to self-determination must be interpreted as embracing not only an individual interest in her bodily integrity, but in her dignity'.\footnote{Perley, p. 356.} As argued above, part of what it means for a person to have dignity is for her to be self-determining and part of what this means is that the determinations she makes in relation to events in her life reflect her goals, values and beliefs. So, in practice, a person's having a dignitary interest in her body parts means she may want an excised part to be treated in a way that is consistent with her beliefs and values. Given that a person may have such an interests in an excised part of her body, it is important that such an interest be promoted and protected. Below I suggest the best way of ensuring that this happens.

\textit{iii. A Person's Prerogative to Determine what Happens to Her Body Parts}

Throughout this chapter, I have suggested the main manifestation of a person's interest in an excised part of her body may be her concern about how that part should be treated. Such concerns or preferences are morally significant because they may be influenced by her beliefs or values. The simplest way to ensure such parts are treated

\footnote{Perley, p. 356.}
so as to reflect the values and beliefs of the person from whose body they have been removed is for that person to determine how that part is treated. As pointed out earlier, there may be some parts of a person's body that, once removed, a person would not be concerned about. For this reason, I am not advocating that a person has a positive duty to determine what happens to an excised part of her body, but rather that they have a prerogative to do so. She may well choose not to exercise this prerogative, but where she does, as long as it is socially and culturally acceptable way of treating excised human body parts, then that is how that part should be treated.

Even a person's weak or seemingly incidental preferences concerning the treatment of an excised part of her body may warrant consideration against other possible interests, on the basis that a particular body part was once part of a particular person's body. Judgements as to when such interests should be considered significant are partially contingent on the particular interests or what, if any, competing interests or claims there are, and so need to be made on a case by case basis. Nevertheless, any interests a person may have in an excised part of her body are potentially significant, in virtue of the particular body part having been from her body.

Earlier in this chapter I briefly described some conflicts of interests that could occur concerning how excised human body parts are to be treated. One such conflict was between of the preferences the person from whose body a part has been removed and a researcher's interests in that part.

As Perley has pointed out '... at least some people, if given the choice, would not consent to the use of their excised body parts for research purposes'. For example,

---

50 Perley, p. 345.
Moore claimed he would not have agreed to the use of his spleen in the development of a cell-line (although he did not explain the basis for his objection). There could be a variety of reasons for a person's withholding such consent. As mentioned above, some religious doctrines prescribe specific treatment of bodies and by extension body parts, which would rule out using an excised part of the body from a person holding those beliefs for experimental purposes. Alternatively, the research may be contrary to a person's deeply held conviction, such as a pacifist not wanting her body part to be used in the development of chemical weapons.

In some circumstances the researcher's interest may seem to outweigh the particular interest of the person from whose body a part has been removed. For example, if the research was important and only a particular body part were suitable, the preferences of the person, whilst still being considered important, could be justifiably be overridden. This, however, should only occur after a person has been consulted about the research, had its importance explained to her, and her reasons for objecting duly considered. It is worth remembering, though, that overriding the person's interest would amount to a violation of her autonomy. So, one question that would need to be addressed in resolving these types of conflicts is: would the researcher's autonomy be violated in the same way, or to the same extent, if his interests were overridden? If such a restriction does not violate the researcher's autonomy, then, I contend, it would not override the person's refusal to consent.

The other possible conflict mentioned above occurs between two of a person's own interests concerning how a part of her body removed for therapeutic reasons should be treated. Conflicts of this type may not be so easily resolved. Suppose, for example, that a person's religious or cultural beliefs required a body part be destroyed in a particular way, whilst cells from that body part could be used to develop a product that
could possibly assist in the treatment of a disease she and other family members were suffering from. Conflicts of this type would require the person to weigh the significance of each of her interests, in this case how important her religious beliefs were, and what she thought the consequences of not adhering to them would be, as against the possibility and probabilities of relieving her relatives suffering. The most important point is, however, that it would be up to the person herself to resolve any such conflict and decide how she would exercise her prerogative in relation to her body parts.

**CONCLUSION**

In this chapter, I identified one reason for supposing there is a relationship of some significance between a person and her body parts. This relationship exists even when particular body parts are no longer functioning as part of her whole body. Specifically, a person may continue identify with an excised part of her body. This interest may be morally significant, and so it should be recognised a person has a prerogative to determine what happens to any of her body parts removed for therapeutic reasons. Further, in all but some exceptional cases, if a person exercises this prerogative then that is how her body part should be treated. In the following chapter, I argue a person may also have an interest in, and so has the associated prerogative to determine, what happens to some or all of her body parts after her death.
CHAPTER FOUR

A Person's Interest and Prerogatives Concerning the Treatment of Her Body Parts After Death

In the previous chapter I argued a person's continuing to identify with a part of her body removed for therapeutic reasons indicated there may be a morally significant relationship between a person and her body parts. Another indicator of such a relationship would be a person's concerns about what happens to her body parts after she dies. If a person had such concerns, she may give directives as to how her body parts should be treated after her death. Alternatively, if a person gave no such directives, this could indicate she did not care what happens to her body parts, although this should not simply be assumed.

In chapter two, I described the two policies for procuring body parts from cadavers for transplantation currently operating in different parts of the world. Both policies gave a primary role to the person from whose body the parts will be removed, but, at best, only a superficial explanation was given why a person should have this role. Alternative procurement policies have been proposed which aim to maximise the number of body parts available for transplantation. These alternative policies are often dismissed because they do not give due consideration to the prior wishes of the person from whose body the parts will be removed. Whilst I am sympathetic to such concerns, it needs to be made clear why saving lives should be a secondary consideration to ensuring that a person had agreed to her body part being used for transplantation after her death.

In this chapter I investigate the significance and implications of a person's having an interest in what happens to her body parts after death. In the first section, I determine
the basis for, and content, of such an interest, arguing that it may be both significant to
the interest-bearer and morally significant. I then describe, evaluate and finally
dismiss two proposals for modifying the current organ procurement policies, both of
which ignore such interests in favour of the needs and interests of persons still living.
In section two I argue that, because such interests may be morally significant,
respecting a person's interest in what happens to her body parts after her death, and
adhering to any directives resulting from that interest, is a specific, albeit unusual,
instance of acting in accord with the principle of respect for persons.

SECTION I: ARE PARTS FROM CADAVERS SIMPLY RESOURCES FOR
THE LIVING?

I have argued that any directives a person may give concerning the treatment of a part
of her body removed for therapeutic reasons should be respected and adhered to
because they may reflect her beliefs and values. Further, she may be adversely affected
if her excised body part were treated in some other way. Whilst a person's interest in
what happens to her body parts after her death may also be influenced by her beliefs
and values, a person will not be adversely affected if, after her death, her body and
parts are not treated in accord with any prior directives she had given as a result of
having that interest. For this reason, a different explanation is needed why a person's
interest in the treatment of her body parts after her death may be significant.

i. A Person's Interest in What Happens to Her Body Parts after Her Death

A person's interest in how her body parts will be treated after her death is, I suggest,
an example of an interest a person may have in events that will occur after her death.
More familiar examples of such interests are how a person's property will be
distributed, whether her nearly completed book will be published, or how she will be remembered. Moreover there are '... some interests of humans beings that can only be fulfilled after they die',¹ such as how their body parts will be treated.

To determine whether a person has an interest of any significance in what happens to her body parts after her death it may be useful to first determine whether a person has such an interest in her whole body parts. When a person dies, something of a dilemma is posed by the remaining body which is '... the mortal remains of a unique human being'.² On the one hand, the person no longer exists, except indirectly via other people's memories, representations such as photographs or, perhaps, even through the results of his endeavours, such as a book he had written. On the other hand, the corpse remains '... as still uniquely related to the original person ... [and is] in some way ... most strongly "his", far more strongly than, for example, his clothes or letters'.³ Since a person knows that after his death a body will remain that is strongly representative of him and his life, it is understandable why he may have an interest in, and so give directives concerning, how that body should be treated.

a. Disposing of Bodies

Cadavers are usually disposed of, and so a person may be concerned about, and give directives concerning the manner of disposal for her body. Such directives are not the only considerations when disposing of cadavers, since '... failure to remove a

---

1 R. Belliotti, 'Do Dead Human Beings Have Rights?', The Personalist, 1979, p. 203.
cadaver from human proximity can injure the physical and psychic health of the entire community'.

So some directives a person may give regarding the disposal of her body—for example that it be publicly displayed—should not and would not be adhered to. A further reason for disposing of corpses in particular ways or in designated areas is to separate deceased from living persons. Whilst such separation may partially be for public health reasons, there seems to be a psychological and/or spiritual aspect to the disposal of cadavers.

More specific considerations concerning the disposal of cadavers are determined by the '... cultural structures or context that form much of the life of the deceased'. In many instances the relevant 'cultural structures' are the former person's religious beliefs. Many religions prescribe particular ceremonies and even specify the manner of disposal for cadavers. These ceremonies are in part to benefit those still living, specifically to give those who knew the person an opportunity to show respect and grieve for their loss. At the same time, though, '[r]eligious beliefs embodied in funeral practices are amongst those most characteristic and closest to the heart of every religion'.

So if a person had held particular religious beliefs and adhered to the prescribed practices, then it is reasonable to assume she would have wanted her body disposed of in accord with those beliefs. Further, the manner of disposing of a body

---

4 Quay, p. 901.
5 Quay, p. 907.
6 In Lott v. State and Tumminelli v. State, 32 Misc. 2d 296, 255 N.Y.S. 2d 434 (1962), the relatives of two deceased persons were awarded damages for mental suffering after each person was buried according to the other person's religious ceremony.
7 Quay, p. 908.
8 Even when a person had not closely followed the practices of their nominal religion during their life they are usually buried according to the ceremonies of that religion. This may be because of the lack of comparable secular ceremonies.
in a particular way may be due to some further, deeper, beliefs of that religion, such as the need for the body to be appropriately prepared for re-incarnation or an after-life. In most western societies a person’s right that her body be disposed of in accordance with her religious beliefs is protected as part of her right to freedom of religion.

A person’s only concern may be that her body should be treated with respect and dignity after her death, and this would be achieved by adhering to the various general obligations and prohibitions relating to the treatment of cadavers. Alternatively, she may have some specific non-religious reasons for wanting her body disposed of in a particular way. Someone with a fear of fire may prefer to be buried, whereas someone else may find the prospect of her body slowly decaying or being consumed by worms disturbing, and so prefer cremation. Other preferences may not relate to a particular method of disposal, but rather reflect a person’s other concerns. For example, a person may prefer cremation because she wants her body to cease being recognisable as her body as soon as possible after her death or because she believes cemeteries take up valuable living space. Alternatively, a person may prefer her cadaver to be buried because her spouse’s cadaver had been.

b. Designated Donations and Other Directives Concerning Body Parts

Just as a person’s beliefs and convictions may influence the way a person wants her body disposed of, they may also determine how a person wants her body parts treated after her death. Since under current policies it is supererogatory for a person to make her body parts available for transplantation after her death, her consenting to this use of her body parts may reflect her altruistic tendencies or her belief it is important to assist those in need. Alternatively, such a donation may be made out of a sense of
gratitude if, for example, she had, or knew someone who had, undergone a successful transplant.

It has been argued that '[i]ndividuals have a right to designate the recipient of their organs', and some US jurisdictions have legislated to protect such a right by amending the relevant Act. Designated donations are made in response to an immediate need, and so, for example, could occur if a person was close to death but his kidney remained unaffected and healthy, and was physiologically compatible with a relative or close friend who needed a kidney transplant. More likely, though, such donation may be made in response to a public appeal on behalf of a specific donor.

Whilst designated donations on the basis of family ties may be acceptable, just as acts of living organ donation between family members are acceptable, such donations resulting from public appeals have been criticised because such a practice is '... person-specific and thereby abandons the general ethical framework' for allocating organs. My interest in designated donation relates to the permissibility of a person's putting conditions or restrictions on the donation of her body parts after death. It could be argued that not permitting a person to give specific instructions of


10 This occurred in 1982 when Charles Fiske made an appeal of behalf of his 9 month old daughter. A day later the parents of a child killed in a road accident donated their child's liver specifically to Fiske's daughter. See F. Chapman, 'The Life-and-Death Question of an Organ Market', Fortune, June 11, 1984, p. 82.

this type is inconsistent with the current policies requiring that a person's consent. One response to such an argument may be that designated donations would be unfair to those potential recipients who are not designated, either because none of their family are willing to donate their body parts or because they could not afford to make a public appeal. This raises the further question of what part of the procedure is morally dubious—responding to the appeal or making the appeal in the first place. However, if a person does have a significant interest in what happens to her body parts after her death, then allowing designated donation may give her more flexibility to reflect that interest in any directives she gives.

Other directives a person may give as a result of her interest in how her body parts will be treated after her death may be influenced by her beliefs and values. She may, for example, specifically donate her body and its parts for experimentation, thus reflecting her interest in and respect for science. Further, because of her values and beliefs, a person may put limitations on which body parts and/or how they can be used after her death. For example, a person may not want particular body parts, for example her eyes, to be transplanted. A person may also wish to place limitations on the type of experiments that her body parts could be used for. If she was, for example, concerned about some particular illness or disease, she may specify that her body parts be used in research relating to its prevention.

c. The Basis for a Person's Directives Concerning Her Body Parts

The other side of the coin to a person's having interests in events that will occur after her death is that those events may in some way relate to that person. Specifically, there are some events at the end of a person's life, or even after her death, that in some sense completes that person's life. This is because the '... final tally book on a
person's life is not closed until some time after his death'. Awards or commendations may be made after a person's death; her outstanding projects, such as business ventures or unpublished manuscripts, may be completed; or her prior directives relating to events that can happen after her death be carried out. Whilst some of these 'posthumous events' may just tie up the 'loose ends' of a person's life, the more significant ones may in some sense complete it.

Perhaps the most significant event that completes a person's life is his death, or more precisely the manner of his death. Richard Dworkin argues that in seeking to determine the appropriate treatment for someone who has become permanently unconscious, '[w]e worry about the effect of his life's last stage with the character of his life as a whole'. In order to prevent the manner of his death being inconsistent with his life when considered as a whole, a person may make a living will. These documents typically contain instructions about the medical treatment a person should receive if he can no longer participate in treatment decisions. Such directives may reflect a person's deeply held beliefs and convictions, and represent an attempt to ensure the manner of his death is consistent with other significant aspects of his life.

Disregarding a person's directives concerning events happening at the end of his life or after his death may '... damage ... [the person's life when] ... considered as a whole'. Although this observation was made in relation to a person's existing in a vegetative state, a similar type of damage may result from events occurring after a person's death. For example, if a malicious falsehood were spread and believed about


a person who had led a morally exemplary life then there would, at the very least, be an inconsistency between the way that person had lived her life and what was thought about how she had lived her life. Disregarding a person's prior directives concerning how her body parts should be treated after her death may not seem as damaging as malicious lies being told after a person's death. But given that the person has died, it is difficult to see why the second but not the first would be wrong. The person (being dead) cannot be harmed (although as will be discussed in the next section some believe this is possible), and so both would constitute equal violations of the deceased person's prior beliefs and values. More generally, if the way a person wanted her body parts treated after her death was influenced by her beliefs and values, then this would be an event that in some sense completes a person's life, and so would be significant.

The first step in ensuring that, after her death, a person's body parts are treated in accord with her prior directives is to recognise a person has a right to determine what happens to her body parts after her death, similar to a person's right of disposition over her property (although some important differences between these two rights will be identified below). The basis of a person's right of disposition over her body parts is the type of interest she may have in what happens to her body parts. Specifically, she may be concerned that after her death her body parts be treated in a way that reflects her values, beliefs and perhaps even her life when considered as a whole. Such treatment may be a culmination of the different rituals that must be performed in accordance with that person's religious beliefs or reflect a person's other, but equally significant beliefs or values. The reasons why other people should respect and promote this right will be explained in the next section.
However, the possibility of using parts from recently deceased person's to save or significantly improve other people's lives, either directly by transplantation or indirectly by experimentation, may outweigh any prior interests the now deceased person had. More than this, it may be asked why the prior directives of a deceased person concerning the treatment of her body parts should be considered at all, when it is possible to use such parts to save or significantly improve the lives of other people. The need for organs to save lives is perhaps the strongest argument against adhering to a person's directives concerning the treatment of her body parts. This is a specific instance of a more general principle that the interest and needs of living persons should outweigh the directives or wishes of deceased persons, although this does not mean such directives or wishes are necessarily insignificant. I now discuss and evaluate two proposals for modifying current organ procurement policies in line with this principle.

ii. Compulsory Removal of Parts from Cadavers

There have been various proposals for modifying the current policies in order to increase the supply of organs to be used for transplantation. Such proposals place varying degrees of significance on any relevant prior directives given by deceased persons. One of the more aggressive proposals recommends the compulsory retrieval of parts from cadavers. Under this proposal, any parts deemed suitable for transplantation would be retrieved from a cadaver regardless of whether the person whose body it was had given permission.\textsuperscript{15} The motivation for a compulsory removal organ procurement policies is that ' ... a death resulting from the unavailability of a organ ... must be seen for what it is in fact: a senseless tragedy which could be

\textsuperscript{15} Sometimes a presumed consent policy is known as a compulsory removal policy but this is not how I am using the term here.
avoided by overcoming needlessly restrictive taboos'.\(^\text{16}\) Requiring the prior permission of a deceased person before using her body parts for transplantation has been argued to be one such taboo.\(^\text{17}\)

Proponents cite various aspects of the current situation in relation to organ procurement to support the introduction of a compulsory removal policy on public interest grounds. One of these is the discrepancy between public support for organ donation, which opinion polls indicate to be around 80-90\%, and the number of people who actually indicate their willingness to make their body parts available for transplantation, which is around 19\%.\(^\text{18}\)

However, claiming the above discrepancy provides support for the introduction of a compulsory removal policy assumes that the opinion polls, and not the number of people who give explicit consent, better reflects public opinion. Further still, a person's being 'in favour' of organ donation may only amount to being in favour of the general permissibility of donation and not (necessarily) in favour of personally donating. Moreover, empirical research suggests a person may have '... feelings of uncertainty, fear and even horror'\(^\text{19}\) about their body parts being used for transplantation. Such a reaction may be a result of a person's more general fear or


\(^{19}\) S. Younger, 'Psychological Impediments to Procurement', *Transplantation Proceedings*, vol. 24, no. 5, 1992, p. 2159.
unwillingness to think about her own death. Further still, a person may be concerned about the organ procurement procedure, specifically, '... the violation and mutilation of their own or a loved one's body'.20 Whilst this does not mean reported public support for organ donation is not genuine, it does raise questions about how best to gauge a person's true intentions in relation to making her body parts available for transplantation after her death.

The main argument of the proponents a compulsory removal policy is that more body parts could be removed within the required time and under the appropriate conditions to be used in transplantations and so more lives would be saved. This may initially seem to make a compulsory removal policy a reasonable, perhaps even a morally justifiable, alternative to policies which give priority to a deceased person's prior directives concerning the treatment of her body parts after her death. Further, an argument supporting such a policy could still acknowledge the significance of the deceased person's directives or wishes, but maintain that priority should be given to saving lives. Finally, it may also be argued a compulsory removal policy would be less stressful for the deceased person's relatives since there would be no need to consult them before organ retrieval took place.

Notwithstanding these seemingly strong supporting arguments for a compulsory removal policy, adoption of such a policy has rarely, if ever, been seriously proposed.21 Two specific objections raised against this policy are, first, the compulsory removal of organs from a cadaver may result in demands for


21 For one of the very few assessments of the plausibility of adopting such a policy see A. H. Barnett & D. L. Kaserman, 'The Shortage of Organs for Transplantation: Exploring the Alternatives', Issues in Law & Medicine, vol. 9, no. 2, 1993, pp. 123, 126-134.
compensation, and, second, that such a policy would contravene a person’s freedom of religion. Other objections concern the ‘... extreme intrusiveness of such government action’, which is given as the main reason why such a policy would find little, if any, public acceptance. These reasons, though, are given in the context of the current organ procurement policies. It may be argued that the continuing shortage of body parts for transplantation requires a change in policy, perhaps even the adoption of one as aggressive as a compulsory removal policy.

Other rationales for adopting a more aggressive organ procurement policy seek to undermine the significance of any directives a person may have given in relation to her body parts. Joel Feinberg argues that giving such directives priority over procuring and using such parts to save or improve other people’s lives is an instance of ‘... attaching a value to a symbol, and then absorbing oneself in the sentiments evoked by the symbol at the expense of real interests, including the very interests the symbol represents’. The idea is that the prior directives of a deceased person concerning the treatment of her cadaver are respected because it is a symbol of her life, but that this becomes an act of sentiment if done at the expense of saving other people’s lives. Feinberg also suggests some of a person’s reasons for refusing to give permission for her body parts to be used for transplantation after she dies just result


from squeamishness, and so are clearly less important than saving or improving of other people lives.

However, arguments that dismiss a deceased person’s prior directives concerning the treatment of her body parts as being based on misplaced sentiment or squeamishness fail to acknowledge the personal nature of such directives, and as a consequence their whole significance. Any body parts were previously part of a particular body which, in turn, had been the body of a particular person. That person may have had an interest in, and so give directives concerning, how her body parts should be treated after her death.

The reason a person may give directives concerning what happens to her body parts after her death is to ensure they are treated in a way consistent with her values, beliefs and other significant aspects of her life. Moreover, the treatment of a person’s body parts after her death is an event that contributes to the completing of her life. So rather than overriding a person’s opposition to her body parts being used for transplantation purposes because it undermines the value of human life, avoiding such devaluation is precisely why such opposition should be respected. If deceased people are so unimportant that their strongest beliefs and deepest values are not worth respecting then this seems to detract from the importance of respecting the beliefs and values of living persons. Saving other people’s lives at the expense of disregarding a person’s prior directives concerning the treatment of her body and its parts is to undermine the value of such directives and their importance in completing a person’s life.

There is another, possibly more morally acceptable, proposal for modifying the current policies, and which may significantly increase the supply of organs available for
transplantation whilst allowing, even requiring, prior involvement by the person from whose body the parts are to be removed.

iii. Does a Person Have a Moral Duty to Make Her Body Parts Available for Transplantation?

Rather than a person's having a choice to make her body parts available for transplantation after her death, it has been suggested she has a moral duty to do so. The moral justification of such a duty is that '... no person has the right to withhold life from another where there is neither serious harm to the person in assisting nor benefit in withholding that assistance'. It has been suggested that this duty is akin to the better known duty of easy rescue. This is the duty a person has to rescue someone in situations where there is little or no risk to herself, hereafter known as easy rescue situations. Patricia Smith describes such situations as ones where there is '... one person in peril whose only real chance of survival depends on the action of one agent who has no special relationship to the victim other than the (accidental) fact that she happens to be on the scene'. In addition to various parallels between such

---


27 P. Smith, 'The Duty to Rescue and the Slippery Slope Problem', Social Theory and Practice, vol. 16, no. 1, 1990, p. 27. There are at least two other important questions about this type of duty raised in the literature. First, whether there is a legal duty to rescue, which need not concern us here, since the proposal under scrutiny here is that a person has a moral, rather than a legal, duty to make her body parts available for transplantation after her death. See J. Feinberg, Harm to Self: The Moral Limits of Criminal Law, Vol I, Oxford University Press, New York, 1984, pp. 126-186; and J. Kleinig, 'Good Samaritanism', Philosophy and Public Affairs, vol. 5, no. 4, 1976, pp. 382-407. The second question, also not relevant here, is what the causal relevance of not rendering assistance is when determining the overall harm the victim suffers. See Kleinig,
Thomas Young undertakes a detailed analysis of the supposed analogy between a duty of easy rescue and a person's proposed duty to make her body parts available for transplantation after her death. In seeking to identify a point of disanalogy between these two duties, Young explores and dismisses several possibilities. First, he argues that although a potential organ donor is not the only one in a position to help, this does not obviate the duty, since '... if numbers weaken obligation, then ... [in an easy rescue situation] ... the more people standing around doing nothing, the less ... [a particular person] ... is obligated to assist.' Second, in response to the suggestion a person may suffer psychological harm if obligated to become an organ donor, and further that this would not happen in an easy rescue situation, Young queries whether suffering mild or even severe psychological harm removes moral obligation. He suggest that if it did, that would, for example, '... allow a racist who refused to throw a life preserver to a drowning black man to claim he had no moral obligation to help because doing so would have caused him some mental distress'.

The point of disanalogy between a person's duty to make her body parts available for transplantation after her death and the more general duty of easy rescue Young
identifies arises from a rights-based approach. On the assumption that '... we stand in a special relationship with our body parts and it makes sense to capture this relationship by saying that we 'own' our organs, blood etc.', \(^3\) Young argues that if a person has a duty to make her body parts available for transplantation after her death, she would forfeit her right of disposition over them, whereas a person in an easy rescue situation is not asked to forfeit any rights. Rather, a person in an easy rescue situation is at most asked to temporarily surrender his freedom and perhaps use his skills to render assistance, for example by interrupting his walk by a river to rescue a drowning person. Young attempts to restore the analogy in two ways. First, he constructs a situation where a person is required to give up some of his property in order to perform a seemingly easy rescue, but then rejects such situations as ones where a person would have a duty of easy rescue, since requiring people to give up property to help others would make '... supererogatory actions into obligatory actions'. \(^2\) Further, only those who had property rights in objects needed to perform such a rescue would have such an obligation. For this reason, Young concludes that such a duty would be unjust.

Young's second attempt to restore the analogy between a person's duty to make her body parts available for transplantation after her death and the more general duty of easy rescue involves construing a person's time and energy as her property. Young argues this would have the same undesirable implications: some people would have certain obligations whilst others would not, given their particular circumstances. If, however, it does not make sense for a person's time and energy to be her property, but

\(^3\) Young, p. 339 footnote 9.

\(^2\) Young, p. 334. There is a further aspect to this argument, namely that it would be restricted to those people who did not suffer any psychological harm by giving up their property—thus supererogatory actions would become obligatory actions for only some (generous) people.
a person does have the right of disposition—which is typically taken to be a property right—over her body parts, then this would be a disanalogy between the two duties. Whilst the question of whether a person has such rights over her body parts is the subject of later chapters, it is worth noting that Young's assumption of a person's having a right of disposition over her body is also made by current organ procurement policies, and for which I have provided part of a justification above.

There are more straightforward reasons why a person's supposed duty to make her body parts available for transplantation after her death would not be the same kind of duty as that arising in an easy rescue situation. Smith identifies five features of such situations. First, the act of rescue only requires minimal action, since '[n]o one is obligated to incur great cost or risk to himself in order to help a random stranger'. Second, easy rescue situations typically involve one person acting to save another. Third, in such situations a person must be confronted by a situation which at '... minimum [requires] the agent must be close enough to be aware of a problem, identify it as a problem and act on it'. Fourth, a duty only arises in such situations where there is a clear and immediate need—that is an emergency. The fifth, and final, feature is that easy rescue situations present a need for harm prevention.

So does the need for body parts, and the action required to alleviate this need, share any criteria with easy rescue situations and associated duties? Three of the above criteria do seem to be met: a person making her body parts available for transplantation

33 Smith, 'The Duty to Rescue and the Slippery Slope Problem', p. 25.
34 Smith concedes in some circumstances a person may have a duty to rescue more than one person, although '[a] single agent who is in the position to help has merely a duty to do what she can. She does not have a duty to save all of them if she cannot do so without risk to herself.' See Smith, p. 26.
35 Smith, p. 28.
after her death will assist at least one other person; that person has a clear and usually immediate need; and that assistance would be a form of harm prevention. Two remaining criteria of easy rescue situations—a person’s being confronted by another’s need, which only requires minimal action to alleviate—do not, however, seem to be met. Even though potential organ recipients do have an immediate need, a person will not be confronted by it at the time he can alleviate it. Whilst this is true, if this were the only difference, it would not be sufficient grounds to dismiss a possible analogy between a duty of easy rescue, and a person’s duty to make her body parts available for transplantation after her death. After all, this need for body parts is well known, and, although a person is not able to alleviate the need of potential recipients she may be confronted with whilst alive, there will be other potential recipients whose need may be alleviated if her body parts are available for transplantation after her death.

The final criterion of easy rescue situations may seem relevant to the shortage of body parts for transplantation: that alleviating the situation only requires minimal action by a person. Paul Menzel, one of the main proponents of a person’s having a moral duty to make her body parts available for transplantation after death, argues that this way of ‘... contributing is a very easy thing to do in terms of time, effort, of life plans and effects on one's other duties’. The bureaucratic procedures by which a person makes her body parts available for transplantation after her death are simple, for example carrying a signed donor card or ticking the appropriate box on a driver’s license application. A person’s making her body parts available for transplantation

36 In the case of living organ donation the exact opposite is the case.

37 It may be argued that it is the transplant surgeon who has a ‘duty of easy rescue’ to the potential recipient rather than a potential donor. This is because the surgeon has the relevant skills.

38 Menzel, 'The Moral Duty to Contribute and Its Implications for Organ Procurement Policy', p. 2175.
after her death may, however, be contrary to her deeply held convictions, such as religious beliefs. This would mean that 'contributing' in this way would not be simple in the relevant sense.

Admittedly, some of the reasons a person may have for not making her body parts available for transplantation after her death could be morally dubious. Earlier in this chapter I indicated support for the practice of designated donation, or more generally allowing a person to put restrictions on the use of her body parts after her death, suggesting this would allow a person to give directives which more accurately reflect her interest in what happens to her body parts after her death than just consenting to their use for transplantation. Some designated donation may, however, be motivated by prejudices such as religious bigotry.\textsuperscript{39} Such prejudices should be no more condoned in this context than any other, such as employment, housing, participation in leisure activities and so on. At the same time, though, if a person has some deeper reason for a seemingly irrational prejudicial restriction on the use of his body parts after his death—such as having being persecuted by a particular group of people—then such a restriction should not necessarily be overridden. This does not detract from the general point that donating body parts is not necessarily a simple act.

Consider, though, Menzel’s suggestion that a person’s duty to make her body parts available after her death is part of her more general duty to contribute to society. A justification for a person’s having this type of duty may be that since she has utilised medical resources and benefited from medical practice throughout her life, making her body parts available for transplantation after her death would seem a reasonable form of repayment. Such a duty would be less stringent than a duty of easy rescue, which

\textsuperscript{39} Although it may seem a more likely example, I have not referred to racial bigotry here since members of different races are rarely physiologically compatible.
seems to be a strong *prima facie* duty, given that acting in accord with it usually saves a particular person's life. In particular, a general duty to contribute does not meet two of the five criteria for easy rescue: no one person is the only one who can act, and the person is not confronted by a clear and immediate need. This would not preclude there being such a duty, it just that it would not be the same kind of duty as one of easy rescue.

Those who argue a person has a moral duty to make her body parts available for transplantation after her death, either as a duty of easy rescue or some other weakened duty, usually allow exemptions. For example, Menzel's specific proposal is where a person '... had no objection [she] would be morally required to allow [her] organs to be used'. It is unclear, though, what Menzel views as a valid objection. At one point he says '... any objection a person is willing to state counts, with no need to justify the objection', but later he says that if a person 'object[s], but [her] objection is not serious, [she] still has a moral duty to contribute'. It is unclear what counts as 'serious' objections, but it seems Menzel would include any based on a person's religious beliefs or ethical concerns.

A person's 'duty' to make her body parts available for transplantation after her death may be weakened further once it is acknowledged that a person has a morally significant interest in what happens to her body parts after her death. The nature and the significance of a person's interest in what happens to her body parts after her death competes strongly with those who claim such parts should be available for

---

40 Menzel, p. 2177.

41 Menzel, p. 2176.

42 Menzel, p. 2176.
transplantation after her death. Moreover, a policy which makes it obligatory, morally or legally, for a person to make her body parts available for transplantation after her death is little better than just taking parts from a cadaver regardless of any prior directives from a deceased person. Further, any claims that such a policy adheres to a person's prior consent would be deceptive. Allowing exemptions of the type discussed above would, however, make a policy advocating this duty unjust, since the duty would be extinguished if a person had some specific beliefs but would remain for someone else whose beliefs were as significant but differed in content.

In this section I have examined two proposals which give the needs of the living priority over any directives a person may have given concerning the treatment of her body parts after her death. The first proposal was argued to be abhorrent, whilst the second shown to be impractical. More generally, I suggested the underlying rationale for these proposals—namely, that the prior directives of a deceased person concerning the treatment of her body parts should be overridden in order to save as many lives as possible—would be self-defeating. This is because such policies would diminish the value and respect for human life, specifically by undermining the significance of a person's directives concerning the treatment of her body parts after death. This will be clearer when it is explained exactly why a deceased person's prior directives concerning the treatment of her body and its parts should be respected.

SECTION II: RESPECTING DECEASED PERSONS

Respect for deceased persons is common to most societies, although the actual practices exhibiting this respect vary between societies and even within the same society, particularly pluralistic ones. Such practices often appeal to the moral principle of respect for persons, but at least two questions have to be addressed before such an
appeal is justified: who or what is the object of respect, and why should she or it be respected? After a brief discussion of the relevant principle, I address these questions, both generally in relation to deceased persons and their outstanding affairs, and specifically in relation to a person's interest in, and the associated directives she may give concerning, the treatment of her body parts after her death.

i. The Principle of Respect for Persons

The principle of respect for persons is common to diverse moral theories, and, although explanations of its importance vary, it has been argued to be amongst the basic moral principles. According to Aristotle, the virtuous person is disposed to act from the right motives, and so presumably would act in accord with this principle. Kant argues a person '... possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world'. This principle also underlies Mill's principle of negative liberty, because it '... derives from commonsense views about the moral importance of being left free to make choices rather than having them imposed on us'. However, despite its commonality to different moral theories, and the fundamental nature of the principle of respect for persons, there is '... little agreement about the nature and strength of the obligations owed to persons, and still less agreement about what is to be respected'.

46 Beauchamp, p. 194.
Broadly speaking, different moral theories interpret the principle of respect for persons in one of two ways. For Kant, and following him many deontologists, this principle entails respect for a person's *moral* autonomy, that is for a person's ability for '... willing moral principles and acting in accordance with them'.\(^{47}\) The second interpretation, which has its roots in Humean moral theory but finds its full expression in Utilitarianism, is as respect for a person's *individual* autonomy, which entails '... a fundamental moral obligation to respect autonomous agents by duly recognising their considered value judgements and outlook, including their right to their beliefs and their right to take actions based on their beliefs'.\(^{48}\) The second interpretation of the principle of respect for persons is relevant here, although my concern is to establish its relevance in an unusual context—namely in relation to deceased persons and their outstanding affairs.

One of the more important questions raised by the principle of respect for persons is: why *should* persons be respected? One possible explanation is that persons deserve respect because of their merits, but '... since people's merits vary, there seems to be a problem about understanding what it is that about persons as such we value'.\(^{49}\) An alternative explanation is that a person should be respected in virtue of those features '... which constitute the "generic" human "self" or are the "distinctive endowment of being human"'.\(^{50}\) One suggestion of what constitutes the distinctive endowment of being human is the '... exercise of rational will, taking that concept in a broad sense, which does not exclude the concomitant presence of feeling and desire'.\(^{51}\) This

---

47 Beauchamp, p. 195.

48 Beauchamp, p. 196.


50 Downie, p. 19.
answer incorporates the Kantian idea of a person deserving respect because of her capacity to be rational, as well as other aspects that are distinctive of persons which, despite Kant's views to the contrary, '... contribute something of distinctive value to the human personality'.

Whenever the notion of respect is invoked there must be an object of respect. So the specific question that needs to be addressed whenever the principle of respect for persons is invoked is: Why should a person be respected? Although general answers such as persons having dignity, are still relevant, answers to this question typically refer to a person's capacity to be autonomous. More specifically, it is the degree to which a person can be autonomous and the variety of ways in which a person could exercise her autonomy that are considered worthy of respect. This is not to say those persons who are unable to act autonomously should not be respected, it is just that when the principle of respect for persons is invoked in relation to those persons, it is usually the more general aspects of why all persons should be respected that are relevant.

Once it has been established, generally, why persons deserve respect, the next question to be resolved is: What is entailed in respecting a person? One suggestion is that respecting a person means making their '... ends one's own ... and to take into account in all one's dealing with him that he too is self-determining'. Amongst other things, this entails respecting a person's values, convictions, aspirations, concerns, and, more generally, allowing that person to live his life as he chooses, albeit within

51 Downie, p. 23.
52 Downie, p. 21.
53 Downie, p. 37.
certain general limits. A person's interests would also be respected, since they often reflect that person's convictions and may directly relate to her aspirations.

A further question raised by the principle of respect for persons is what type of obligations this principle places on persons regarding their treatment of each other. Exactly what is entailed in any given instance of this principle varies since it gives '... rise to certain characteristic principles of actions—ways of treating persons'.54 The particular principle of action that is relevant depends very much on the context, since whenever this principle is invoked, the concern is that a particular person should be treated in accord with respect in the particular circumstances.

Given its centrality to moral theory and discussions of many moral issues, the principle of respect for persons could be discussed in much more detail. This brief examination of this principle will, however, be sufficient to determine whether and why the principle of respect for persons entails respect for deceased persons.

**ii. Why Respect Deceased Persons?**

It has been argued that acts which seem to respect deceased persons are undertaken because '[t]he living have a deeply rooted need to be able to look forward with solidly grounded confidence to having their own determinations carried out'.55 So, for example, '... because the living have expectations and concern for having their own wills [etc.] respected, they also have an interest in respecting the wills of the deceased'.56 Whilst admitting such explanations seem inadequate—perhaps because

54 Downie, p. 37.

55 Quay, 'Utilising the Bodies of the Dead', p. 913.
no reference is made to the person who gave the directive—Ernest Partridge contends
the only way to make sense of the various obligations and prohibitions concerning
deceased persons and their outstanding affairs is as a contract between successive
generations.

Some of a deceased person's prior directives may have positive implications for those
still living—for example, the distribution of her property or use of her body parts for
transplantation. Hence a more specific explanation why such directives should be
adhered relates to the benefits to, for example, the beneficiaries nominated in a
person's will or potential organ recipients. There may, however, be more efficient
ways for living persons to receive such benefits. For example, if the sole reason for
adhering to a deceased person's prior directives concerning her body parts is for the
benefit of those still living, then this would justify adopting the compulsory removal
policy that was discussed and dismissed above.

Whilst part of the reason for carrying out a deceased person's prior directives may be
to reassure living persons that their own directives will be carried out after they have
died, or because of the benefits to specific individuals, by themselves such
explanations are inadequate. They do not identify what I contend is a morally
important reason for carrying out such directives, namely that doing so is in
accordance with the principle of respect for persons. It is not, however, the person as
she is now—a corpse—who is being respected, but rather the person who once was.

What precisely would failing to respect the person who once was—for example, by
ignoring a deceased person's prior directives—amount to? Feinberg and others.

———
argue it is possible to harm deceased persons, whilst Partridge, amongst others,\(^{59}\) deny the possibility of such harms. Since Feinberg's suggestion that deceased persons can be harmed is one of the more recent and interesting philosophical explanations why the various obligations and prohibitions relating to deceased persons should be respected, it is worth briefly outlining his argument and explaining my reasons for rejecting it.

The notion of 'posthumous harm' seems clumsy, perhaps as a result of using a common well-understood notion, namely, that of a person being harmed, to explain something to which the concept is not usually applied, namely, a rationale for the various prescriptions and prohibitions concerning deceased persons and their outstanding affairs. Some attempts are better than others. For example, Raymond Belliotti claims that '... human beings have interests that can be satisfied after they are dead and they have rights which can be violated or respected after they are dead'.\(^{60}\) But even Belliotti's phrasing is slightly problematic, since it implies a person's interests and rights somehow survive her death—an idea advocated by the proponents, and rejected by the opponents, of posthumous harms.

By contrast, Feinberg and others argue for the possibility of posthumous harms. Whilst I agree with their first claim—that a person can have interests in events that will, and perhaps can only, take place after her death—it is their next claim that makes


\(^{59}\) For example, J. Callahan, 'On Harming the Dead', *Ethics*, 97, 1987, pp. 341-352.

\(^{60}\) Belliotti, 'Do Dead Human Beings Have Rights?', p. 201.
such arguments problematic. That claim is that if any of a person's interests relating to things that may happen after her death are thwarted after she has died, then that person has been harmed. This claim give rise to the following dilemma: either a person's interests can in some sense survive her death—which raises the question of whose interests they are when they are thwarted—or, as Feinberg contends, the person was harmed whilst still alive by an event that occurred after they died.

In attempting to explain how a deceased person would be harmed if interests she had whilst alive are somehow thwarted after her death, Feinberg invokes George Pitcher's distinction between two ways a deceased person may be thought or spoken about: either as the postmortem person (a buried and decomposing corpse), or as the antemortem person (the person as she was before she died). According to Pitcher '... harming a person changes his condition for the worse', and so '... the sense in which an antemortem person is harmed by an unfortunate event after his death is this: the occurrence of the event makes it true that during the time before the person's death he was harmed—harmed in that the unfortunate event was going to happen'.

Feinberg clarifies Pitcher's explanation with the following example. A person would be harmed if, shortly after his death, the insurance company where he established a trust fund for his children goes bankrupt. His interest in providing for his children, however, was not thwarted when the company collapsed but rather he was in a harmed condition from the time he started the trust fund—it is just that the harm only becomes apparent after the insurance company collapses. According to Feinberg, from the time the person made the investment, he was 'playing a losing game, betting a substantial


component of his own good on a doomed cause'. Feinberg is more precise than Pitcher in pin-pointing when a person may be harmed by a posthumous event. Specifically, the person was in a harmed condition from the time he gained the relevant interest that was subsequently thwarted by an event occurring after his death.

Although I agree with Feinberg, that a person may have interests in events that will happen after her death, I also agree with Partridge that '... the relation "P has an interest in Y" cannot survive the death of the interest bearer—the relatum "P"'65. This means that all of a person's interests, including those concerning events that will happen after her death, cease to exist when she does. A distinction needs to be made, though, between an interest, which is contingent on there being an interest-bearer, and the object of an interest, which could still be brought about even though there is no longer an interest-bearer. For example, when I request an inter-library loan I have an interest in a particular book coming to the library, so I can borrow it. If, however, I decide I no longer need the book before it arrives, I would no longer have that interest. It is, though, still possible for the book to arrive at the library because of my request, and so the object of my (now former) interest would have been brought about. Similarly with a person's interests concerning events that will happen after her death: her children could continue to prosper, or her book may be published, even though her interests in such things will cease to exist when she does.

63 Feinberg, Harm to Others, p. 92.

64 According to Feinberg, when a person is in a harmed condition he '... may or may not be in a harmful condition, depending on whether it has itself the tendency to generate further harm', Feinberg, p. 31. What Feinberg seems to have in mind is that those events which may cause immediate minimal harm or even discomfort but do not have any long term consequences and only cause a person to be in a harmed condition, rather than being (significantly) harmed.

65 Partridge, 'Posthumous Interests and Posthumous Respect', p. 248.
In light of the above example, it may be objected that once an interest ceases to be an interest, either because the interest-bearer no longer has the relevant concern or has died, then there is no reason for the object of that interest to be brought about. After all, it is merely because a procedure was in process that the library book still arrives despite my no longer wanting it. The analogy between this reconsidered interest and a person's interests in events that will happen after her death breaks down precisely because in the second case the person retained the interest until her death. Specifically, part of the content of that interest is that the relevant events or whatever do occur after her death, and moreover the person continued to have that interest until the time of her death, and (unlike the inter-library loan example) had no reason to reconsider her interest. So a person does not 'lose' such an interest in the same way that a person would lose an interest when she was alive. The moral imperatives for bringing the object of such interests about was because, first, it was part the interest that the relevant event that place after her death, and, second, the person continued to have that interest up till the time she died.

Even though a person's directives relating to events that will occur after her death may be morally significant, she necessarily relies on other people to ensure such directives are carried out. Some directives are legally recognised and so in some instances adherence to them is enforced, the most obvious being the disposition of a person's property according to her will. Such directives are not, however, absolute since, for example, a person's will may be challenged and, in some instances, overridden. Other directives a person may give are more informal, such as making a request of family members or friends. Due to the informal nature of these types of directives, the person relies wholly on the goodwill of others for them to be carried out.
Even if she gave no explicit directive, it may be assumed that a person had an interest in a particular event occurring after her death. For example, if a person died unexpectedly prior to sending the final version of a manuscript to a publisher or completing a business venture, then it would be reasonable to assume she had an interest in such events occurring. That interest may not have been explicit, but if a person had known she was going to die prior to completing a major project, she probably would have wanted it to be completed, and moreover made it known that this was what she wanted. Further, the completion of such projects would be one of those events that, although happening after a person’s death, in some sense completes her life. The nature of a person’s interests in events that will happen after her death require other people to be involved in the realisation of those interests, for example, by adhering to directives or completing an outstanding project. Such involvement, I suggest, is not supererogatory but rather is one manifestation of respecting deceased persons.

iii. Adhering to a Deceased Person’s Directives Concerning Her Body Parts

Although a person’s interests in events that will happen after her death may be significant, the only involvement she can have in bringing about such interests is to give the relevant directives prior to her death. Someone else has to act in accord with those directives and so needs a reason for doing so. I suggest the reason is out of respect for the person who once was.

Just because a person no longer exists, and so cannot be harmed, this does not mean that she can no longer be respected. There are a variety of reasons why a deceased person may be respected: for example, because of her character, for her achievements and because of events that take place after her death which she had been instrumental
in bringing about. Respecting a person after her death is an act of recognition of her achievements, and the life she had lived, and signals that a person's death does not eliminate all there is about that person. Further, it is still possible to recognise a person as having been self-determining and to make a deceased person's previous ends one's own, specifically by adhering to any directives she may have given to concerning events being that will occur after her death.

Hence, failing to adhere to a deceased person's prior directives is a failure to respect the person who once was. Specifically, it is a failure to acknowledge the type of person she was and what was important about her life both to her and others. It may be objected that whilst these various acts of respect for the deceased persons are admirable, there is no moral imperative to exhibit such respect in the absence of something akin to the possibility of posthumous harms. I have argued, though, that there are significant moral reasons for respecting deceased persons, for example, by adhering to the directives that a person gave prior to her death. The purpose of at least some of these directives would be to ensure consistency between significant aspect of a person's life. Moreover, it is particularly important that events at the end of a person's life, or after her death, are consistent with her values and beliefs. since these events may in some sense complete that person's life.

There are, though, limitations on how much a person deemed responsible for carrying out a deceased person's prior directives has to do. Generally, the limitations on adhering to a particular directive are determined by what the request was, what is required for the request to be fulfilled, and whether the designated person has the necessary resources or skills to do so. So, for example, the completion of a deceased person's outstanding project is contingent on whether the person has the skills or resources, how much effort would be involved and what sacrifices he would have to
make, as well as the nature of the project. One general guideline may be that those directives that are minimally burdensome should be adhered to out of respect for the person who once was.

Some of a deceased person's prior directives concerning the treatment of her body parts may be too burdensome, for example distributing individual strands of hair to specified people around the world, and so no one would be obliged to carry them out. Another reason for not carrying out such directives would be if doing so utilised too many of society's resources, for example a person's directive that her various body parts be kept viable in case her children ever need replacement organs. When the content of a person's directives concerning the treatment of her body parts after her death do not contravene public health standards, are within that relevant cultural constraints, and do not make unreasonable demands, then they should be carried out.

Typically, a person's directives in relation to the treatment of her body part after her death will either relate to the manner of their disposal or give permission for them to be used for transplantation or experimentation. Such directives would pose a minimal, if indeed any, burden on those deemed responsible for carrying them out. Moreover, given the possible significance of such directives, that little effort is required to bring about their fulfilment would presumably provide an additional incentive for adhering to them. That is, as well as it being important for such directives to be adhered to, typically there is no burden in doing so.

What implications does this have for practice? Recall my central concern in this chapter has been to argue against the use of parts from the body of a deceased person.

Even if the person provided the means to finance such a request, utilising the necessary resources which are scarce in this way may still be considered wasteful.
in ways other than that the person wanted, or in ways she may have objected to. This possibility of misuse arises for at least two reasons. First, parts from cadavers can be used to save or improve other people's lives. I have argued that meeting the needs of the living does not justify using parts from a cadaver in ways that would be contrary to, or ignores, the prior directives of the deceased person, whose body the cadaver once was. To do so would be to devalue both the life of that person and perhaps human life generally, since it would devalue not only the person's directives but also the values and beliefs on which they were based. In practice, though, there would be few instances of a deceased person's prior directives concerning the treatment of her body parts being disregarded or overridden in this way. This is typically prevented by the current organ procurement policies which require that a person had consented, or at least not objected, to her body parts being used for transplantation after her death. Rather it is the involvement of the deceased person's relatives that is the second, and more probable, reason why the deceased person's prior directives concerning the treatment of her body parts may be ignored or overridden.

It is the deceased person's relatives who are usually deemed responsible for carrying out that person's prior directives. This is because determining what happens to the cadaver has been deemed the legal, and moral, responsibility of the family. This is because the family is '... the basic social group and the one containing those with whom the deceased had the closest natural bonds ... [and this creates] ... natural bonds of familial piety, of fidelity to promises made to the deceased and reverence for him and his memory'. 67 For this reason '... the right of the deceased to dispose of his cadaver is equivalent to the obligations of the next of kin (to honour their promises

67 Quay, 'Utilising the Bodies of the Dead', p. 901.
and to show familial reverence and piety) conjoined with the indirect duty that binds society (to see that the survivors are free to meet those obligations)'\textsuperscript{68}.

As discussed in chapter two, even though current organ procurement policies do not require consultation with the deceased person's relatives, their wishes and preferences may determine how that person's body parts are treated. Whilst in the majority of instances this would probably result in the deceased person's directives being adhered to, where the wishes of her relatives are at odds with those directives, it is the wishes of the relatives that usually prevail. Despite a common perception to the contrary, perhaps inadvertently encouraged by routinely consulting the relatives, the '... next of kin are not free to simply deal with the cadaver in accord with their own desires'.\textsuperscript{69} Rather, because of the nature and significance of such directives the relatives have a duty to carry out the deceased person's directives relating to the treatment of her body parts after her death, as part of their 'intrafamilial obligations to the deceased'.\textsuperscript{70}

At the same time, though, in meeting their obligations the relatives are not obliged to forgo their own beliefs, since '... the decedent cannot require ... a positive act by his next of kin of which they cannot approve'.\textsuperscript{71} This would suggest a person's directives concerning the treatment of her body parts after her death would only be carried out if the relatives agreed with or, at least, did not object to them. The relatives are, however, '... obliged to tolerate those who are willing to carry out the act he [the decedent] prescribed'.\textsuperscript{72} Further, even in situations where a person has not given any

\textsuperscript{68} Quay, p. 906.

\textsuperscript{69} Quay, p. 906.

\textsuperscript{70} Quay, p. 906.

\textsuperscript{71} Quay, p. 909.
directives, it is not up to the relatives to determine how the deceased person's body parts will be treated. Rather, it should be discerned from what is known about the deceased person—for example her religious beliefs or whether she had been an altruistic person—what she would have wanted, and where possible her body parts should be treated accordingly. The relatives will be an, if not the most, important source of evidence on this matter, but this role need to be distinguished from giving the relatives' own beliefs and values a determining role in what happens to the deceased person's body parts.

In this section I have rejected various explanations for the prescriptions and prohibitions relating to deceased persons and their outstanding affairs as either incomplete or problematic, and suggested an alternative justification based on the principle of respect for persons. When this principle is invoked in this context, it is the person who once was who is being respected. There are many manifestation of such respect, ranging from not slandering a deceased person to completing her outstanding projects. My main focus has been on a deceased person's prior directives concerning events that will happen after her death, specifically those in relation to the treatment of her body parts. Despite the possibility of using parts from cadavers in other ways, I argued there are important reasons why such directives should be adhered to, and, further, in the absence of such directives, that it should be discerned from what was known about that person how she would have wanted her body parts treated.

**CONCLUSION**

On reflection, the suggestion that deceased persons be included within the scope of the principle of respect for persons is not particularly novel or strange. There is,
however, more to respecting deceased persons than simply treating the cadaver with respect and dignity. A person may give directives that are to be, and perhaps can only be, carried out after her death. At least some of these directives are given to ensure events that relate to her life but occur at the end of her life, or after her death, are consistent with her values and beliefs and other significant aspects of her life. Adhering to such directives is to act in accord with the principle of respect for persons, specifically to respect the person who once was.

The directives a person may give relating to how her body parts should be treated may, however, be overridden. This is because there is uncertainty about the nature of the relationship between a person and her body parts. As suggested at the end of chapter two, there is a need to clarify the nature and significance of the relationship between a person and her body parts in order to address the discrepancies between organ procurement policies and what happens in practice. More importantly, this clarification is needed to ensure recognition of a person's prerogatives relating to her body parts, and that where she exercises these prerogatives, her body parts are treated accordingly. It is my contention that this clarification will be achieved if it is recognised that a person owns her body parts. A conceptual defence and moral argument (incorporating the arguments given in this and the previous chapters) supporting this proposal will be given in chapters five and six respectively.
CHAPTER FIVE
A CONCEPTUAL DEFENCE OF THE
OWNERSHIP OF HUMAN BODY PARTS

David Peters suggests many of the decisions a person may make regarding her body and its parts involve her exercising property rights over them, and although some of these rights '... may not intelligibly apply to the relationship of a person to his or her body ... enough do apply to warrant the claim that a person's body or parts is (are) that person's property in an important sense'.¹ Peters' project is not unlike my own, in that he argues '[s]omething else must be added to an autonomous decision ... [in relation to the treatment of body parts] ... before such a decision can command first authority'.² My claim is, however, stronger than Peters': that in order to ensure recognition of a person's prerogatives to determine what happens to her body parts she should be recognised as the owner of her body parts.

In this chapter I defend the conceptual possibility of a person's owning her body parts. In the first section I determine which, if any, of various property systems has rules suitable for governing access to and control of human body parts. The property system identified as being the most appropriate will be examined more closely in the second section. And, in the third section, I give two further arguments to strengthen my conceptual defence of a person's owning her body parts.

SECTION I: PROPERTY SYSTEMS AND HUMAN BODY PARTS

According to the legal theorist A. M. Honore, '[o]wnership is one of the characteristic institutions of human society. A people to whom ownership was unknown, or who

² Peters, p. 252.
accorded it a minor place in their arrangements ... would live in a world that is not our world'.
Perhaps, because the concept of ownership is so central to our society, few people '... pause to ask why anyone should be thought to own anything at all, why property of any kind is desirable, or on what grounds they should assert their entitlement to what they call "their own".' Yet whenever these, or any one of numerous other, questions about the concept of ownership are asked, its complexity quickly becomes apparent. Also, many of the issues that arise in such discussions are themselves perplexing and have generated much debate. Further, '[t]he focus of explanatory and normative discussions ... [of ownership] ... varies according to the sort of inquiry on which a writer is engaged'.
That is, historians, lawyers, economists and political scientists, as well as philosophers, have all developed theories of ownership approaching the debate from different theoretical positions and focussing on different issues. My purpose in discussing the concept of 'ownership', and related concepts such as 'property' and 'property rights', is as background for a conceptual defence of the possibility of a person's owning her body parts. In this and the following section I address two broad questions. First, which property system has rules which could conceptually govern access to and control of human body parts? And, second, is it conceptually possible for a person to exercise any of the rights of the most appropriate of these systems over her body or its parts?

i. Different Property Systems

According to Waldron, a property system is '... a system of rules governing access to and control of material resources ... [which are] ... material objects[s] capable of

5 Reeve, p. 9.
satisfying some human need or wants'.6 These rules determine who can use a particular material object, under what conditions and, to some extent, for what purpose, although wider considerations such as the nature of the object and general rules of behaviour are also relevant. Further Waldron and others have suggested that property rules do not govern the relationship between persons and the material resources over which they seek to have control, but rather govern relations between persons with respect to those resources.7

Waldron argues that each of the three property systems he identifies has an 'organising idea' which '... serves as an essential point of reference by which the operation of these systems of very detailed and complicated rules is to be understood'.8 Without such an idea '[e]veryone would need to become a legal expert to determine at any point what he could or could not do in relation to the resources he came across'.9 People are not, however, always making decisions about which particular resources they may have access to or use. Rather, the organising idea of the relevant property system, along with aspects of a society's legal systems, enables a person to '... negotiate his way through the complex web of property relationships that structure his social universe without even perceiving a need for expert guidance'.10 Waldron claims the organising idea of a property system provides the main basis for members of a society to '... learn to apply the property rules of the society [and in any] given property

6 J. Waldron, The Right to Private Property, Clarendon Press, Oxford, 1988, p. 31. Waldron does not claim that only material objects can be property, but argues it is easier to sort out the more basic questions concerning property in relation to material objects rather than incorporeal ones.

7 Waldron pp. 27-29; Reeve, Property, pp. 6-7.

8 Waldron, p. 42.

9 Waldron, p. 42.

system may be important for its legitimation'. One function, perhaps the most important one, of the organising idea of a property system is to deal with the problem of the allocation of resources, although in each property system Waldron identifies the potential for this problem remains.

In a system of *collective* property '... the problem of allocation is solved by a social rule that the use of material resources is to be determined by reference to the collective interests of society as a whole'. In such a system '... material resources are answerable to the needs and purposes of a society as a whole, whatever they are and however they are determined ... [and so] ... no individual has such an intimate association with an object that he can make decisions about its use without reference to the interests of the collective'. It has been suggested collective property could be viewed as a type of ownership, where the state 'owns' those things (for example, water and energy sources) to which all members of a society need access. However, as indicated below, such an idea seems contrary to the usual sense of ownership.

Although superficially similar to collective property systems, under a system of *common* property, the collective interest of a society has no special status. Rather, the organising idea of this type of property system is that '... each resource is in principle available for the use of every member of society ... [where] ... the needs and wants of every person are considered, and when allocative decisions are made they are made on a basis that is in some sense fair to all'. Waldron argues there is no society

11 Waldron, p. 43.  
12 Waldron, p. 40.  
13 Waldron, p. 40.  
14 Waldron, p. 41.
where a collective property system dominates. Rather in many societies, the allocation of those resources that all members of the society are entitled to have access to, for example public parks, accords with the organising idea of a common property system. Such resources are not often referred to as being the 'property' of those who choose to make use of them. Rather, they are resources held *in common*. This may in part explain why the question about the fairness of resource allocation also arises in relation to a common property system, particularly in relation to finite resources or those resources that cannot be used simultaneously by everyone who wishes to do so.

The organising idea of both a collective and a common property system specifically seeks to address the problems of, and provide a rationale for, the allocation of those resources to which two or more people may need access. Since excised human body parts or parts from cadavers can be appropriately regarded as resources, and further are in short supply but high demand, then perhaps they should be regarded as either common or collective property. I argue below, though, that the rules of either property system are inappropriate to govern access to and control of human body parts. Prior to this, I will briefly describe the third property system identified by Waldron.

The organising idea of a *private* property system is that material resources are separate objects, each assigned and belonging to specific individuals. This correlation between individual persons and material resources is used as a basis for the allocation of resources, and, further, is upheld by rules and regulations of the society. These aspects of a private property system are captured by the concept of 'ownership' which, as Waldron points out, is '... peculiar to systems of private property ... [and] ... the owner of a resource is simply the individual whose
determination as to the use of the resource is taken as final in any state of this kind'.\textsuperscript{15} This makes the suggestion mentioned above—that the state 'owns' those resources governed by the rules of a collective property system—misleading. It may be asked, though, '[w]hy should one individual be put in a privileged position with regard to a given resource.'\textsuperscript{16} This is one of the central questions any justification of a private property system has to address.

In most societies, two, if not all three, property systems operate, though one usually dominates, and, Waldron argues, that system is determined by the society's dominant ideology. The property system relevant in any particular instance of allocation and control of a resource partially depends on the nature of that resource. Within many western societies, for example, personal belongings are usually governed by the rules of a private property systems; natural resources needed for public utilities such as water and energy, by the rules of a collective property system; and recreation facilities such as public parks and swimming pools, by the rules of a common property system. In such societies a private property system dominates, and I argue below that such a system should also govern access to and control of human body parts.

\textit{ii. Which Property System is Applicable to Human Body Parts?}

As mentioned above, the nature and use of an object partially determines which property systems governs access to and control of that object. In determining which property system's rules are conceptually appropriate to govern access to and control of human body parts, I focus specifically on the use of excised body parts removed for

\textsuperscript{15} Waldron, p. 39.

\textsuperscript{16} Waldron, p. 39 (author's emphasis).
experimentation, and the use of parts from cadavers for transplantation. When human body parts are used in either of these ways they can be sensibly viewed as resources which are potentially useful to more than one person. So, theoretically, the rules of any of the above three property systems could govern access to and control of them.

Under a collective property system, access to and control of body parts would be determined by reference to the needs of a society. This seems to be the suggestion of the US Federal Task Force on Organ Transplantation in its final report, where it states that 'donated organs should be considered a national resource to be used for the public good'. In response to this report James Childress identifies some unresolved ambiguities about 'collectively' owning body parts made available for transplantation, particularly in relation to allocation and distribution. In addition, when a human body part is made available for transplantation, it is difficult to understand what reference could be made to the 'collective interest', since there are only a small number of potential beneficiaries, and ultimately, only one person will benefit from the use of that body part, and then only if the transplant is successful. In that event, the recipient would be granted exclusive access to and control of that part, so that other people would be excluded from using it. The rules of a collective property system, however, may seem more appropriate if human body parts are donated for experimental purposes, since the benefits of such purposes are easier to relate to the collective interest.


18 See Childress, p. 103.
The US Task Force endorsed the current voluntary donation procurement policy, and thus their proposal is limited to *donated organs* being 'collectively owned'. If this proposal were widened so that excised body parts suitable for experimentation were also collectively owned, then the status of the body parts after being removed from a person's body but before that person has consented to any use of that part would still need to be addressed. Moreover, this is one of the circumstances I have previously identified as involving uncertainty about the relationship between a person and her body parts.

The organising idea of a common property system makes no reference to the collective interest, rather, each individual has equivalent access to the available resources. Decisions of allocation are made by evaluating and comparing the needs of each individual, and so this property system may seem more appropriate for governing access to and control of body parts available for transplantation. Problems of allocation would still arise, however, since if more than one person needs a particular body part then they could all have the equal claims to it. Further, the organising idea of a common property system only becomes applicable once a person's body part(s) has been removed, since it is only then the part may be of potential use to other people. Therefore, the same issues concerning the status of body parts after being removed but *before* the person has consented to that part being used would also remain unresolved if a common property system were deemed suitable for governing access to and control of human body parts.

---

19 This may not necessarily be the case, since one person may desperately need the replacement body part whilst for another person the replacement may be desirable but not necessary.
It could be argued that when body parts are still part of a particular person's body they are not resources that could be used by another person, and so access to and control of such parts does not need to be governed by the rules of any property system. There is, though, a clear correlation between a particular person and particular body parts, and since such a correlation is the defining feature of a private property system, this indicates it might be fruitful to investigate whether the rules of that system would be appropriate for governing access to and controlling the use of human body parts.

The particular rules of a private property system, and whether it is conceptually possible for a person to exercise these over her body parts, will be the focus for the remainder of this chapter. It is worth noting here, though, that because such rules could conceivably continue to govern access to and control of a person's excised body parts, then this may mean she could make various determinations in relation to any of her body parts removed for therapeutic reasons. Further, if the rules of a private property system govern access and control to a person's body parts when still part of her body, then because some of those rules are concerned with the disposition of a person's property after death, she could make determinations as to how her body parts should be treated after her death. The relevant property rights a person would need to have over her body parts to make such determinations will be identified below. Suffice to say that the organising idea of a private property system seems the most appropriate for governing access to and control of a person's body parts, both when still part of her body and prior to her relinquishing them.

20 Although other people may benefit from the way a person uses her body parts.
SECTION II: OWNERSHIP, BODIES AND BODY PARTS

Waldron distinguishes the concept of ownership in a private property system, which is concerned with there being 'a correlation between individual names and particular objects',21 from conceptions of ownership, which are '[t]he rules of real or postulated legal systems assigning rights, liberties, powers, immunities and liabilities to people in regard to particular resources'.22 So, it is the conception rather than the concept of ownership that is relevant when determining whether a person owns an object. Whilst conceptions of ownership have normative force, my concern here is to determine whether it is conceptually possible for a person's having the various rights, liberties, powers, immunities and liabilities assigned by the rules of a private property system over her body and or its parts. The further question of why a person should be recognised as the owner of her body parts will be addressed in the following chapter.

In his account of the "liberal" concept of "full" ownership',23 Honore offers the following provisional definition of ownership: 'the greatest possible interest in a thing which a mature system of law recognises'.24 He argues, though, that the '... common features transcending particular systems'25 are worth identifying and, for this reason, compiles a list of the standard incidents of ownership. He claims these '... may be regarded as necessary ingredients in the notion of ownership ... [but] are not individually necessary, though they may be together sufficient'.26

21 Waldron, p. 52.
22 Waldron, p. 52.
23 Honore, 'Ownership', p. 110.
24 Honore, p. 108.
individual incidents Honore identifies are '... the right to possess, the right to use, the right to manage, the right to the income, the right to the capital, the right to security, the incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity'. Whilst he acknowledges there are other ways of classifying them, Honore argues these incidents also demonstrate that '... the owner is subject to characteristic prohibitions and limitations ...' contrary to other analyses, which give the impression that being the owner of an object simply entails having rights over it.

It is beyond the scope of this discussion to provide a justification for using Honore's classification of the constitutive features of ownership rather than one of the many others. Suffice to say that property theorists from various disciplines have described Honore's incidents as one of the more comprehensive classifications, and as being both lucid and helpful. For example, Waldron endorses Honore's incidents as a list of the ' ... common features ... [of ownership] ... in ordinary "uncomplicated" cases' within a private property system. The following description of each incident

---

26 Honore, p. 112.
27 Honore, p. 113.
28 Perhaps the most common characterisation of the constitutive features of ownership is as 'property rights'. See Honore, p. 113.
29 Honore, 'Ownership', p. 113.
32 Waldron, The Right to Private Property, p. 49. Waldron does take issue with one of Honore's incidents- namely the prohibition of harmful use-which, as previously indicated, he would describe as a general background constraint rather than a detailed property rule.
pertains to its general function, though, for some objects particular incidents will operate in slightly different ways.

i. **Honore's Standard Incidents of Ownership**

The *right to possess*, which Honore suggests is '... the foundation on which the whole superstructure of ownership rests',\(^{33}\) has two aspects: '... the right ... to be put in exclusive control of the thing and the right to remain in control'.\(^{34}\) The incident of the *right to use* may be interpreted narrowly (as the owner's personal use and enjoyment of an object) or widely (to include two other incidents, the right to manage and the right to the income). Someone has the *right to manage* an object when he has '... the right to decide how and by whom the thing owned shall be used'.\(^{35}\) According to Honore, the *simplest* way of deriving *income* from a thing is to use or occupy that thing, but usually deriving income from an object involves the owner '... forgoing personal use of a thing and allowing others to use it for reward'.\(^{36}\) The *right to the capital* '... consists in the power to alienate the thing and the liberty to consume, waste or destroy it'.\(^{37}\) The power to alienate may be further '... subdivided into the power to make a valid disposition of the thing and the power to transfer the holder's title ... to it'.\(^{38}\) The *incident of transmissibility* is concerned with the power to devise or bequeath the thing owned, and is usually confined to posthumous bequests.\(^{39}\) All

---

33 Honore, 'Ownership', p. 113.
34 Honore, p. 113.
36 Honore, p. 117.
37 Honore, p. 118.
38 Honore, p. 118. Honore specifically mentions gifts and other modes of transfer in this context.
of the above incidents, and, more generally, any of a person's actions with respect to a thing he owns, are '... subject to the condition that uses harmful to other members of society are forbidden'. This, in general terms, is the incident of the *prohibition of harmful use*.

The remaining incidents are not concerned with what a person is permitted to do with or to an object he owns, but rather whether there are any limitations on a person exercising the incidents discussed above. If someone has the *right to security* in an object, he can '... look forward to remaining owner indefinitely, if he so chooses and he remains solvent'. The incident of *absence of term* refers to the type of (ownership) interest the owner has in an object: determinate, indeterminate or determinable. Someone has a determinate interest for a limited time, whereas indeterminate interests have no such limit. A determinable interest is one where '... the present holder [owner] may lose his [ownership] interest in certain events'. *Liability of execution* allows things a person owns to be taken away from him in lieu of paying of his debts. Finally, *the right of residuary* determines what happens to the

---

39 It has been suggested by some authors that the power of transmissibility is required for any transfer of goods. Honore seems to suggest that the power of transmissibility is only required for posthumous bequests and other ways of transferring goods are forms of alienation, which is an aspect of the right to the capital.

40 Honore, p. 123.

41 Honore, p. 119.

42 Honore's discussion indicates the difficult of making sense of a person having an indeterminate interest due to their mortality. At one point he suggests that if a person has the power of transmissibility over an object then she would have an indeterminate interest in it, but elsewhere he says that '[o]n inspection it will be found that what I have called indeterminate interest are determinable', since all of a person's interests may be lost in certain events, the final event being when a person death. Honore, p. 122.

43 Honore, p. 122. Honore suggests that most determinate interests are in fact determinable since an interest in a thing may be lost in certain circumstances or when the person dies.
other incidents ownership after they lapse under some arrangement, such as in a leasing agreement.

A person need not have all of the incidents of ownership in relation to an object in order to own it. Conversely, a person could have many of the incidents over an object without owning it. Further, under some arrangements, two or more persons may have different incidents of ownership over the same object. For example, under a tenancy agreement, a tenant has the rights to possess and use as well as some rights to manage the property for the duration of the lease. The landlord has the rights to the income from, security in, and a residuary right over her property, as well as other rights to manage which she may relinquish to an agent. Although the landlord is the owner of the property, the property would probably be identified as the tenant's in the everyday sense of being a particular person's to use.

As mentioned above, the different constitutive features of ownership determine what it is possible for a person to do with a particular thing. When a person has all the incidents of ownership in relation to an object then there are quite a few things he is permitted to do with or to that object. Conversely, if a person only has a few of the incidents over an object then what he could do with or to that object would be limited. For example, if a person has the rights to possess, use, and manage, but not the right to the capital in an object, then he owns the object in a restricted sense—namely, he cannot relinquish possession of the object. In other circumstances, a person may own an object but the means by which it is possible for him to alienate it may be restricted. More generally, there are always restrictions on what a person is permitted to do with objects he own.
I have only provided a cursory description of the standard incidents of ownership. Much more has been said on the individual incidents and their interrelation. Further, Honore's incidents may be compared with other lists of the constitutive features of ownership for accuracy or completeness. Nevertheless, this brief description of the individual incidents is sufficient to determine whether it is conceptually possible for a person to have some, or all, of the standard incidents of ownership over her body or its parts.

ii. Incidents of Ownership Over Bodies and Body Parts

Given the fundamental importance of a person's body and its parts, it is difficult to see who other than that person would have the greatest interest in a whole intact live body and, similarly, in her body parts when still part of her body. Some possible contenders for having such an interest may be that person's owner, if she were a slave, or her employer. In relation to body parts, someone in need of a transplantation or transfusion might have a strong interest in a healthy person's body parts. Yet, even in these circumstances, until the person agrees to her body being used in a way that benefits others, or relinquishes the relevant body part, that person would still have the strongest claim to that part, in the sense of having the most defensible claim. Also, as argued in chapter three, a person may have a significant interest in her body parts after they have been removed, on the basis that she continues to identify with that part. Hence, on Honore's provisional definition of ownership—as the greatest possible interest in a thing—a person would own her whole intact body, and her body parts, both when in situ and after having been removed.

Nevertheless, to talk of a person owning her body parts is at odds with the usual understanding of the relationship between a person and her body parts, and both
conceptual or moral objections have been made to this and similar proposals. In chapter seven I respond to the moral concerns. Here I argue it is at least conceptually possible for a person to exercise many incidents of ownership over her body and its parts, although it is worth noting at the outset that in practice a person would only exercise a few of these incidents.

Those incidents of ownership it seems conceptually possible for a person to exercise over her body are the right to possess, which consists of an exclusive right to control and the right of non-interference, a right to use, and a right to security. Also, the incident of prohibition of harmful use also applies to the body, as there are, for example, laws against assault. As discussed in the previous chapter, a person may give directives concerning the treatment of her body after her death, and such directives could be described as her exercising the power of transmissibility over her body. Given it is conceptually possible for a person to exercise this power over her body, she would then have a determinable interest in them, where the relevant event causing the person to lose that interest would be her death.

Likewise, it is conceptually possible for a person to exercise some incidents over her body parts. There is, however, an added complication. Since it is possible for a person to have body parts removed and remain alive, it is conceptually possible for her to exercise various incidents of ownership over her body parts after they have been removed, as well as when they are part of her body. Prior to its removal, it is conceptually possible for a person to have the rights to possess and use, as well as the incident of transmissibility, over body parts. In addition, some of the more contentious suggestions made in the debate about how to increase the number of body parts available for transplantation, such as the payment of debts by selling blood or a kidney, suggests a person could conceivably have a liability of execution over her
Finally, it could be argued a person has determinable interest in her body parts, since the person could lose that interest when she has her body part removed or when she dies.

It may initially seem conceptually problematic for a person to exercise other incidents of ownership over her body or its parts; however, in particular contexts they could be exercised. A person could exercise the right to manage her body by determining how it could be used, and perhaps by determining who uses her body—for example, by undertaking forms of employment involving physical activity, or consenting to experiments being performed on her body. Whilst it is not clear how a person would exercise the right to manage her body parts when still part of her body, once removed there is no conceptual problem with a person's determining how parts will be used and by whom. For example, acts of living organ donation or designated organ donation on death involve a person's specifying who should use her body parts. Also, a person may place restrictions on the use a part of her body removed for therapeutic reasons.

In the context of employment, it is conceptually possible for a person to exercise the rights to the income and residuary over her whole body. If the right to the income of the thing is understood as Honore characterises it (namely, as the right to the benefits derived from forgoing personal use of a thing and allowing others to use it), this could be one possible interpretation of the employee-employer relationship, where a person performs certain activities, some of which presumably involve the person using her body in accord with a contract in return for payment. Similarly, if an employment contract is described as a person's leasing out her body for a specified period, perhaps for a certain number of hours each day, then the person's 'regaining' the use of her

44 See 'Pay your Debts with your Kidneys', *Bioethics News*, vol. 8, no. 2, 1988, p. 2.
body, and associated incidents, at the end of each work period could be described as the person exercising the right of residuary over her body.

Similarly, there are certain acts that could be described as the person’s exercising the incidents of the right to the income and residuary over her body parts. A person could conceivably 'rent-out' a part from her body on the condition that under certain circumstances she gets it back. For example, a person could 'rent-out' one of her kidneys on the condition that if her other kidney failed she could get the 'rented' one back. A variation on this suggestion would be to rent out the use of a body part for a limited period. This is one possible description of commercial surrogacy arrangements, where a woman is paid for the use of her body, specifically her uterus (but also provides the developing fetus with nutrients via her blood), for a definite period, after which she regains the use of it.

The remaining incident is the right to the capital which, as mentioned above, can be subdivided into the liberties to destroy, waste or consume, and the power to alienate. A person committing suicide could be described as exercising her liberty to destroy or power to alienate her body, although, as I argue in the next section, there is something problematic about a person exercising the power to alienate over her whole body. When a person goes on a diet, it could be said she is exercising her liberty to waste her body, but it is not clear how a person would exercise the liberty to consume her whole intact body. The opposite is true of body parts. There is nothing conceptually incoherent about a person consuming her body parts, for example by chewing finger nails, having hair cut, removing growths, but it is not clear how a person would waste a part of her body, although alcohol abuse or smoking tobacco could be described as a person wasting her liver or lungs respectively. Nor is there anything conceptually problematic about a person exercising the power to alienate or liberty to destroy her
body parts, and, as will be discussed in the next section, it is these aspects of the right to the capital that a person is in practice most likely to exercise over her body parts.

So whilst it is conceptually possible for a person to exercise many of the incidents of ownership over her body and it parts, some incidents seem more readily applicable to body parts than to whole intact bodies. Although this is contingent on what the specific incidents of ownership are, this may mean body parts have more in common with things which can be owned than do whole intact bodies. In addition, if a person's exercising these incidents over her body parts is similar to the way a person exercises them over things she does own, this provides further support for the conceptual possibility of a person's owning her body parts. In the next section I provide further arguments in support of these suggestions.

**SECTION III: OWNING ALIENABLE BODY PARTS**

Although a conceptual defence of a person's owning her body parts may be provided by demonstrating it is possible for a person to exercise all the incidents of ownership over her body parts, such a defence may take on a surreal character. There are two reasons for this: first, it only makes sense for a person to exercise various incidents of ownership over her body or its parts in specific circumstances; and second, and more pertinent, many of the descriptions of a person exercising particular incidents over her body or its parts are unrealistic. In this section, I strengthen my conceptual defence of a person's owning her body parts by providing two further arguments in support of it. First, I argue that a person's alienating her whole intact body differs in an important respect to her alienating a part of her body, and that only the second case is really akin to alienating an object a person owns. Second, I demonstrate that the determinations a person may make concerning her body parts that I have focused on in this thesis—
instructing that a body part removed for therapeutic reasons be used for experimental purposes or alternatively that it be destroyed, and giving directives concerning the treatment of her body parts after her death—can be re-described in terms of a person exercising various incidents of ownership over her body parts. I argue this strengthens my defence of the conceptual possibility of a person's owning her body parts.

i. Alienating Bodies and Alienating Body Parts

Although it is conceptually possible for a person to exercise the power to alienate over both her whole intact body and individual body parts, there is a marked difference in these two instances of alienation with regard to their consequences. If a person alienates her whole body, or any vital body parts, she commits suicide. It is possible for a person to alienate some of her body parts and remain alive, although alienating many such parts would result in her becoming debilitated. The salient difference between a person's alienating her whole body and (some of) her body parts which needs to be examined further is the person's existence after the act of alienation.

One point on which those who have considered the question of whether a person owns her body agree is that if she does own her body, it will be in a different sense to which she owns alienable property.\(^{45}\) This is because the idea of a person's 'alienating' her whole body misconstrues what is involved in an act of alienation. When a person alienates an object, she 'puts it away' from herself.\(^ {46}\) But how could a person put her body away from herself? Since human persons are necessarily embodied—a person


\(^{46}\) See A. Reeve, *Property*, p. 139.
has to have a body in order to exist—a person’s ‘alienating’ her whole intact body amounts to her alienating at least part, albeit an essential part, of herself, which simply does not make sense on the above explanation of what it means for a person to alienate something. Further, when a person alienates an object, the previous relationship between a person and an object has ended. However, when a person alienates her whole intact body, the relationship between the person and her body has not ended, but rather the person has ‘ended’. There is then something conceptually problematic about describing acts of suicide in terms of alienation, since it is not possible for a person to alienate her body in the way she does other objects or even parts of her body.

Another aspect of the incident of the right to the capital—namely, the liberty to destroy—seems to more accurately capture what happens when a person commits suicide. Describing this act as a liberty conveys the idea of a person choosing to end their life. At the same time, the results of a person exercising this liberty are at least unusual if not drastic. That is, by exercising her liberty to destroy her body, a person foregos exercising any other liberties, or indeed doing anything at all. There is then one similarity between a person’s exercising her liberty to destroy her body and a person exercising the liberty to sell herself into slavery, which, for the duration of the ‘slavery-contract’, would mean she foregoes the possibility of exercising most, if not all, her other liberties. The difference between these two liberties, however, is that a slave can regain her power to exercise other liberties, but a person’s exercising her liberty to destroy her body cannot.

47 One explanation of a person instructing that her body be cremated is as her exercising her liberty to have her body destroyed.
A person's exercising the power to alienate over any of her vital body parts would also bring about her death, and so it may be argued that for the same reasons it seems odd to say a person alienates her whole body, it does not make sense for a person to have this aspect of the right to the capital over her vital body parts. As mentioned above, there are other body parts over which a person can exercise the power to alienate and remain alive. Further, even though it is conceptually possible for a person to exercise all the incidents of ownership over her body parts, in practice it is because the parts can be alienated that a person can exercise particular incidents in a greater variety of ways over her body parts than her whole intact body.

ii. Those Incidents a Person Would in Practice Exercise Over Her Body Parts

The final part of this chapter bridges the gap between the foregoing discussion, which aimed to provide a conceptual defence of a person's owning her body parts, and the moral argument why it should be recognised that a person owns her body parts, which will be given in the next chapter. Here I argue that the various determinations a person may make in relation to her body parts I have been concerned with in previous chapters can be re-described as a person's exercising various incidents of ownership over that part, and, further, that these ways a person may treat her body parts are akin to ways a person may treat other objects she owns.

Each of the three determinations a person may make in relation to her body parts focussed on throughout this thesis—consenting to a part removed for therapeutic reasons being used for experimental purposes, instructing that it be destroyed, or giving directives as to how her body parts should be treated after her death—can be re-described as a person's exercising various incidents of ownership over her body parts. A person exercises aspects of the right to the capital over a part of her body removed
for therapeutic reasons if she consents to its being used for experimental purposes or, alternatively, gives instructions that the part be destroyed. In both cases she exercises the power to alienate, and, in the second, she also exercises the liberty to destroy a part of her body. When a person gives permission for her body parts to be used for transplantation purposes after her death, she exercises the incident of the power of transmissibility over her body parts.

A person's giving permission for a part of her body removed for therapeutic reasons to be used for experimental purposes is similar to some acts of donation. When a person donates an object she divests herself of it, and transfers ownership of it. When a person has a body part removed for therapeutic reasons, she usually divests herself of it, although this is not done simply by having it removed, but rather by her consenting to a particular use of that part. Further, by giving this consent she does more than just divest herself of the body parts; she indicates that she wants it to be used in a particular way. This is similar to common acts of donation, such as giving money or goods to a charity organisation, where there may be a designated, albeit a general, use for the donated object. For example, if I give money to a disaster appeal, I expect it to be used to help the victims of that disaster. Further, I would object to the money being used in other ways, for example to invest on the short-term stock exchange. Similarly, if a person consents to a part of her body being used for experimentation, she would not expect, and would probably object to, it being used (say) as a prop in a horror movie.

Acts of donation involve a person's both divesting himself of, and transferring ownership, of an object. It is possible for a person to divest himself of something he doesn't own, such as returning something he has borrowed. Also, if a person found an abandoned object and gave it to another person it may seem she transfers ownership
of that object, without first owning it herself. In such cases, though, ownership may not be transferred. Rather, the person receiving the object has acquired and so comes to own it, albeit through someone else's actions. Alternatively, even though a person finding the abandoned object does not intend to keep it for herself, she does own it until she gives it away, and so transfers ownership of it. Either way, it would seem that prior to it being legally or morally acceptable for a person to transfer ownership of an object, either by donation or some other method, she would first have to own, or at least have the strongest claim, to that object.

Whilst it is possible for a person to destroy an object she does not own, typically she would own, or at least have the strongest claim to, that object. This is indicated by the relevant right of ownership being a 'liberty'. There are at least two possible interpretations of what it means for a person to be at liberty to do something. The first and weaker interpretation is that there are no impediments to her performing the relevant actions whereas the second, stronger, interpretation is that a person has a prerogative to do that thing. Whilst either interpretation could describe a person exercising her liberty to destroy objects—including her body parts—it may seem the second, stronger, interpretation of liberty would be required. Just because there are no impediments to destroying something, does not mean that anyone is permitted to do so. Rather, when a person exercises the liberty to destroy an object, she should have a special claim to that object. I argued in chapter three that a person had such a claim to an excised part of her body. Further, a person exercising the liberty to destroy her body parts has more in common with a person exercising this liberty over an object than her exercising it over her whole intact body.

The third determination a person may make in relation to her body parts—that some or all of them be used for transplantation purposes after her death—could be described as
her exercising the power of transmissibility over her body parts. In his discussion of this particular incident of ownership, Honore seems to limit the exercise of this incident to transfer of ownership interests in objects between family members. There could, however, be other instructions a person could give which could be described as her exercising the power of transmissibility. For example, a person could make arrangements for all her possessions to be donated to a charity organisation after her death.

When a person exercises the power of transmissibility over an object she transfers ownership of that object. Unlike other ways of transferring ownership, this method (usually known as a bequest) occurs in two or three stages. In the first stage, a person specifies the object, beneficiary and any conditions of the bequest. The second, optional, stage, occurs when a nominated trustee carries out these directives. The third stage occurs when the beneficiary receives the object of the bequest. At this point transfer of ownership of the object being bequeathed is complete. Similarly, a person may also indicate prior to her death how she wanted her body parts to be treated after her death, but the person's body parts are not removed in accord with her instructions until after she has died. Further, where the person's directives are for some or all of her body parts to be used for transplantation after her death, the relevant medical personnel carry out the second stage of the bequest process. Unless a person has the power of transmissibility over an object, any directives as to how it should be treated after her death would have little or no force. Further, a person must have this power over the objects till the time of her death. These requirements would perhaps be more easily met in the case of a person's body parts than other objects, since the body parts are clearly still something a person could have this power over, since they would still be part of her body.
So, in addition to it being conceptually possible for a person to exercise many incidents of ownership over her body parts, several of the determinations a person may actually make in relation to her body parts can be re-described as a person's exercising specific incidents over her body parts. Whilst the body parts are still part of her body, a person would exercise the rights to possess and use them. Also, if a person needs to have a body part removed for therapeutic reasons, she may exercise the power to alienate that part in a particular way, either by consenting to its use for experimental purposes, or by instructing that it be destroyed, which also involves exercising the liberty to destroy over that part. Further, she may choose to exercise the power of transmissibility over her body parts by giving directives as what should happen to them after her death. Unlike her whole intact body, a person exercising these incidents over her body parts has much in common with the way a person exercises these over objects that she owns.

CONCLUSION

In this chapter I have provided a conceptual defence of the possibility of a person's owning her body parts. This, however, only shows that there are no conceptual obstacles to recognising that a person owns her body parts; a moral argument is still needed why it should be recognised that a person owns her body parts. I have already argued that a person has certain prerogatives in relation to her body parts, and, further, that the exercise of these prerogatives can be re-described as her exercising various property rights in relation to her body parts. It still needs to be established, though, that recognising a person owns her body parts would be more likely to ensure recognition of a person's prerogative to determine what happens to them. An argument to support this further claim will be given in the next chapter.
CHAPTER SIX
WHY IT SHOULD BE RECOGNISED THAT
A PERSON OWNS HER BODY PARTS

Those who oppose a person's owning her body parts would probably respond to my argument in the previous chapter by saying just because there is no conceptual problem with a person's owning her body parts, does not mean it would be a morally acceptable for it to be recognised that she does. Moreover, they may argue there are good moral reasons why a person should not own her body parts (some of which will be discussed in the next chapter). In this chapter, I argue for the opposite position: that, for moral reasons, it should be recognised that a person owns her body parts.

In the first section, I discuss and evaluate two proposals which, although not explicitly claiming to, may ensure recognition of a person's prerogatives to determine what happens to any of her body parts removed for therapeutic reasons, or some or all of them after her death. One significant benefit of either proposal is that should they ensure such recognition, it would not be necessary to deal with many of the objections to a proposal which would entail a person owning her body parts. Neither proposal does, however, ensure recognition of these prerogatives. So, in the second section, I provide an argument why it should be recognised that a person owns her body parts, drawing on the various moral arguments concerning the nature of the relationship between a person and her body parts (from previous chapters), as well as two additional arguments relating to the notion of ownership. In the third section, I argue that recognising a person owns her body parts would be more likely to ensure recognition of the various prerogatives I have argued a person should have in relation to her body parts.
SECTION I: ALTERNATIVE PROPOSALS TO A PERSON'S OWNING HER BODY PARTS

Opposition to, or at least ambivalence about, a person's owning her body parts is perhaps strongest in legislative and judicial arenas. This was recently demonstrated by the inconsistencies and ambiguities in the various rulings in the Moore case. In particular, the different Courts came to contradictory conclusions about whether Moore owned or had property rights over his spleen after it had been removed. As discussed in chapter two, the Supreme Court dismissed Moore's claim of unlawful conversion, but upheld two of the other causes of action he originally brought: breach of fiduciary duty and lack of informed consent. Below I determine whether a proposal made in light of the Supreme Court's ruling on these two causes of actions would ensure recognition of a person's prerogative to determine what happens to any of her body parts removed for therapeutic reasons.

In contrast to the Supreme Court's ruling in the Moore case, Stephen Munzer maintains that since there are '... a great many things that the law permits or enables people to do with their bodies, it would be a mistake to say that they have no property rights in them at all'. At the same time, though, he claims that '... [I]oo many incidents are lacking to say people own their bodies'. In the previous chapter I suggested that the various determinations a person would usually make in relation to her body parts—consenting to a part removed for therapeutic reasons being used for experimentation, or give instructions that it be destroyed, and giving permission for her body parts to be used for transplantation after her death—could be described as the person exercising various property rights over them. So, explicitly recognising a person has these relevant property rights in her body parts, may be sufficient to ensure they were treated according to any of the directives she may give. Prior to evaluating


2 Munzer, p. 43.
this proposal, Munzer's argument that some body rights are property rights will be
discussed. First, though, I determine whether a proposal arising from the Moore case
would ensure recognition of a person's prerogatives concerning her body parts.

\[i. \quad \text{Implications of the Moore Case for a Person's Prerogatives Over Her Body Parts}\]

One discrepancy between the relevant policies regulating the use of body parts
removed for therapeutic reasons and what happens in practice is that a person may not
always be consulted before an excised part of her body is used in experimentation.
Further, even if a person were consulted and subsequently consented to her body part
being used in this way, she may not have given her fully informed consent, since she
may not have been told all the relevant information prior to giving consent. This,
according to the Supreme Court, was why Moore deserved compensation. Golde—
Moore's physician and one of the defendants in the Moore case—had not disclosed his
research interest in developing a cell-line from Moore's spleen and other body parts
removed under the guise of post-operative testing and treatment. The court argued
that:

\[
\text{[t]he possibility that an interest extraneous to the patient's health has}
\text{affected the physician's judgment is something that a reasonable}
\text{patient would want to know in deciding whether to consent to a}
\text{proposed treatment. It is material to the patient's decision and thus a}
\text{prerequisite for informed consent.}^3
\]

The Court concluded Golde breached his fiduciary duty by failing to disclose his
research interests, and because Moore had not had this information prior to consenting
to the removal of his spleen, the consent he had given had not been fully informed.

\[^3\text{Moore v. Regents of the University of California et al., 1990 793, P 2d 479, (Supreme Court) at 484.}\]
The Supreme Court's direction that Golde had a duty to disclose his research interests to Moore was based on previous US court rulings which had recognised the importance of patient autonomy and informed consent. Specifically, in relation to the allegation that the defendants had '... concealed the full purposes for which they sought consent for access to the plaintiff's cells', the Supreme Court directed that:

(1) a physician must disclose personal interest 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 cause of action for performing medical procedures without informed consent or [for] breach of fiduciary duty.

Thus the Supreme Court's ruling sought to clarify the requirements of a physician's fiduciary duty, specifically concerning what information she has to disclose prior to obtaining a patient's consent, in light of the circumstances that resulted in the Moore case.

The directions from the Supreme Court for extending the requirements of a physician's fiduciary duty have been criticised, however, for lack of clarity and for failing to consider the possible negative effect that disclosing such information would have on the physician-patient relationship. The Supreme Court did not, and failed to suggest a mechanism to, establish which of her peripheral interests a physician would have to disclose prior to obtaining a patient's informed consent beyond the general description of her 'research or economic' interests. Whilst it is clear that a substantial financial interest—such as the physician's possibly receiving remuneration for any products

---

6 Moore v. Regents of the University of California et al., 1990 at 483.
developed from research, or holding shares in companies associated with the
developments of such products—should be disclosed; what if remuneration were not
expected or the physician only held a few shares in the relevant company? A related
question is: at what point does a physician's research interest become relevant? When,
for example, he assesses a patient's cells to determine their suitability for his research
project, or after it has been determined they would be suitable?

Such concerns are not, however, decisive against the Supreme Court's directions, but
merely identify some of the questions that still need to be resolved. In relation what
constitutes a relevant interest, I suggest it may be worth erring on the side of caution,
although this needs to be balanced with the physician's right to privacy. As to when a
patient's treatment becomes related to or part of a physician's research project, the best
rule of thumb would be for the patient's consent to be sought when any aspect of her
treatment is assessed for its potential research value. This would cover a range of
research activities, such as the experimental use of body parts, or a patient's proposed
participation in a clinical trial.

Another objection to the Supreme Court's ruling—namely, that the physician
disclosing relevant research or economic interests may adversely affect the physician-
patient relationship—is perhaps of more concern. The suggestion is that disclosure of
such information may indicate a physician has '... conflicting goals ... [and that this]
... will compromise the vital trust between a physician and her patient'. Further, if
such disclosure were mandatory, the trust that is important to this relationship could be
jeopardised, even in cases where the potential research never eventuated. A related
concern is that '... disclosing research interests may obscure the patient's treatment
decisions by shifting the patient's focus from the patient's immediate health needs to

7 J. Lavoie, 'Ownership of Human Tissue Life after Moore versus Regents of the University of
the collateral issues of research and development'. If the patient were suffering a serious illness, as Moore was, then any negotiations relating to the proposed research may delay the patient's treatment and so could exacerbate her illness or condition. Further, if the patient refused to participate in the research after the disclosure of such information, either actively or by allowing parts from his body to be used in the research, then the patient may no longer receive the optimum level of care from that physician, or the physician may even refuse to continue treating him.

Some of the specific objections mentioned above, for example that additional information may distract the patient and result in his treatment being delayed and possibly endangering his health, seem to have more to do with the context in which the information is presented rather that its content. A person is usually asked for her consent to use her (soon to be) excised body part for experimentation as part of consenting to a surgical procedure. In that context, the patient's main concern will be to understand what the surgery involves, its success-failure rate, expected recovery time, how debilitated she will be and for how long. So even if one of the clauses on the consent form gave a person the opportunity to determine what happens to part(s) of her body that will be removed during the procedure, this would not ensure the consent was given after appropriate deliberation. This, however, is a fairly minor problem, and it could be addressed by modifying the consent procedures, specifically by separating the two types of consent. For example, one form could be used for obtaining a patient's consent to the surgical procedure and another for obtaining her consent to a proposed use for her excised body parts, or for specifying the manner of their disposal. Further, the patient could be given these forms at different times and/or by health professionals other than his treating physician(s), who would provide the relevant information and give any explanations required.

These various objections to the Supreme Court's directions are all underpinned by the general concern that the physician's disclosing additional information prior to obtaining a patient's consent could adversely affect the physician-patient relationship. This is precisely the opposite of what the court intended. The rationale for giving the patient additional information is so to enhance both her capacity for making a fully informed decision and the trust in the physician-patient relationship.

The Supreme Court's direction in the Moore case would not ensure recognition of a person's prerogative to determine what happens to a part of body removed for therapeutic reasons. Simply requiring a physician to disclose any information she thought was relevant to the patient's treatment would not necessarily guarantee the person from whose body the part has been removed was told everything he thought was relevant. For example, he may want to know about the other activities of any company involved or what other experiments could her excised body part(s) be used for.

More generally, simply asking for the patient's consent to use an excised part of her body in a particular way is not the same as that person determining what happens to that part. In chapter three, I identified a number of reasons why a person may want an excised part of her body to be treated in a particular way. Whilst the recommendations of the Supreme Court perhaps may ensure the patient is better informed about one proposed use of an excised part of her body, it would not necessarily ensure a patient will be told all her options and, perhaps more importantly, ensure she understood that she has a right to refuse permission. Finally, this proposal does little to clarify the nature of the relationship between a person and her body parts, which I have argued is the reason why, amongst other things, a person is not always consulted before an excised part of her body is used for experimental purposes. Such clarification may be given by another proposal, that a person has some property rights in, but does not own, her body parts.
ii. **Explicit Recognition that a Person Has Property Rights Over Her Body Parts**

In chapter two, I discussed policies and practices for procuring human body parts for various purposes. I argued that, despite the relevant policies giving a person a primary role in determining what happens to part of her body removed for therapeutic reasons, the consultation required by these policies either does not happen or is inadequate. Further, although current policies for procuring body parts from cadavers for transplantation only require consultation with the deceased person's relatives if that person's prior wishes are not known, such consultation occurs on a regular basis. Since the relevant policies already implicitly recognise a person has certain rights over her body parts (which I argued in the previous chapter it makes sense to characterise as property rights) it needs to be determined whether *explicitly recognising* these rights as property rights would ensure recognition of a person's prerogatives. Prior to this, it is worth examining Munzer's arguments to the conclusion that '... people do not own, but have some limited property rights in their bodies'.

Whilst it is not Munzer's primary focus, his discussion of '... the status of the body and body rights ...' provides an analysis of the rights a person has over her body that is both conceptually and morally useful. His taxonomy of body rights provides a framework for determining the nature, role and strength of specific rights a person has over her body as well as showing how they interrelate. Further, although Munzer does not give a moral justification for a person having these rights, he is concerned with *moral* property rights—that is, property rights justifiable under moral principles—which a person may have over her body, which once established would be

---


10 Munzer, p. 37.
useful in determining what moral claims a person has over her body and, by extension, its parts.

Munzer suggests it is '... analytically useful to draw attention to the different elements in the collection called body rights and to regard only some of these elements as property rights'.\(^{11}\) Reflected in his taxonomy of body rights is his contention that persons '... have interests and make choices and ... [so] ... are potential bearers of rights'.\(^{12}\) The rights a person has either protect her interests, which Munzer refers to as personal rights, or protect individual choices, which he refers to as property rights. If I am right and the basis for a person's prerogatives concerning her body parts is that she may have a morally significant interest in them, then, in Munzer's terms, having personal rights over her body parts would protect that interest. Further, a person having property rights in her body parts would protect any choices she made in relation to her body parts. That is, both her interests in her body parts, and, her choice to determine what happens to them would be protected. In principle, then, Munzer's taxonomy of body rights may ensure recognition of the various prerogatives I argued a person should have in relation to her body parts.

According to Munzer, although most body rights are personal rights, some are property rights, since they protect choices involving transfer of a particular body right to another person, which '... is a highly important feature of property as usually understood ... [and] ... is even more important in the special case of body rights because of their close connection with autonomy'.\(^{13}\) A person may make various choices of transfer in relation to her body—this, for example, would be one way of explaining labour contracts and, perhaps more obviously, organ donation. Property

---

\(^{11}\) Munzer, p. 45.

\(^{12}\) Munzer, p. 43.

\(^{13}\) Munzer, pp. 49-50.
rights can be further divided into weak property rights, which protect gratuitous transfers, such as gifts, and strong property rights, which protect those transfers that are part of an exchange, usually for money. An example of a weak property right is a person's right to donate her body parts, and an example of a strong property right would be a person's right to sell her body parts.

Munzer argues his taxonomy of body rights '... undercuts some overly simple conceptions of what should count as a property right in the body', including: the idea that a person's rights in her body must be original (that is, she must have them from birth), whilst property rights in external material objects must be acquired; and, further, that the more intimate the connection between a person and an object the less likely it is to be that person's property. In response to the first, Munzer rightly points out that, for example, the (property) rights a model has to control the commercial exploitation of his appearance are not rights a person would have at birth. In response to the second claim—that intimacy between a person and her body precludes her having property rights over it—Munzer argues that '... parts of one's body seem very intimate, and yet the power to transfer them is a property right'.

Finally, Munzer claims his taxonomy may have '... illuminating applications in many moral and constitutional problems involving body rights', including the problems of suicide, slavery, self-enslavement and abortion. He suggest, that because previous appeals to ownership in such debates have been met with mixed reactions, and, where applied, have had mixed results, his '... finer-grained taxonomy ... may help to draw morally pertinent distinctions more clearly than

14 Munzer, p. 49.
15 Munzer, p. 52.
16 Munzer, p. 53.
17 Munzer, p. 53.
saying, or denying, a person owns her body'. Of particular interest here is whether Munzer's taxonomy of body parts is of use in resolving problems concerning the procurement of body parts; in particular, what should be the extent, and limitations on, the role of the person from whose body the part is to be removed in determining how her body parts are treated. In evaluating this proposal I continue to focus on the various determinations a person may make in relation to her body parts discussed in previous chapters.

Munzer's suggestion that a person does not own but nevertheless has some property rights over her body would not, I contend, ensure recognition of a person's various prerogatives concerning her body parts. The current policies, regulating the procurement of body parts from both living persons and cadavers, already implicitly assume a person has some rights over her body parts, which I argued in the previous chapter made sense to describe as property rights, but such rights are usually ignored or overridden.

Moore was asked to relinquish certain rights regarding products that may be developed from his spleen and cells, which may indicate it was recognised he has some rights over his body parts. At the same time, though, some of his other rights were not recognised. Specifically, it was not recognised he had a right to determine what happened to his excised spleen.

The circumstances of the Moore case provides evidence that when a person no longer has any use for an excised part of her body, it may be assumed that she will no longer have an interest in, and certainly will not exercise any rights over, that body part. Moreover, there may be a further assumption that if a person did have such an interest,

---

18 Munzer, p. 54.

19 A less charitable, but perhaps more accurate, interpretation may be that the researchers were ensuring Moore would not have a legitimate claim to the cell-line.
it would be insignificant and justifiably overridden by, for example, research interests. These, and perhaps other assumptions concerning a person's lack of concern about the treatment of part of her body removed for therapeutic reasons may explain why a person's fully informed consent is not always obtained prior to using such body parts for experimental purposes.

Both policies for procuring parts from cadavers for transplantation purposes described in chapter two give a significant role to the person from whose body the parts may be removed after her death. There are, though, various logistical and contextual problems which have resulted in the deceased person's relatives being routinely consulted before that person's body parts are removed which may in turn lead to any that person's prior directives being ignored or overridden. It is difficult to see how explicitly recognising a person's right of disposition over her body parts, already implicit in the relevant policies, as a property right would ensure any relevant directives were adhered to. This is because the reasons for overriding such directives do not question the legitimacy of a person's right to make such directives concerning her body parts, but rather simply assume these other reasons are considered to be more important.

I argue in the following two sections that the best way of ensuring recognition of a person's prerogatives in relation to her body parts is for her to be recognised as the owner of her body parts. Ownership, however, is only a prima facie relationship between a person and object which can be overridden. For example, a person's vehicle could be requisitioned by some authority in an emergency. So an explanation is needed why recognising a person owns her body parts would do more to ensure her prerogatives concerning her body parts were acknowledged and respected than just recognising a person had some property rights over her body parts. The explanation lies, in part, in some of the pragmatic features of ownership.
SECTION II: OWNING THINGS CONSIDERED UNOWNABLE

The suggestion that a person owns her body and/or body parts has been variously described as odd, inappropriate, or demeaning. A useful starting point for challenging such descriptions is the liberal idea of self-ownership, which provides a justification why a person should own her body parts whilst they are still part of her body. This, however, will only get part of the argument required. I also need to explain why recognising that a person owns her body parts will better ensure her prerogatives in relation to them will be acknowledged and respected. This explanation draws heavily on C. B. Macpherson's argument that a person should have access to those things necessary to obtain and maintain a certain quality of life, and that the best way to ensure such access is to recognise a person has property rights in these things. After discussing the notion of self-ownership, with particular reference to a person's relationship to her body parts, Macpherson's argument will be discussed in detail. I then use both these arguments to provide the final part of the argument why it should be recognised that a person owns her body parts.

i. Self-ownership and Body Parts

Both right-wing liberals such as Robert Nozick and left-wing liberals such as Gerald Cohen defend '... the thesis that each person has full private property in himself.'


Cohen suggests that the attractiveness of Nozick’s political thought lies in its foundation, which he paraphrases thus:

... each person is the morally rightful owner of himself. He possesses over himself, as a matter of moral right, all those rights that a slaveholder has over a complete chattel slave as a matter of legal right, and he is entitled, morally speaking, to dispose of himself in the way such a slaveholder is entitled, legally speaking to dispose over his slave. Such a slaveholder may not direct his slave to harm other people, but he is not legally obliged to place him at their disposal to the slightest degree: he owes none of his slave’s service to anyone else. So, analogously, if I am the moral owner of myself, and therefore of this right arm, then, while others are entitled to stop it from hitting other people, no one is entitled without my consent, to press it into their own or anyone else’s service, even when my failure to lend it voluntarily to others would be morally wrong.\(^{24}\)

The issue on which right-wing and left-wing liberals differ is that the former argue that self-ownership provides a justification for the appropriation of external resources while the latter do not. My interest in self-ownership here, however, is limited to any justification it may provide for a person’s owning her body parts.

Cohen suggests that the ‘self’ in self-ownership ‘... has a purely reflexive significance. It signifies that what owns and is owned are one and the same, namely, the whole person’.\(^{25}\) In various discussions about self-ownership the ‘whole person’ at the very least includes a person’s body and, by extension, its parts. He argues that what most people find appealing about the idea of self-ownership is ‘... the idea of controlling one’s life’.\(^{26}\) That is, there is a significant connection between a person’s

\(^{24}\) Cohen, p. 109.

\(^{25}\) Cohen, p. 110.

being self-owning and a person's being self-determining, perhaps to the extent that the
later is contingent on the former.

Those advocating self-ownership do not seem to think it necessary to explicitly argue
that a person owns her body or body parts, but, rather, seem to assume this is
obvious. As argued in previous chapters, though, the relationship between a person
and her body parts is uncertain. So some justification why a person owns her body
parts in virtue of being self-owning would be useful. To motivate such a justification,
it may be instructive to examine another issue from the debate about self-ownership:
whether a person owns her natural talents and capacities.

As part of establishing his egalitarian principles of justice, John Rawls argues that a
person's natural talents and capacities should be collectively owned, because
'... inequalities of birth and natural endowment are undeserved',
and, further, are
arbitrary from a moral point of view. Just because a person has various talents she is
not morally entitled to them, or more specifically, to decide to what ends they should
be used. Cohen has interpreted Rawls as suggesting that '... it is a matter of brute
luck that people have the talents they do, their talents, do not, morally speaking,
belong to them, but are, properly regarded, resources over which society as a whole
may legitimately dispose'. This, Cohen argues, would amount to a significant
restriction on a person's being self-owning.

There is some uncertainty about what Rawls' proposal that natural talents and
capacities be collectively owned entails. Andrew Kernohan, in attempting to
undermine claims that Rawls' proposal deprives people of basic rights, argues that
Rawls is only suggesting that '... the natural talents of others are useful to all of

28 Cohen, 'Self-Ownership II', p. 79.
us ... [and] ... that we all have a claim on the produce of these talents ... [but this] ... does not deny personal freedom or self-ownership in any significant way'. 29 Kernohan's interpretation of Rawls' proposal seems to suggest that Rawls is more concerned that a person's talents or capacities be used to benefit as many people as possible rather than who it is that determines their use.

By contrast, proponents of self-ownership, such as Robert Nozick and Cohen, reject the collective ownership of natural talents and abilities on moral grounds. Responding to Rawls' specific suggestion that a way should be found to ensure natural talents are used to benefit all members of a society, Nozick (rhetorically) asks

[i]f people's assets and talents couldn't be harnessed to serve others, would something be done to remove these exceptional assets and talents, or to forbid them from being exercised for the person's own benefit or that of someone else he chose, even though this limitation wouldn't improve the absolute position of those somehow unable to harness the talents and abilities of others for their own benefit? 30

Elsewhere Nozick argues that Rawls' proposal denigrates '... a person's autonomous choices and actions ... [which is] ... a risky line to take for a theory that otherwise wishes to buttress the dignity and self-respect of autonomous beings'. 31 He further criticises Rawls' proposal that natural talents and capacities should be collectively owned, since it would '... prevent the better endowed gaining extra material benefits for themselves unless this would also improve the position of the worst off', 32 and that this would violate the separateness of persons.

---


31 Nozick, p. 214.

Whilst Cohen is sympathetic to Rawls' broader egalitarian principles, particularly with regard to the appropriation and distribution of external resources, he nevertheless wants to affirm self-ownership. He suggests that those, like Rawls, who want to deny '... each person's rights over himself lose confidence ... when they are asked to consider who has the right to decide what should happen to their own eyes'. Cohen argues further that '[i]t is an intelligible presumption that I alone am entitled to decide the use of this arm and to benefit from its dexterity', since the fact it's being his arm, is a plausible basis for the normative claim that he alone is entitled to decide its use and benefit from it. Rawls may concede that the person whose arm it is should have first claim to determine it use, but still require that the central concern of such determinations should be, as far as possible, to satisfy the collective interest. More generally, Cohen argues that whilst a compelling case can be made for no one person to have a greater *prima facie* right to external resources than any other, this is not true of a particular person's parts and powers since '... few have discerned an ... injustice in a person's insistence on sovereignty over his own being', which for Cohen includes not only a person's body and, by extension, its parts, but also her natural talents and capacities.

Several of Nozick's arguments implicitly suggest a person has the full complement of property rights over her body and its parts. One of these that is a person has a basic entitlement to her body parts in order to avoid their '... forcible redistribution ... ', since '... only you have the right to decide what is to happen

33 Cohen, 'Self-Ownership I', p. 111.
34 Cohen, p. 112.
35 Cohen, p. 112.
36 Nozick, *Anarchy, State and Utopia*, p. 206. Further evidence of Nozick's view that a person has the full complement of body rights over her self is that he believes voluntary self-enslavement as permissible. See Nozick, p. 331.
to your life, your liberty, and your body, for they belong to no-one but you'.

Further, it has been argued that an '... implication ... [of Nozick’s argument against
the redistribution of body parts] ... is that only a right of self-ownership ... can
provide protection for individual integrity against these proposals, and that such a right
has simply to be accepted as an axiom, rather than established as a theorem, in our
thinking about these matters'.

As mentioned above, the proponents of self-ownership see no need to argue a person
owns her body parts but rather take it as given. Moreover, proponents of self-
ownership respond to the suggestion that a person's natural talents and capacities
should be collectively owned by comparing it with a suggestion that a person's body
parts should be collectively owned, which they assert is either conceptually incoherent
or morally abhorrent. Although this argument relies primarily on intuition, it does
indicate that at the very least self-ownership entails a person's owning her body parts
whilst they are still part of her body.

Once part of a person's body has been removed, however, an argument based on self-
ownership no longer seems to provide a justification for her owning that part. Excised
body parts can be plausibly viewed as external resources, and so, at least for some
right-wing liberals, anyone who is self-owning can appropriate them. As argued in
chapter three, a person exercising her prerogatives to determine what happens to an
excised part of her body is an act of self-determination. Since, according to the self-
ownership thesis, a person owns her body parts whilst they are still part of her body,
and further that part of what it means for a person's to be self-owning is that she is
self-determining, this may provide the basis for distinguishing excised human body
parts from other external resources. This idea will be used in the final part of my


argument below. Prior to this, another argument, with important similarities to the argument I give below will be described and evaluated.

**ii. Human Rights as Property Rights**

Macpherson argues that it should be recognised that a person has property rights in those things necessary to obtain and maintain a certain quality of life, such as natural resources. Such a proposal may not be as problematic as may initially seem, since '... the concept of property has changed in several ways ... and is now again perceptibly changing and may be expected to change further'.39 Two of the changes to the concept of property Macpherson identifies are relevant to the present discussion.

First, the concept of property was previously much broader. For example, Thomas Hobbes included a person's '... life, his limbs and in the next degree (in most men) those that concern conjugal affection; and after them riches and means of living',40 amongst his property. Moreover, a person's having property rights in such things seemed particularly important, since these '... were seen as the source and justification of individual material property'.41 With the growth of full capitalist market economies, the concept of property has narrowed, because '... every individual's effective rights and liberties, their effective ability to develop their own persons and exercise their capacities came to depend so much on what material property they had'.42

---


41 Macpherson, 'Human Rights as Property Rights', p. 72.

42 Macpherson, pp. 72-73.
Second, the concept of property previously included '... both an individual right to exclude others from some use and enjoyment of some thing and an individual right not to be excluded from the use and enjoyment of things which society had declared to be for common use', but now is just the right to exclude others from use or enjoyment of certain objects. So, whilst previously each person had individual property rights to use, enjoy and not be excluded from those things deemed to be for common use, such as the local water supply or public places, access to such things is now governed by the rules of a common or collective ownership system. When a person does have private property rights over something, the right to exclude other people from the use and enjoyment of that thing is generally one of them.

These and other changes to the concept of property have, according to Macpherson, made this institution inconsistent with democracy. Specifically, there are inequalities between persons in relation to access and control of those material resources necessary to maintain a certain quality of life. This type of inequality undermines one of the basic justifications for property: namely '... that human needs cannot be met without that institution'. That is, whilst this modern conception of property has provided the means for persons to acquire and use resources necessary for fulfilling their various needs, it has also allowed those individuals with the means to do so to acquire more than their fair share of some resources. This means other people may not have enough of a particular resources to meet their needs, whilst others may have an excess, and so more than their fair share, of that resource.

For these reasons Macpherson suggests it may be worth investigating whether '... some further change is needed, in order to make the concept of property consistent with a democratic society'. Specifically, he is concerned that a person

---

43 Macpherson, p. 73.
44 Macpherson, p. 74.
should be ensured access to those things necessary for her to obtain and maintain a certain quality of life.

Macpherson maintains that everyone needs a certain amount of '... individual property, in the means of life and to the means of labour, as will ensure the continuance of his or her life'.46 Further, a person needs to have two kinds of rights to property to continue living and develop his capacities: an exclusive right to some of the means of life, and a right to the means of labour, which need not be exclusive and may entail the right not to be excluded from the use and enjoyment of those things. He suggests the concept of property needs to be 'rebroadened' to a '... more natural sense of an individual right to some exclusive property and to some nonexclusive right of access to the remaining natural resources and accumulated capital of a given society'.47 This 'rebroadening' would recapture '... the idea that individual property is much more a matter of property in life and liberty, in the use and development and enjoyment of human capacities, than it is merely a matter or rights in things and revenues'.48

According to Macpherson, the conception of property prior to the development of a market economy was more consistent with the principles of a democratic society, because 'society did establish and maintain legal rights, not only to life but to a certain quality of life'.49 Despite this, he believes contemporary democratic societies are in a much better position to 'assert an equal right for everyone to a certain quality of life, certain liberties to develop and enjoy the use of our capacities'.50 It is important,

45 Macpherson, p. 73.
46 Macpherson, p. 74.
47 Macpherson, p. 74.
48 Macpherson, p. 76. Macpherson claims, and gives examples of how, this rebroadening of the concept of property is already occurring.
49 Macpherson, p. 77.
though, to recognise these rights as property rights, otherwise '... the whole prestige of property would work against it ... [because] ... [w]e have made property so central to our society that any thing and any rights that are not property are very apt to take second place'. 51 This is because on '... our present scale of values it is only if the human right to a full life is seen as a property right that it will stand much chance of general realisation'. 52 Implicit in Macpherson's argument is that property rights are amongst the 'strongest' rights a person can have.

Whilst it seems Macpherson is right in saying that property and property rights are central to our society, some may think his claim that any right that is not a property right will immediately be secondary to, and overridden by, such rights is too strong. They may argue some of a person's more important rights, such as a right to free speech, are not, and perhaps should not be, property rights. Macpherson would reply that whilst ideally this might be true, it may be that if such rights were characterised in this way it would be clearer a person had these rights and was entitled to all they entailed.

There are, then, good strategic reasons for recognising a person has property rights in those things necessary for obtaining and maintaining a certain quality of life. This would ensure a person access to such things since, at least in western democratic societies, property rights are amongst the strongest rights a person can have. More than this, Macpherson claims that a person's having property rights in such things will minimise her claims to them being overridden. This is the crux of his argument, and it is because ownership has a similar role and status in western democratic societies that I argue that it should be recognised that a person owns her body parts. Although very often the terms 'ownership' and 'property' are interchangeable, Macpherson

50 Macpherson, p. 77.
51 Macpherson, p. 77.
52 Macpherson, p. 77.
deliberately avoids the term 'ownership'. Rather, he deliberately uses 'property' and 'property rights', since he maintains any rights a person has, even in those things he should have in order to obtain and maintain a certain quality of life, can be restricted. I have acknowledged there are limitations on the rights a person may exercise in relation to her body parts. Nevertheless, simply recognising a person has some property rights in her body parts would not ensure recognition of her prerogatives in relation to them. Rather, as I argue below, this is more likely to be achieved if it is recognised that a person owns her body parts.

iii. Why it is Necessary to Recognise a Person Owns Her Body Parts

Macpherson's argument for a person's having property rights in those things necessary for a certain quality of life could justify a person's having such rights over her body parts when they are part of her body. Many of a person's body parts are necessary for her to remain alive, whereas others may be relinquished, although doing so may have a detrimental effect on her quality of life. So a person should at least have property rights over her body parts when they are still part of her body (the most important one perhaps being the right to exclude others from their use) in order to maintain bodily integrity, which is necessary for obtaining and maintaining a certain quality of life. It does not seem necessary for a person to have a stronger claim to her body parts when they are still part of her body, since other people do not have the same type of claim to a person's intact body parts as they do to common resources. Nevertheless, as will be argued below, it may be prudent for a person to own her intact body parts, since it will clarify the type of claims she has in relation to them.

Once a person's body parts have been removed, however, it is not so clear she would need to have access to them to maintain a certain quality of life. Moreover, the potential uses for such parts, notably in medical research, may have implications for
the quality of life of other people.\textsuperscript{53} Also, in order for her to obtain and maintain a certain quality of life a person does not seem to need the power of transmissibility over her body parts, which is the property right a person seems to exercise when she gives directives concerning the treatment of her body parts after her death. There may, further, be a number of people who need the various parts from the cadaver to maintain their quality of life, or in some cases any life at all. So a specific application of Macpherson's argument would seem to justify those persons in need of replacement organs having property rights over the relevant body parts from cadavers.

I claim, however, that a comparable argument both in strength and structure can be given for a person having such rights in, even owning, her body parts. To motivate my argument for this conclusion it is worth briefly restating Macpherson's argument. Macpherson is concerned that a person should have access to those things necessary to obtain and maintain a certain quality of life. He argues the most effective way of ensuring this access is for a person to have \textit{property rights} in such things. This is because in western democratic society property rights are amongst the strongest rights a person can have in relation to an object. So when a person has property rights in an object, she probably has a stronger claim to it than if she had any other type of rights over it. Further, if a person had other types of rights in such things they may be overridden.

My argument that a person should be recognised as the owner of her body parts runs parallel to Macpherson's. My concern is that it should be recognised a person has various prerogatives in relation to her body parts. As argued in chapter three, a person's directives concerning the treatment of part of her body removed for therapeutic reasons may be given to ensure consistency between significant aspects of

\textsuperscript{53} Whilst such people would not need to have property rights over those parts, an argument could be made in the spirit of Macpherson's that those conducting the research do have property rights over their materials, including any human body parts.
that person's life, thereby exercising self-determination. So, just as a person should have access to those things necessary to obtain and maintain a certain quality of life, I contend she should have access to the means for making the significant aspects of her life consistent.

If, as Macpherson claims, the best way to ensure such access to something is for her to have property rights in it, then a person also needs to have property rights in those things necessary for her to make the significant aspects of her life consistent. It is here, though, that my argument differs from Macpherson's. A person's having the relevant property rights over her body parts would not be sufficient to ensure that if she exercise any of these prerogatives, her body parts will be treated accordingly. Rather, it is clearest a person has the prerogative to determine what happens to an object when she *owns* it. This is not to say that whenever a person owns an object she has such prerogatives over it, just that it would be unusual for a person to have such a prerogative over something she did not own.

Other events or aspects of a person's life which she may wish to be consistent with her values and beliefs may not occur until the end of her life or even after her death. In order to ensure such consistency a person may give directives stating what she wants in relation to those events. Although a person would not be adversely affected if such directives were not carried out, a person's giving such directives would, nevertheless, be an act of self-determination. This is because the events at the end of a person's life may be particularly significant, since they may in some sense complete a person's life. One such event may be what happens to a person body parts after her death. As argued in the previous chapters, the various determinations that a person may choose to make in relation to her body parts after her death involve her exercising property rights. Given there are competing claims concerning the use of parts from cadavers, recognising that a person *owns* her body parts would be more likely to ensure that her prerogatives to determine what happens to them after her death will be respected.
Like property and property rights, the institution of ownership is central to our society, and for similar reasons. Ownership makes it clear—more clear than a person's having specific property rights in an object—that she has an array of claims to that object, which together usually constitute a stronger claim than anyone else. Although the particular claims a person has over objects she owns may vary, those claims a person would need to have in relation to her body parts in order to determine what happens to them either if removed for therapeutic reason or after her death would be amongst them. Finally, a person owning an object would mean that her claim to it would have a greater chance of being realised, since other types of claims would probably be more likely to be overridden.

It may be objected that whilst it may seem important for there to be consistency between significant aspects of a person's life, it is more important to ensure that she has access and control of those things necessary for a certain quality of life. So, although my argument may be analogous to Macpherson's, it may not seem to carry the same weight. Joel Feinberg's distinction between ulterior interests which concern a person's '... ultimate goals and aspirations ...' and welfare interests, which are the '... basic requisites of a man's well-being ...' discussed in chapter three, may be relevant here.

The objection put simply is that satisfying a welfare interest, by, for example, receiving a replacement body part, is much more important than satisfying an ulterior interest, for example that a person's body be buried with all her body parts intact. In response, whilst Feinberg acknowledges some of a person's welfare interests need to be fulfilled for her ulterior interests to be realised, he argues the former '... achieve


55 Feinberg, p. 37.
their status as interests in virtue of their being generalised means, often indispensable ones, to the advancement of more ulterior interests.\textsuperscript{56}

Macpherson's concern that a person has access to things necessary for a certain quality of life may, at first glance, be interpreted as ensuring a person's welfare interests are fulfilled. However, Macpherson's more fundamental concern is to ensure a person should obtain and maintain a certain \textit{quality} of life. Although he does not make explicit what is required for a person to do this, it would include, but also go beyond, having access to the necessities of life such as food, shelter and so on. This would require that, as well as many of a person's welfare interests, at least some of her ulterior interests would need to be fulfilled. Further, in order for many of a person's welfare interests to be fulfilled, they would have to be met beyond a certain level, since barely meeting the relevant conditions would not constitute fulfilment of them. If, for example, a person only had minimum access to medical resources, so that her health-care requirements were only just met (so that she may remain alive but not be able to, say, undertake employment or partake in leisure activities) then her welfare interest in obtaining and maintaining good health has not been met. Finally, the fulfilment of a specific interest, either welfare or ulterior, is contingent on which of the person's other interests have already been fulfilled and to what extent, the nature of the specific interest, and what if any of that person's other interests will remain unfulfilled.

A person has a welfare interest in her body parts when they are still part of her body, since some of her body parts are necessary for her to continue living, and further whilst having an intact body means it is easier for a person to act to fulfil her other welfare, and her ulterior interests, and so obtain and maintain a certain quality of life. A person may also have ulterior interests in her body parts. Specifically, she may be concerned about what happens to any excised parts, or all of them after she has died.

\textsuperscript{56} Feinberg, p. 42.
Although these interests would not be ongoing in the same sense as some of a person's other ulterior interests, such as her career plans, such an interest is a specific example of a person's more general ulterior interests, such as being autonomous and ensuring consistency between various significant aspects of her life. A person's interest in being autonomous would in many instances warrant as much respect as her welfare interests.

Two or more people may need access to the same resources in order to fulfil their interests. So it is possible that fulfilling one person's ulterior interests may mean someone else's welfare interests remain unfulfilled. It could be argued that this is what happens if a person's directives concerning the treatment of her body parts after her death precludes using them for transplantation, and perhaps less clearly if a person refuses to consent to part of her body being used for experimentation. In such circumstances, perhaps the fulfilment of one person's ulterior interest should be sacrificed in order to fulfil other people's welfare interest.

I have already indicated that Macpherson's argument could be thought to provide a rationale for a researcher having access to excised human body parts for experimentation. I argued in chapter three, though, that there may be a number of reasons why a person may object to an excised part of her body being used for experimentation. So a person would need to have at least the same type of claim as any researcher with a potential claim to her body parts. In the Moore case it was recognised that the researchers could have property rights in Moore's excised body parts; I contend that it should have been recognised that Moore had such rights.

It is perhaps more obvious that Macpherson's argument could be used to justify potential organ recipients being entitled to and obtaining property rights in parts from cadavers. In chapter four, I rejected the similar proposal the interests of living should take precedence over the prior directives of a deceased person because such a proposal
fails to respect the person who once was. So if the potential organ recipient had
property rights over parts from cadavers which would be supported by Macpherson's
rationale, then a person needs to have an equally strong, if not stronger, claim to her
body parts, in virtue of the significant interest that person would have in how her body
parts may be treated after her death.

Although they differ in detail, my argument—that it should be recognised that a person
owns her body parts—has a similar structure and underlying rationale to
Macpherson's—that a person should have property rights in the things necessary for a
certain quality of life. Both arguments are motivated by moral concerns: Macpherson's being to ensure a person has access to those things necessary to obtain
and maintain a certain quality of life, and mine to ensure recognition of a person's
prerogative to determine what happens to any of her body parts removed for
therapeutic reasons or some or all of them after her death. Both arguments appeal to a
contingent fact about society to bring about these outcomes, namely the centrality and
importance of property and property rights (in Macpherson's argument) and
ownership (in mine) in our society. It would not be sufficient for my purposes to
simply apply an unamended version of Macpherson's argument, since, as
demonstrated in the evaluation of Munzer's argument earlier in the chapter, simply
recognising a person had certain property rights over her body parts would not ensure
recognition of a person's prerogatives in relation to her body parts. Rather, it is
necessary to recognise that a person owns her body parts.

Whilst I have used the controversial notion of self-ownership to explain why we
should recognise a person owns her body parts whilst still part of her body, it would
generally be accepted that a person has some sort of sovereignty over her body parts
when they are still part of her body. The problem arises when a part is removed from
a person's body. Having previously been part of a person's body, and so according
to the self-ownership thesis being owned by that person, a body part does not simply
become a resource, since it cannot be assumed that the person no longer has an interest in it. A person may also have an interest in what happens to her body parts after her death, and so it cannot be assumed that parts from cadavers are resources, for example to be used in transplantation. To the contrary, because of the nature of these interests and their associated prerogatives, they need to be protected and promoted. I have suggested that because of the centrality of ownership in our society, and, more importantly, the strength and array of claims a person has over an object she owns, a person should be recognised as the owner of her body parts. This, I contend, is the best way of ensuring her interest in them, and the associated prerogatives will be protected and promoted. In the final section of this chapter, I explain how a person's owning her body parts will ensure recognition of these prerogatives.

Section III: Ownership and a Person's Prerogatives Concerning Her Body Parts

Throughout this thesis I have been concerned primarily with three determinations a person may make in relation to her body parts—consenting to a body part removed for therapeutic reasons being used for experimentation, or instructing that it be destroyed, and giving directives concerning the treatment of her body parts after her death. In this section, after identifying some general benefits of recognising that a person owns her body parts, I explain why such recognition would be more likely to ensure that a person's determinations would be respected.

i. General Benefits of Recognising that a Person Owns Her Body Parts

It may be possible to promote and protect a person's interests and associated prerogatives in relation to an object—similar to those interests and prerogatives I have argued a person may have in her body parts—without having to recognise she owns that object. This, however, does not seem to be possible in relation to human body
parts. This is partly because one person's body parts could be used to save or improve the lives of other people, directly through transplantation or indirectly through experimentation. Another problem is the assumptions that may be made concerning a person's interest in her body parts. Alternative proposals—such as recognising that a person had certain property rights in her body parts or enhancing the informed consent procedures—would not ensure recognition of a person's prerogatives in relation to her body parts. This is because these proposals do not address the reasons why such prerogatives are ignored or overridden, and, further, do not clarify the nature of the relationship between a person and her body parts.

My proposal that it should be recognised that a person owns her body parts will, I suggest, address each of the problems mentioned above. Although the potential uses and subsequent need for human body parts for medical purposes would remain, it will be clearer that there are requirements to be met before body parts can be used for such purposes. Specifically, it would be clearer that a person has to be consulted, and have given her consent, to any proposed use of her body parts. This is because included amongst the various claims a person usually has to an object that she owns is the claim to determine what happens to that object.

Recognising that a person owned her body parts would also undermine the various assumptions made by the relevant medical personnel and researchers about access to and uses for excised human body parts or parts from cadavers. When a person owns an object it is at least assumed that she has various types of claims to it, including to determine what happens to that thing. So if a person had such claims over her body parts then, at the very least, it would be required that she had relinquish her claims to them before someone else uses them. Further, and this is particularly relevant to using parts from cadavers, a person's (prior) permission would be all that was required.
Finally, a person's owning her body parts would clarify the nature and significance of the relationship between a person and her body parts. It is, though, not sufficient to merely assert a person owns X, but rather some justification for a person owning X is required. In previous chapters I have provided such a justification. I have argued that the lack of clarity of this relationship had given rise to practices that were at odds with organ procurement policies, and, more importantly, assumed that a person had no concerns relating to the treatment of her body parts. Contrary to such assumptions, a person may have a morally significant interest in what happens to her body parts in these circumstances and so it should be recognised that she had certain prerogatives in relation to her body parts. Below I establish that the specific prerogatives I have argued a person should have in relation to her body parts are more likely to be acknowledged and respected if it is recognised that a person owned her body parts.

ii. Recognising that Moore Owned His Body Parts

In the first section I argued the directions from the US Supreme Court in the Moore case, requiring a physician to disclose additional information in order to fulfil his fiduciary duty and ensure a patient gives her fully informed consent, would not ensure recognition of a person's prerogative to determine what happened to a part of her body removed for therapeutic reasons. This is because simply requiring a person's consent to a proposed use for an excised part of her body is not the same as her determining, amongst a number of options how she wants that part treated. In addition, this proposal did not so much improve the informed consent procedures as just require disclosure of specific, albeit additional, information. Finally, it does not address what I have suggested is the main cause of the discrepancies between the relevant policy and practices: that there is uncertainty about the relationship between a person and her body parts.
A person's prerogative to determine what happens to any of her body parts removed for therapeutic reasons means that within the general constraints discussed in chapter two a person could make any of a wide variety of determinations in relation to her body parts. In practice, a person will typically either give permission for an excised body part to be used for experimentation or instruct they be destroyed, perhaps specifying the manner of disposal. These and other specific determinations a person may make concerning the treatment of her body parts could be described as her exercising one or more property rights over them. I argued above, though, that explicitly recognising a person had the relevant property rights over her body parts would not ensure the proper consultation takes place before her excised body part was used for experimentation or, more generally, ensure recognition of her prerogative to determine what happens to such parts.

Circumstances such as those resulting in the Moore case provide evidence of the assumption that once a part of a person's body has been removed, particularly if it was diseased, she no longer has an interest in what happens to that part. This assumption would be undermined, and a number of aspects of the relationship between a person and her body parts would be clarified, if it were recognised that a person owned her body parts. First, it would be clearer what sort of claim a person had to her excised body parts—usually one that is stronger than anyone else's claim. Second, this claim is not extinguished simply when a person has a part of her body removed. Third, because a person continues to have a significant claim over her excised body part, it would be clearer that she had to be consulted before anything is done with or to that part. More than this, though, a person's having such a claim in relation to her body parts entitles her to determine what happens to any excised parts, and as argued in chapter three, a person may have significant moral reasons for making such determinations.
Some of the implications of a person's owning her body parts for the use of human body parts in experimentation can be illustrated by speculating what would have happened if it had been recognised Moore owned his spleen and other body parts removed during the course of his treatment. To begin with, it would have been clearer Moore had a claim over his excised body parts. So Golde and his associates would not only have needed Moore's consent to the removal of his body parts but also that he had explicitly relinquished his claim to them. At that point, Moore could have asked about what would happen to his excised body parts and if, as he suggested in his evidence to the various court hearings, he did not want his spleen used for medical experimentation, he could have refused to give his consent.

If it has been recognised that Moore owned his body parts, it would have been clearer what information he should have been told prior to being asked for his consent. This would include, but also go beyond, the type of information specified by the Supreme Court. Specifically, Moore should have been told what the cell-line developed from research using his body parts would be used for and about any legal and commercial implications. Further, it may have been clearer what type of claim Moore had to the profits from the cell-line. Resolving this issue would require a detailed analysis of the relevant complex aspects of property and commercial law in order to answer various specific questions: How much did the raw material from Moore's spleen contribute to the development of the cell-line? How does this compare to the knowledge and skills of the researchers? And, if such a comparison is possible, are there other property rules which would justify awarding Moore a share in the profits? It will suffice for my purposes to suggest that if is recognised that a person owns her body parts, then

57 Whilst Moore was asked to relinquish some specific rights in relation to his spleen and other body parts, it was indirectly via a hypothetical clause on the consent form, and further Moore was not told that his body parts were being used either at the research stage of Golde's project or when the cell-line was being developed.

58 For a detailed discussion of these and other issue and a suggestion as to their resolution, see R. Hardiman, 'Toward the Right of Commerciality: Recognising Property Rights in the Commercial Value of Human Tissue', UCLA Law Review, vol. 34, 1986, pp. 207-265.
the various specific issues raised by the Moore case, and the more general issues raised by the use of human body parts in medical experimentation, would be easier to resolve.

A person's owning her body parts would also be more likely to ensure a person's prerogative to give instructions that an excised part of her body be destroyed would be respected. This is because included amongst the rights a person usually has over objects she owns is the right to destroy it. Since the various determinations a person is most likely to make in relation to a part of her body removed for therapeutic reasons—permitting it to be used in a particular way or instructing that part be destroyed—are the types of determinations a person may make over objects she owns, recognising that a person owns her body parts would be the best way of ensuring recognition of her prerogatives.

iii. **Cadaver Organ Donation and Ownership of Body Parts**

I argued in chapter four that adhering to the wishes of the deceased person's relatives is the main reason why a deceased person's prior directives concerning the treatment of her body parts after her death may be ignored or overridden. My proposal that a person should be recognised as owning her body parts would help to address this discrepancy between the relevant policies and practices in relation to cadaver organ donation. This is because if a person owned her body parts, the significance of any directives she gave concerning the treatment of such parts after her death would be clarified and strengthened.

In chapter five, I suggested a person's giving directives about the treatment of her body parts after her death was akin to her bequeathing her property. Both involve a person's giving directives that are to be carried out after her death, and both have formalised procedures regarding how these directives are made known to the person
responsible for carrying them out. So if a person were recognised as owning her body parts, then her directives as to what should happen to them after her death would have a similar status to the directives given as part of a bequest.

It is only morally and legally permissible for a person to bequeath something she owns up until the time of her death. Although it is conceivable for a person to give directives concerning the treatment of an excised part of her body (kept in a suitably preserved state) after her death, such directives usually pertain to body parts that are still part of a person's body at the time of her death. As argued above, a person has sovereignty over her body parts when they are still part of her body, and there is at least one argument why this sovereignty should amount to ownership. So a person would have sovereignty over, or have owned, those body parts that are still part of her body up till the time of her death. This means any directives a person gave concerning the treatment of her body parts after her death have a further similarity to bequests—namely, both concern things a person owned up until the time of her death.

Bequests may be challenged, and when such challenges are successful, the relevant prior directives of the deceased person are overridden. Such challenges are usually a result of uncertainty, or a dispute, about what the person wanted, and there are procedures for resolving such disputes. Since similar disputes may arise concerning how a person would have wanted her body parts treated after her death, if it is recognised that a person owns her body parts, then the same procedures could be used for resolving those disputes.

Other challenges to a person's will could be made if someone who expected to benefit from the deceased person's estate (typically because they were related to the deceased person) is in her or someone else's view unjustly treated under the terms of that person's estate. It is difficult to see how a comparable challenge could be made in relation to a deceased person's directives concerning the treatment of her body parts.
after her death. One possibility is that the deceased person's relatives could claim they would suffer emotional or psychological distress if the deceased person's prior directives concerning the treatment of her body parts were carried out.

Given the significance of the interests a person may have in how her body parts are treated after her death, and the general significance of a person's directives relating to events at the end of her life or after her death, the interests of the deceased person's relatives must take second place. After all, a person's being distressed by the contents of a will is not usually grounds for overriding that will. Further, because the deceased person's relatives are usually deemed responsible for carrying out many of that person's prior directives, they have a responsibility to ensure, as far as they can, such directives be adhered to. This, however, is not the extent of the deceased person's relatives responsibilities. Where the deceased person did not give any explicit directives, it does not become the relatives' prerogative to determine how that person's body parts will be treated. Rather, as argued in chapter four, the relatives have a responsibility to discern from what was known about the person how she would have wanted them treated.

In practice, though, the relatives of a deceased person will not usually deliberately ignore or override that person's directives concerning the treatment of some or all of her body parts after her death. Rather, as argued in earlier chapters, the central, and typically decisive, role of the relatives in determining whether a deceased person's body parts will be removed and used for transplantation purposes has resulted from uncertainty about whose wishes should prevail. As discussed in chapter four, one of two outcomes usually result. When the deceased person's relatives are consulted about the use of that person's body parts for transplantation purposes, they may well be asked whether she would have wanted her body parts to be so used. In such circumstances, the deceased person's directives may be adhered to, but it is also possible, because of a combination of ignorance and the circumstances in which such
decisions have to be made, that the relatives' wishes will prevail. Alternatively, and this is perhaps more likely, no attempt will be made to determine the deceased person's prior wishes, since the relevant health professionals will be reluctant to consult the distressed relatives.

I have argued in this chapter that if it is recognised a person owns her body parts this will serve to clarify both her relationship to and the claims she has regarding them. Whilst such recognition may not immediately eliminate those practices which result in the deceased person's prior wishes or directives being ignored or overridden, once it is accepted that this is the nature of the relationship between a person and her body parts, and moreover that there are sound moral reasons for such a relationship, these practices may well begin to decline. This is because, first, where the deceased person had given prior directives regarding the treatment of her body parts after her death, it will be clearer that she has the right to give such directives and, further, that such directives are all that is required for her body parts to be treated according to her wishes. Second, in the absence of such directives, the main objective of any consultation that takes place between the deceased person's relatives and the relevant health professionals would be to determine what the deceased person would have wanted. Third, and finally, the health professionals' concerns about further distressing the grieving relatives, which will probably be the most difficult obstacle to overcome, may well be diminished since it will be clearer what the role of the deceased person's relatives is in such circumstances, namely to carry out the deceased person's prior directives, or in the absence of any directives to determine what she would have wanted, regarding the treatment of her body parts after her death.

So the directives a person may give concerning the treatment of her body parts after her death have much in common with bequests a person may make, for example, in her will. It is only legally and morally permissible for a person to bequeath those objects she owns. So, if it is recognised that a person owns her body parts, any
directives she gives concerning the treatment of her body parts after her death would have the same status of the more usual types of bequest. More importantly, such recognition means any directives a person does give concerning the treatment of her body parts after her death are more likely to be adhered to. This is because the main objective in determining whether to retrieve a person's body parts for transplantation purposes, or to use them in some other way, will become to try to do what would have that person wanted.

In the next chapter, I identify and respond to what will probably be the main objection to my argument. Here, though, it is worth briefly responding to another objection that may be made specifically concerning the implications of my proposal for the retrieval of parts from cadavers for transplantation. It may be argued that one consequence of recognising that a person owns her body parts is that there will be a decrease in the already insufficient supply of organs available for transplantation. Those taking this position may well acknowledge that it is important to protect the (prior) interests of those from whom the body parts are removed, but argue that the social consequences of a further decrease in the supply of organs suitable for transplantation would be a greater social evil.

If my proposal is adopted, it would not necessarily lead to a decrease in the supply of organs available for transplantation. This is because it does not follow from recognising that a person owns her body parts that she would refuse to give permission for any or all of them to be used for transplantation after her death. As discussed in this and the previous chapter, the current policies regulating the procurement of body parts from cadavers seem to implicitly assume a person has certain rights over her body parts, that can be re-described as property rights. So it may be possible that once it is made explicit that a person has these rights over her body parts, which I have argued will be best achieved if it is recognised that a person owns her body parts, then it may well increase the supply of organs available for
transplantation. This is because it will be clearer that a person has the right to give the relevant directives concerning the treatment of her body parts after her death. This issue would ultimately have to be decided empirically.

Let us suppose, though, that recognising that a person did own her body parts did result in a decrease in the supply of organs available for transplantation purposes. Then it would need to be ascertained which is the greater social evil: the decrease in organs, or ignoring or overriding the specific directives that a person gave concerning the treatment of her body parts after her death. I argued in chapter four that the needs of the living do not automatically extinguish any contrary directives a person had given concerning events that would occur after her death. With regard to a person's directives concerning the treatment of her body parts after her death—including refusing to make them available for transplantation purposes—such directives may have been given in order to ensure that, after her death, her body parts were treated in accord with her deeply held values and beliefs. Further, a person's body part being treated in accord with her prior directives may be one of the events that whilst it happens after her death, may complete that person's life when it is considered as a whole. This in turn would undermine the value of that person and her life. For these reasons, I argued, a person's directives concerning the treatment of her body parts after her death should only be disregarded in exceptional circumstances. A possible decrease in the supply of organs for transplantation would not constitute such a circumstance.

More generally, recognising that a person owns her body parts clarifies the nature and type of claims a person would have in relation to her body parts. Whilst I have mainly been concerned with the interests and claims a person may have in relation to a part of her body removed for therapeutic reasons and all of her body parts after her death, a person may have other interests in her body parts. Recognising that a person owns her body parts may also better ensure recognition of any further claims resulting from such interests.
In the first section of this chapter I rejected two alternative proposals that may have ensured recognition of and respect for the prerogatives I have argued a person should have in relations to her body parts. These proposals, I suggest, were perhaps the most likely alternatives to my own. First, the proposal to extend the notion of informed consent so that a person would be given more information before being asked to consent to a particular use of an excised part of her body being was made in a legal context, specifically as a remedy to the problems that arose in the *Moore* case. Second, Munzer's proposal that a person has some property rights in, but does not own, her body parts, seems to reflect the current policies regulating the various uses of human body parts, although such policies only implicitly recognise that a person has various rights in relation to her body parts.

These, however, are not the only possible alternatives to my proposal that in order to protect and promote a person's prerogatives in relation to her body parts it should be recognised that she owns them. There may be those who whilst agreeing with me that such prerogatives should be protected, feel uncomfortable with the idea of a person owning her body parts, some of the reasons for which will be discussed in the next chapter. They may then wish to explore other legal mechanisms for ensuring recognition and protection of these prerogatives. It would be unlikely though that such mechanisms will be as effective as ownership.

I argued in the previous section that it is clearer what claims and rights a person has over an object when she owns that object than when she just has a number of property rights in relation to it. This is despite Macpherson's contention that in western democratic societies, all other types of rights are subordinate to property rights. Macpherson argued further that where there is a conflict or uncertainty as to the strength of one party's claim against another, if one party has property rights in the disputed object, then their claim will usually prevail. This is not to say that when a
person has property rights in an object, that none of those right will ever be contravened. For example, just because a person has the right to possess an object does not guarantee that object will not be stolen from her. What having property rights over an object does guarantee though is that the person usually has a right of redress if any of these rights are contravened.

It is my contention that, with respect to material objects, ownership is to property rights as Macpherson has suggested property rights are to all other rights. This is because, as argued earlier in this chapter, when a person owns an object, rather than simply having various property rights over it, it is clearer what claims and rights she has in relation to that object. Further, just as other types of rights generally take second place to property rights in cases of uncertainty and conflict, so too if a person owned an object then if some uncertainty or conflict in relation to that object would usually be resolved in her favour, even if some other person had various property rights over the same object. Finally, when a person owns an object if any of those rights that she has in relation to it are contravened then it will perhaps be clearer that she entitled to some form of redress rather than if she just had some property rights in that object. In sum, then, in western democratic societies owning an object usually gives a person the strongest set of claims, and corresponding types of redress should those claims be interfered with, in relation to an object. For this reason, in addition to the other arguments I have given earlier in this chapter, I contend a person owning her body parts is the best way of ensure that the prerogatives I have argued a person should have in relation to her body parts should be recognised as ownership.

CONCLUSION

Whilst the argument I have given in this chapter is, in part, a pragmatic one, it is based on the conclusion from earlier chapters that a person may have a morally significant interest in her body parts and thus she has certain prerogatives in relation to them.
After dismissing two other options for ensuring the recognition of these prerogatives, I argued that because of certain pragmatic features of ownership (the most important one being a person usually has the strongest claim to an object that she owns) the best way to ensure recognition of a person's prerogatives in relation to her body parts is to recognise that she owns her body parts. This is because of the centrality and status of ownership in western democratic societies.

Nevertheless, because there is a common perception that, at the very least, there is something odd about a person's owning her body parts, there will be various objections to my proposal. Perhaps the most significant moral objection will a specific application of the commodification objection: since it is usually the case that a person is permitted to sell what she owns, human body parts should not be owned because they should not be treated as commodities, since this would undermine the value and dignity of persons. An analysis and evaluation of this objection will be the focus of the next chapter.
CHAPTER SEVEN

OWNERSHIP AND THE COMMODIFICATION

OF HUMAN BODY PARTS

Macpherson characterises the modern conception of property as '... an exclusive individual right to use and dispose of material things',¹ and maintains that the concept of property is now almost entirely associated with market transactions. The same is true of ownership: although there are exceptions, it is generally assumed that if a person owns something then she has the right to sell it. This, I argue in the first section of this chapter, is the basis for one possible moral objection—probably the one that will most likely be made against my proposal—that it should be recognised that a person owns her body parts. In the second section I describe and evaluate several detailed philosophical arguments in support of this objection, arguing that at best they are inconclusive. In the third section, I argue that my proposal is not undermined by the commodification objection.

SECTION I: A MORAL OBJECTION TO A PERSON'S OWNING HER BODY PARTS

Since the argument I have given for a person's owning her body parts is primarily a moral one, I need only deal with any moral objections it. So other types of philosophical objections (metaphysical, epistemological) to a person's owning her body or its parts are not of concern here. In this chapter I will, unless otherwise stated, be concerned with whether a person is morally permitted to own her body parts.

When the so-called *commodification* objection—that there are certain objects that because of their nature should not be sold or treated as commodities—is made in relation to human body parts, it is usually as part of the debate about a market for such parts. In that context, it is not argued that a person should not own, or have property rights in, her body parts. Rather, specific moral reasons are given why the *sale* of human body parts should be prohibited. These reasons usually relate to contingencies about the current trade in organs from the third world: that persons already impoverished are being exploited, and that the body parts from such transactions will be unsuitable for transplantation since the 'donors' will be in poor health. A more general objection to the sale of human body parts, *not* related to the current trade in human body parts, is that permitting the sale of human body parts would obviate an unusual and particularly important opportunity for altruism. The primary concern of


3 These objections were originally raised by R. Titmus in relation to blood; see The Gift Relationship, London, Allen & Unwin, 1971, pp. 158-173. Titmuss' concerns about the quality of the blood supply do not necessarily apply in the case of the organs, because a major part of that concern was that poorer people would repeatedly sell their blood without adhering to the time period required between blood donation (sales). This concern could be also raised about living organ donation but only in relation to bone marrow and liver lobes. Also, there are conflicting views about whether a market in blood led to a decrease in the amount of donated blood. It has been suggested that the only way to test this concern in relation to body part is to allow a market in body parts to co-exist with the current system. See M. Brams, 'Transplantable Human Organs: Should Their Sale be Authorised by State Statutes?', American Journal of Law and Medicine, vol. 3, no. 2, 1977, pp. 183-195.

those making this objection is to promote organ donation as the preferred method of organ procurement.

Attempts to give a more fundamental moral reason why a person should not be allowed to sell her body parts usually claim that such sales would be degrading to the person from whose body the part has been removed, and, further, would be contrary to her dignity. It is in such discussions that the commodification objection is made. It is because a person is usually permitted to sell something she owns that those raising the commodification objection in relation to human body parts would probably also object to my proposal that it should be recognised that a person owns her body parts.

i. Owning and Selling

As James Childress has pointed out, ' ... when the language of ownership, property and property rights is introduced, it is assumed that sales represents one acceptable mode of transfer of one's own property'.\(^5\) When an object is sold, the buyer acquires a set ' ... of rights and duties concerning it and the previous owner .... [receives] ... money'\(^6\) in exchange for the object. This means that 'nothing can be sold unless it is first owned',\(^7\) or more precisely, '[n]othing can be sold, ... unless rights over it can and do exist. Nor can anything be sold unless it is possible to separate those rights from the person who has them'.\(^8\) The converse however is not true: just because an object can be owned does not necessarily mean it can be sold.

---

7 Andre, p. 31.
8 Andre, p. 32.
Any of the rights or incidents of ownership may be restricted in relation to a particular object. Of particular interest here are any normative restrictions, rather than, for example, legal or economic restrictions, on a person's right to sell something she owns. In Honore's schema, the relevant incident of ownership a person needs to have in an object in order to be permitted to sell it is the incident of the right to the capital. Specifically, selling an object is one way in which a person could exercise an aspect of that incident—the power to alienate that object. There are important differences between the various ways a person may be permitted to alienate an object she owns. When, for example, a person abandons an object she exercises her power to alienate it but does not transfer any of the rights she has in that object. Another way a person's power to alienate an object may be restricted is that she may only be permitted to transfer her rights to it under certain conditions or in particular ways. A person's being permitted to give away or donate, but not being allowed to sell, an object is an example of this type of restriction.

There may be various reasons why a person may be permitted to give away, but not sell, an object she owns. The object may, for example have historical or cultural significance to the broader community, and, so whilst the person may have the rights to possess, use and perhaps even manage it, she may not be allowed to sell it. She may however be able to donate it to that community. Usually the reason particular objects should not be sold has to do with the nature of that object. For at least some of these objects, though, a person's giving them away, particularly when doing so is an act of generosity or altruism, somehow enhances her character and may even be beneficial to her, whilst selling them might be detrimental to her and perhaps may have wider adverse effects. As will be discussed below, this is part of some reasons given why a person is permitted to donate but not sell her body parts.
ii. The Commodification Objection to a Person Owning Her Body Parts

The general idea underlying the commodification objection is that some objects, as well as some intangible things such as some human interactions or some of a person's rights, are corrupted by the market. Such corruption could be to the object of the proposed sale (for example religious icons), the way participants in the transaction are treated (for example slavery), or by undermining a general practice or institution (for example it is claimed that commercial surrogacy arrangements undermine parent-child relationships, or vote-buying undermines democratic elections). Further, there is also a general reason why a particular object should not be sold, namely that it is closely connected to or associated with the person in some way, which means that if the object was sold it may undermine the value of that person, for that object to be sold.

When the commodification objection is raised in the debate about a market in body parts, the general idea is that '... a free market for transplant organs would make human organs a commodity, something to be brought and sold, and that this is intrinsically morally wrong'.9 Explanations why it is morally unacceptable to treat human body parts as commodities may be general: for example '[b]oth our cultural heritage and our expressed attitudes are hostile to treating human bodies as marketable commodities',10 or they may attempt to specifically identify why such transactions are


 unacceptable: for example, there is a '... deep conviction that the body and its parts are somehow different from other things, central to our dignity as human beings.'

Common to both types of objections is the idea that treating human body parts as commodities is contrary to the dignity a person has simply in virtue of being a person.

If it is recognised that a person owns her body parts, then it may well be assumed she has the right to sell them. Evidence of this association, and further of its being objectionable for a person to own or sell her body parts, is provided by the language used, and not used, to promote the various policies for procuring body parts for transplantation and, more significantly, the extensive literature on the ethics of organ procurement. The terms 'ownership' or 'property' are not used in either context, whereas 'donation' and 'gift-giving' appear frequently in both. Whilst these terms were originally used to liken an unfamiliar and perhaps abhorrent practice—removing parts of a person's body and placing them in the body of another person—to more common and acceptable practice—such as gift-giving or donation. Further, in some contexts, these terms seem to be meant literally.

Body parts made available for transplantation are often referred to as gifts, and, also, the person from whose body the part has been removed is often said to have given the gift of life. The use of the word 'donation' in this context emphasises the act of responding to the needs of stranger, and that doing so is an act of generosity. I suggest these and other purported

---


similarities between acts of gift-giving or donation and a person making a body part(s) available for transplantation after her death are more than just useful fictions.

In the debate about, and the promotion of, policies for procuring body parts for transplantation, it may simply be assumed a person owns her body parts, or at least has the relevant property rights in them, so she can 'donate' them or give them as gifts. I suggest, though, that terms such as 'ownership', and 'property' are avoided rather than assumed in this context. This is because those who promote the practice of a person's giving permission for parts of her body to be removed for transplantation purposes after her death often oppose the sale of human body parts, and so would object to a person's owning her body parts, presumably because this would indicate she could sell them. For this reason, discussions about using parts from cadavers for transplantation are typically couched in terms of the potential recipient's needs and the importance of altruism and gift-giving for the community, rather than ownership or property. The following quote is indicative: '... we should reject body markets because our need to affirm community requires a realm of gifts by which we minister to one another's needs. Gifts of the body, powerfully symbolic of our shared embodiment, are especially important'.

Such claims, however, fail to realise a person would have to own something before she would be permitted to donate it or give it as a gift (even in the latter case a person owns the object for a short time between buying the gift and giving it). Further, donation, giving or selling are all ways a person may alienate an object, and so involve the person exercising the same property rights or incidents of ownership. This means

that '... if there is a relation between a person and his body which legitimises a gift of a body part, then the same relation may also legitimise the sale of a body part'.

I argue below that the different explanations why human body parts should not be treated as commodities are usually inadequate since they do not explain, for example, why there is hostility to selling human body parts or how the treatment of a person's body parts could be an affront to her dignity. There have been some attempts, notably in the philosophical literature, to provide more detailed explanations why it is morally unacceptable to treat human body parts as commodities, and some of these will be discussed and evaluated in the next section. And whilst in previous chapters I have given my own explanation for how the treatment of a person's body parts relates to her dignity, in the final section of this chapter I argue this explanation does not necessarily mean that a person should not be allowed to sell her body parts.

**SECTION II: PHILOSOPHICAL ARGUMENTS AGAINST THE COMMODIFICATION OF BODY PARTS**

Many of the philosophical arguments against human body parts being treated as commodities cite several passages from Immanuel Kant's moral philosophy, specifically his discussion about how a person should treat her body and its parts, to explain why such treatment would in some way degrade the person from whose body a part has been removed, or is contrary to the dignity or value she has in virtue of


being a person. After examining the relevant passages, I argue that once they are understood against the background of Kant's broader moral philosophy it is clearer that he had wider concerns than just prohibiting a market in body parts. I then discuss Stephen Munzer's unusually detailed analysis of these passages and his subsequent argument against a person's having those property rights that operate in the market over her body parts. Finally, I examine two other argument why human body parts should not be viewed or treated as property which, whilst not citing Kant, express similar concerns as the arguments that do.

i. **Kant on Treating Human Body Parts as Property**

One position ascribed to Kant concerning the treatment of human body parts as commodities is that doing so would involve the '... degradation of treating one's own (or another's) body in this way'. The passages which have led to this, and similar, views being attributed to Kant can be found in two of his works: *The Doctrine of Virtue*, and his *Lectures on Ethics*. It is worth noting at the outset these passages are part of arguments concerning suicide and sexual morality, rather than whether human body parts should be viewed or treated as property. Further, the purpose of these discussions is to investigate the implications of Kant's moral philosophy, and so the discussions themselves are peripheral to Kant's broader aims.
Those writers who cite passages from Kant often give the impression that, like them, Kant was solely concerned with arguing that human body parts should not be treated as commodities. Kant's concerns, however, go beyond the effects or consequences of selling human body parts, to determining the correct moral relationship a person should have with her body, given persons are unique beings with the capacity to be rational and moral. Further, the way a person may treat her body, and by extension her body parts, may affect her capacity to be rational and to act morally. This wider concern may even preclude some of the ways generally agreed to be acceptable for a person to treat her body parts, such as living and cadaver organ donation.

Several aspects of Kant's broader moral philosophy need to be explained for the full implications of the passages I discuss below. Since many of these passages are part of Kant's discussions of the various duties a person has to herself, it is important to understand the Kantian notion of duty, and more specifically what is entailed by a person having duties to herself. At the beginning of The Doctrine of Virtue, Kant seems to acknowledge that a person's having duties to herself may seem contradictory, since it does not seem to make sense for a person to put herself under an obligation to herself. He goes on to argue, however, that unless a person has duties to herself there would be no duties at all, since '... I can recognise that I am under obligation to others only insofar as I at the same time put myself under obligation'. In his Lecture Duties to Oneself, Kant claims such duties are ' ... of primary importance ... [because] ... it is obvious that nothing can be expected from a man who dishonours his own person'. The basis for a person's duties to himself is ' ... that we must reverence

humanity in our own person because apart from this man becomes worthless in the
eyes of his fellows and worthless in himself.21

Kant divides the duties a person has to himself into those he has in virtue of being an
animal (natural duties) and those he has in virtue of being a rational agent (moral
duties).22 The particular duty a person has to himself relevant here is the '... duty of
man to himself as an animal being ... to preserve himself in his animal nature'.23 An
aspect of this duty is that one should not mutilate oneself by '... depriving oneself of
certain integral, organic parts, that is, maiming oneself'.24 Unlike another more
important aspect of a person's duty of self-preservation—the duty not to commit
suicide—a person's duty not to mutilate himself is prima facie. In his lecture 'On
Suicide', Kant qualifies a person's duty to maintain bodily integrity thus: '[w]e may
treat our bodies as we please provided our motives are those of self-preservation. If,
for instance, his foot is a hindrance to life, a man might have it amputated. To
preserve his person he has the right of disposal over his body.'25 So, a person's
having a body part removed for therapeutic reasons would be consistent with the duty
of self-preservation. Kant also allows for the severance and disposal of body parts,
such as hair, for practical reasons, although he does not specify exactly what
constitutes a 'practical reason'.

20 I. Kant, Lectures on Ethics, trans. L. Infield and foreword by L. W. Beck, Hackett, Indianapolis,
21 Kant, p. 121.
22 Kant, The Metaphysics of Morals, pp. 216-217 on this division.
23 Kant, p. 218.
24 Kant, p. 218.
25 Kant, Lectures on Ethics, p. 149.
All the duties a person has to himself are part of a more important duty to treat himself in accordance with Kant's *Formula of the End in Itself*. According to Kant, persons alone have the capacity to be rational and perhaps the most important way a person exhibits this capacity is by acting morally. It is because of this capacity that persons have dignity, and so should be treated in accord with Kant's practical imperative, that a person must '[a]ct in such a way that [she] always treat humanity, whether in [her] own person, or in the person of any other, never simply, as a means but always at the same time as an end'. The reason a person should be treated as an end in herself is because she has a rational nature, which '... exists as an end in itself'. With this general understanding of some of the fundamental aspects of Kant's moral philosophy, those passages from his writings cited in arguments why human body parts should not be treated as commodities can now be critically examined.

Perhaps the most considered, and, therefore, the most instructive passage from Kant's writings cited in these arguments is the following:

To deprive oneself of an integral part or organ (to maim oneself) — for example to give away or sell a tooth to be transplanted into another's mouth or to have oneself castrated in order to get an easier livelihood as a singer and so forth—are ways of partially murdering oneself. But to have a dead or diseased organ amputated when it endangers one's life or to have something cut off that is a part but not an organ of the body, for example, one's hair, cannot be counted as a crime against one's person—although cutting one's hair in order to sell it is not entirely free of blame.

---


27 Kant, p. 91.

In the above passage Kant allows the cutting of hair, since it is not an integral body part, but does not countenance a person's cutting his hair in order to sell it. This may seem to support those who invoke Kant to support their arguments against treating human body parts as commodities. Such an argument, however, ignores Kant's central concern, which is to identify the correct moral relationship a person has with her body and its parts in order to preserve her capacity to be rational and moral. This concern may have wider implication than just prohibiting a person's selling her body part. One indication of this is in the above passage Kant describes a person's giving away part of his body as partially murdering himself.

In his lecture entitled Duties to Oneself, Kant argues '... a human being is not entitled to sell his limbs for money, even if he were offered ten thousand thalers for a single finger. If he were so entitled he could sell all his limbs ... [and] ... [w]e can dispose of things which have no freedom but not of a being that has free will'. Kant is making two related points here. First, a part of a person's body should not be treated as a thing because this implies the person is a thing. He makes the same point in more detail in a passage from another lecture (which I discuss immediately below). His second point, not relevant for this discussion, is that a person has free will which, in Kant's moral philosophy, means he will act in accord with the dictates of reason.

In his lecture Duties Toward the Body in Respect of Sexual Impulse, Kant makes it clearer that a person treating her body, or part thereof, in a particular way has implications for how she is perceived, both by herself and others. His specific concern is that a person should not treat her body as a thing:

29 Kant, Lectures on Ethics, p. 124.
Man cannot dispose of himself because he is not a thing; he is not his own property; to say that he is would be self-contradictory; for in so far as he is a person he is a Subject in whom the ownership of things can be vested, and if he were his own property, he would be a thing over which he could have ownership. But a person cannot be a property and so cannot be a thing which can be owned, for it is impossible to be a person and a thing, the proprietor and the property.30

Following this Kant asserts '... a man is not at his own disposal. He is not entitled to sell a limb, nor even one of his teeth'.31 Again the context is important. Kant is arguing here that when a person acts on a sexual impulse, he makes the other person an object. This is because the person's primary interest is the fulfilment of his own desires, and so he does not view or treat the other person as an end in herself. For this, and related reasons, Kant argues a person cannot own his own body, because then he could give or sell it to someone to make use of, which would transform it, and his person, into a thing. Of particular interest is Kant's claim that a person is a subject in which property is vested, not something (that is an object) that is itself property.32 This means that, for Kant, a person cannot own her body because it is part of her person.

It is not immediately clear, though, why a person's selling one of her body parts is not allowed on the basis that a person's whole body cannot be his property. Kant explains

30 Kant, p. 165.
31 Kant, p. 165.
32 For Kant, a person has property in virtue of their capacity to 'will and act'. For details see S. Munzer, A Theory of Property Rights, Cambridge University Press, New York, 1990, pp. 130-132.
further: '[i]t is obvious that to surrender part of oneself is to surrender the whole, because a human being is a unity. It is not possible to have the disposal of a part only of a person without the same time having the right of the disposal over the whole person, for each part of a person is integrally bound up with the whole'.³³ This is because ' ... [t]he body is part of the self; in its togetherness with the self it constitutes the person'.³⁴ In this passage it is clear Kant prohibits the sale of human body parts because it would be contrary to a person's rational nature to treat her whole body in that way and, further, may interfere with her capacity to exercise that nature. As we saw in chapter five, however, there are significant differences in the capacity to exercise the incidents of ownership over one's body, on the one hand, and one's body parts, on the other. Even if it were implausible to suppose a person could own her body, she could still own her body parts.

Further, whilst those who cite Kant to support their arguments against treating human body parts as commodities claim such treatment would degrade the person whose body part it was, this claim is never explicitly made by Kant. Such claims are, however, consistent with the spirit of Kant's broader moral philosophy. For Kant something that has dignity is of incomparable and unconditional worth, and such things are restricted to ' ... morality, and humanity so far as it is capable of morality'³⁵. Therefore, since persons have dignity in virtue of being rational, and a body along with the self constitute a person, then a person's body, and by extension its parts, should be treated in ways consistent with that person having dignity.

---

³³ Kant, Lectures on Ethics, p. 166.
³⁴ Kant, p. 166.
³⁵ Kant, Groundwork of the Metaphysics of Morals, pp. 96-97.
The problem, however, for those who invoke Kant to support their arguments against treating human body parts as commodities is that, unless a part is diseased, Kant prohibits a person's giving away, as well as selling, her body parts and, moreover, for the same reasons: that doing so would be to act contrary to her duty of self-preservation. Since those who oppose the selling of human body parts seek to promote, or, at least, preserve, the practice of organ donation, it is understandable why they would be inclined to overlook this further prohibition. This selectivity, though, suggests that they fail to fully understand Kant's rationale for prohibiting a person from treating her body parts in particular ways, which as described above relates to his broader philosophy, in particular his conception of persons. This seems to be true of even the more detailed philosophical analysis of these passages from Kant, one of which will be discussed below.

**ii. Munzer: Limited Property Rights in Human Body Parts**

In his article, 'Kant and Property Rights in Body Parts', Munzer claims at least three possible arguments can be constructed from Kant's writings to the conclusion it is degrading for a person to have property rights, and therefore perhaps to own, her body parts. In explicating these arguments, Munzer undertakes a detailed analysis of passages from Kant's writings, distinguishing him from many other writers that cite Kant. Nevertheless, I argue that Munzer also fails to acknowledge Kant's broader concerns.

For my purposes, it is only necessary to examine the second argument Munzer constructs from Kant's writings, since it has most in common with the reasons usually given why human body parts should not be treated as commodities, namely that doing so constitutes an offence to human dignity. It is worth noting, though, that in his
evaluation of one of the other arguments he constructs, Munzer exhibits the selectively is his use of Kant that was noted above. Whilst he is correct in claiming Kant has 'a special horror for sales',\(^\text{36}\) he ignores Kant's further prohibition that a person giving away her body parts is partially murdering herself. Munzer suggests 'Kant's comparison is extreme ... [and] ... his reason for rejecting donation should itself be rejected'.\(^\text{37}\) Yet these reasons are the same as those Kant has for rejecting the sale of body parts, namely it is contrary to the duties a person has to her body in virtue of being a rational agent. So, like other writers who invoke Kant to argue against a market in body parts, Munzer seems to overlook some of Kant's other restrictions on the ways a person, as a rational agent, treat her body parts.

Munzer gives the following summary of the second argument that he constructs from Kant's writings, which he labels the Argument from Humanity and Dignity:

> Human beings exhibit humanity. Key elements in this humanity are a rational nature and a capacity to act on principles. The humanity in persons, is roughly, the capacity to be a moral agent. Human beings also exhibit dignity. Dignity is an unconditional and incomparable worth. ... [i]f human beings have property rights in body parts and exercised those rights, they would treat parts of their bodies in ways that conflicted with their dignity. They would move from the level of entities with dignity to the level of things with price.\(^\text{38}\)

Whilst Munzer recognises Kant's peculiar understanding of humanity and its connection with morality and rationality in his construction of this argument, he


\(^{37}\) Munzer, p. 326.

\(^{38}\) Munzer, p. 326.
misconstrues Kant's notion of dignity, suggesting that all human beings have dignity. That is, he suggests that a person's having dignity is in addition to having the capacity to exhibit humanity, not, as Kant argues, in virtue of having that capacity. Whilst Kant does suggest this in some passages, it is not the usual understanding of the Kantian notion of dignity; namely that, only persons who have the capacity to be moral have dignity.

Munzer's main criticism of the argument from humanity and dignity is that it commits the fallacy of division, because '... even if a living body is an entity that has a rational nature, and a capacity to act on principles, it does not follow that parts of that body are such entities'. Munzer concedes various passages from Kant Lectures seems to counter this criticism, for example, the '... body is part of the self; in its togetherness with the self it constitutes the person'. Munzer interprets this as meaning '[t]o sell anything that is integral to the organism impairs humanity and dignity', but claims Kant could only provide an argument in support of this by using his metaphysical distinction between noumena and phenomena, since '... Kant has a complex view of the relationship of various kinds of body parts, whole bodies, selves and persons'. Such a strategy would be complicated and also unnecessary. Munzer is right in that,

---


40 In a later paper, Munzer does seem to acknowledge the usual conception of Kantian dignity, but still does not take into account its broader implications about how and why a person should treat her body parts in particular ways. See Munzer, 'An Uneasy Case Against Property Rights in Body Parts', p. 267.

41 Munzer, 'Kant and Property Rights in Body Parts', p. 326.

42 Kant, p. 166.

43 Munzer, p. 327.

44 Munzer, p. 327.
for Kant, there is this relationship, but wrong to say it is complex. As already mentioned, according to Kant, the body along with the self constitute a person, who because of her nature as a rational being should be treated with respect and dignity. So since body parts constitute the body, they presumably also constitute part of the person, and it is because of the incomparable worth of persons that body parts are significant and so should not be treated in particular ways.

Munzer suggests two possible reconstructions of the argument from humanity and dignity that need not appeal to Kant's noumena-phenomena distinction. First '... one can appeal to the moral status of individual persons to preclude impairment of humanity and dignity'. Munzer concedes this argument may not be compatible with everything Kant says, but nevertheless claims it '... allows for a range of transfers that, under the right circumstances and with the right motives, could qualify as the performance of duties of virtue'. The second reconstruction Munzer suggests '... points to the impact of a system for buying and selling body parts ... [which would] ... transform the attitudes that human beings have toward themselves and each other'. Specifically, persons may be perceived as sources of spare parts rather than as entities of incomparable worth. More generally, Munzer's main criticism of the argument from human dignity is that it does not fully explain how treating human body parts as commodities would constitute an offence to a person's dignity.

Munzer's analysis of the Argument from Humanity and Dignity, which he constructs from Kant's writing, is a springboard for his own argument against a person having

45 Munzer, p. 327 (author's emphasis).
46 Munzer, p. 328.
47 Munzer, p. 328 (author's emphasis).
property rights in her body parts, which I evaluate below. It is worth noting, though, that in his earlier work, *A Theory of Property*, Munzer takes a different position in relation to the problem of human body parts being commodities. As part of his argument for a person's having some property rights in, but not owning, her body parts, Munzer gives several responses to the commodification objection. One relevant for the present discussion is that it '... may overlook the fact that persons do have physical bodies, and may overemphasize the popular conception of property as things'.\(^{48}\) He argues it is difficult to see, except in specific circumstances, such as a person's selling her body parts in order to alleviate impoverishment, how having property rights over her body would interfere with that person's autonomy, and suggests, rather, that a person's autonomy may be enhanced by having such rights.

However, in his later article, 'An Uneasy Case Against Property Rights in Body Parts', Munzer argues a person should *not* have those property rights that operate in the market over her body parts, since this would amount to an offence to her dignity. He suggests '... human actions can offend dignity in at least three ways ... [by] ..., affronting, insulting or demeaning the moral status of the human being'.\(^{49}\) Munzer argues further that '... the unified organisation of body parts, of various kinds, make up a living human being',\(^{50}\) and '... the status of any given body part is a function of the status of the whole organism and the role of that part in the whole ... [suggests reasons for why] ... treating body parts as commodities *can* offend a person's dignity'.\(^{51}\)


\(^{49}\) Munzer, 'An Uneasy Case Against Property Rights in Body Parts', p. 284.

\(^{50}\) Munzer, p. 284.

\(^{51}\) Munzer, p. 285 (author's emphasis).
Munzer suggests the possible offence to a person's dignity may have theoretical implications for a person's having those property rights in body parts which operate in the market. One implication is that whether a person's dignity is offended by exercising such property rights over human body parts is contingent on the role she has in the transaction—as a buyer, seller, intermediary or uninvolved observer. Further, the type or degree of offence may vary depending on the type of body parts a person exercises her property rights over. Finally, it possible that '... the language of the market might distort the way in which people view themselves and others. They might tend to see persons as repositories of body parts with a market worth rather than entities with a Kantian dignity'. However, there are monetary values are placed on different body parts in particular contexts, for example in tort laws dealing with physical injury and workers compensation schedules, without there being a '... property rule ... [which] ... operates ... to make body parts commodities'.

More generally, Munzer himself gives several reason why his argument against a person's having those property rights which operate in the market over her body parts is uneasy: namely, it is difficult to clarify what is wrong with selling human body parts, and, further, the effects of the market will vary depending on the role of the person effected and what particular body part is being sold. Finally, he concedes there is no '... cogent move from the mere existence of a market in body parts to a sound objection, in terms of commodities and Kantian dignity, to that market'. This, I suggest, is partially because of the peculiar notion of Kantian dignity often invoked to

52 Munzer, p. 286.
53 Munzer, p. 281.
54 Munzer, p. 286.
support arguments against treating human body parts as commodities. Perhaps the reason why Munzer, and others, invoke Kant for this purpose is that he gives one of the few philosophical explanations for a connection between the treatment of human body parts and a person's dignity. Once the relevant passages from Kant are understood against the background of his broader moral philosophy, which includes but is not limited to his peculiar notion of dignity, they may not be as useful for arguing against treating human body parts as commodities as those who cite them believe, since the same rationale would prohibit the donation of human body parts. It may be a broader notion of dignity would be more useful.

iii. Further Arguments Why Human Body Parts Should Not be Treated as Commodities

Other writers have expressed concerns about human body parts being treated as commodities, but without invoking the peculiar Kantian notion of dignity. Judith Andre compiles a taxonomy of the 'blocked exchanges', identified by Michael Walzer,55 which seeks to explain more fully why such things should not be brought or sold. Walzer does not specifically include human body parts amongst those things that should be subject to a blocked exchange, although the current trade in body parts from third world countries would probably be classified as a 'desperate exchange' akin to that of slavery. As part of her taxonomy of Walzer's blocked exchanges, Andre suggests human body parts are an example of something that should not be sold because of the possibility of '... endangering buyers and exploiting sellers'.56

Although most of the concerns Andre discusses relating to the sale of human body parts...
parts are the more specific concerns that were mentioned, but not discussed in detail, at the beginning of this chapter, she also has general '... fears about changes in social relationships and in cultural climate'\(^{57}\) that may result from such a market.

Margaret Radin attempts to identify why human body parts should not be treated as commodities. She discusses the ownership and sale of human body parts in the context of giving a justification for property rights based on personhood, drawing on Hegel's theory of property,\(^{58}\) that '... people become bound up with "things"'.\(^{59}\) In order to ensure a person has control over such things, Radin suggests they should be recognised as that person's personal property. Of particular interest is Radin's discussion of the implications of this theory for the topic at hand, namely her argument that it is degrading to treat human body parts as commodities.

The possibility of a market for human body parts is one reason Radin gives why 'universal commodification' should be avoided. According to Radin '[u]niversal commodification implies that all things can and should be separable from persons and exchanged through the free market, whenever some people are willing to sell and others are willing to buy.'\(^{60}\) There are though some things that, for a variety of reasons, '... should not be conceived of or treated as ... commodit[ies]'\(^{61}\). One

\(^{57}\) Andre, pp. 40-41.


\(^{61}\) Radin, 'Market Inalienability', p. 1855.
interpretation of Radin's response to the problems of universal commodification is that '... things necessary for human flourishing should be market-inalienable in order to avoid the harms caused by commodification'. When something is market inalienable it cannot be sold, although it may be transferred in other ways, for example, by gift. There may be degrees of market-inalienability: an object may only be sold under particular circumstances; or some aspects of a thing may be market inalienable, for example an object may be rented but not sold. In order to determine what precludes human body parts (amongst other things) from becoming commodities, Radin gives three arguments, although only one of these is relevant here, since it is '... based upon the degradation and invasion of personhood occasioned by allowing sales'.

The *Personhood Prophylaxis* argument, as Radin labels it, seeks to prevent harm to personhood by, for example, selling body parts. This argument is often raised '... in connection with organ transplants, especially from living people'. According to Radin '... the general idea [of this argument] is that it is somehow degrading to be selling off one's body parts and this is an injury to personhood that society should prevent'. She concedes though, that, despite something generally worrying about selling human body parts, for any particular person selling a body part may be the lesser of two evils.

---


63 Radin also argues that babies, surrogacy and sexual services should not be commodities.


65 Radin, p. 169.

66 Radin, p. 169.
Radin suggests the '... sale of one's body parts presents a dilemma because it seems that we cannot honour our intuitions of what is required for society to respect personhood, either by permitting sales or banning them'.67 On the one hand, a person's selling part of her body degrades her personhood, but, on the other hand, '[i]f people are so desperate for money that they are trying to sell things we think cannot be separated from them without significant injury to personhood, we do not cure the desperation by banning sales'.68 Faced with this dilemma, Radin argues that the issue becomes one of social justice, which means '... we must rethink the larger social context in which this dilemma is embedded. We must think about wealth and power redistribution'.69 Whilst this is a reasonable response to the current trade in human body parts from third world countries, it is not an adequate explanation why human body parts should not be sold per se, but rather raises other moral concerns such as poverty and the unfair allocation of resources between different countries.

Michelle Bray provides a detailed application of Radin's own theories of property and personhood, universal commodification and market inalienability, to the questions of a person's owning or having property rights in her body parts. She argues that because '[t]he body is central to each living individual's identity and self-esteem',70 it should be recognised a person has property interests in her body. However, this property interest should be market inalienable because '... universal commodification threatens to undermine the uniqueness of each body by treating all bodies as fungible commodities.'71 So by having market inalienable property rights in her body parts, a

67 Radin, p. 187.
68 Radin, p. 187.
69 Radin, p. 187.
person '... would have the right to control the disposition of [her] bod[y] and could
give away parts of [her] bod[y], but could not transfer [her] bod[y] in exchange for
consideration'.\textsuperscript{72} One of the implication of her argument that Bray points to is that a
'... market inalienable property right in the human body would solve many of the
problems in the existing law',\textsuperscript{73} including those arising out of the Moore case and in
relation to the treatment of cadavers.

Bray's use of Radin's theories of universal commodification and market inalienability
to argue a person should have limited property rights in the body has certain important
similarities with arguments I have given in previous chapters: namely, she recognises
that a person may have certain interests in her body parts and, further, seeks to
accommodate and protect the various determinations a person may make because of
such interest. At the same time, though, she does not make it clear how treating
human body parts as commodities will have the negative effects she suggests, the main
one being to threaten the 'uniqueness' of each body, and by implications each person.
Her suggestion is similar to the usual response given by those arguing against treating
human body parts as commodities, namely, that it would offend or undermine a
person's dignity, and is just as inadequate. As mentioned above, Munzer explicitly
acknowledges it is not clear what exactly is wrong with selling human body parts, and
so it is not entirely clear how doing so would be an offence to a person's dignity.
There is no such acknowledgment by Bray. Whilst it remains unclear whether treating
body parts as commodities will have these undesirable effects or, further, how, for
example, a person not owning or having some property rights in her body parts would

\textsuperscript{71} Bray, p. 241.
\textsuperscript{72} Bray, p. 241.
\textsuperscript{73} Bray, p. 243.
prevent such effects, then any objection to a person's owning her body parts because
this would mean she can sell them is not particularly substantial.

However, even if we assume for the sake of argument that it can be made clear what
precisely is wrong with selling human body parts, the concerns raised about treating
human body parts as commodities could still be accommodated by my proposal.

SECTION III: MEETING THE COMMODIFICATION OBJECTION

In response to my proposal—that it should be recognised a person owns her body
parts in order to ensure recognition of the prerogatives she has in virtue of having a
morally significant interest in them—those who object to treating human body parts as
commodities may respond that, given a person can usually sell something she owns,
the problems resulting from a person's having the right to sell her body parts would
outweigh any benefits that would amount from recognising a person owns her body
parts. They would argue that some other ways needs to be found to ensure
recognition of a person's prerogatives concerning her body parts. I have, however,
already rejected various weaker proposals, arguing they would not ensure a person's
prerogatives in relation to her body parts will be respected. This, however, may not
satisfy those raising the commodification objection, so I either have to undermine their
objection or accommodate their concerns. In this section, I give both of these possible
responses, and so conclude that this objection does not present an insurmountable
problem for my proposal.

i. Undermining the Commodification Objection

Many, if not all, explanations of why selling her body parts should not be permitted at
some point appeal to notions such as dignity or degradation. As argued in the
previous section, though, even the more detailed philosophical arguments of this type do not clearly explain why treating human body parts as commodities is degrading or contrary to a person's dignity. Much depends on the notion of dignity being used. In some explanations, the Kantian notion of a person's having dignity in virtue of her capacity to be rational and moral is invoked. As indicated above, though, this notion of dignity has broader implications than just that human body parts should not be treated as commodities. So those who cite Kant in this context either have to adopt his other prohibitions relating to a person's treatment of her body parts or, alternatively, justify rejecting those further prohibitions, whilst accepting those which support their arguments. Alternatively a broader notion that all persons, and perhaps even some human beings that are not or no longer considered to be persons (such as handicapped infants or the comatose), should be treated with dignity may be invoked, but then there is no adequate explanation for how a person's dignity would be affronted, if her body parts were treated as commodities, either by herself or someone else.

In chapter three I discussed, endorsed and expanded on Sharon Perley's argument that a person may have a morally significant, specifically a dignitary, interest in part of her body removed for therapeutic reasons. Such interests arise from a person's continuing to identify with an excised part of her body because it had previously been part of her body. For this reason, she may want that part to be treated in a way that is consistent with her values and beliefs. I argued further, in chapter four, that a person had a similar interest in what happened to her body parts after her death. I have argued that both these interests should be respected as part of protecting and promoting a person's dignity—precisely the aim of those who argue against treating human body parts as commodities.
My explanation of how the treatment of a person's body part relates to her dignity does not necessarily preclude a person from selling an excised part of her body, or gaining financially from their subsequent use. Similarly, my argument does not preclude the possibility of a person's giving directives that her body parts be sold after her death. For example, it would be perfectly consistent with an entrepreneur's goals, aspirations and values to give directives that part of her body removed for therapeutic reasons or that all or some of her body parts after death should be sold. So whilst it remains unclear why and how treating a person's body part as a commodity would be an affront to her dignity, the commodification objection, as it is currently stated, does not undermine my argument.

ii. Limited Ownership of Body Parts

Suppose, though, a moral reason with sound supporting arguments were provided for why human body parts should not be treated as commodities. This would not necessarily preclude a person from owning them, since it is possible, and perhaps in some cases desirable, for a person not to be permitted to sell something she owns. I have argued there are important reasons for recognising a person owns her body part, but none of these require that a person be permitted to sell her body parts. So, in order to accommodate concerns of those who raise the commodification objection against my proposal, the sense in which a person owned her body parts could be restricted, namely, she would not be permitted to sell her body parts.

A person's owning an object in a limited sense means she would not have some of the specific incidents of ownership in relation to that object. So, if a person owned an object but for some reason was not permitted to sell it, she would not have the relevant property rights in that object to alienate it by selling it. As discussed in chapter five,
there is no single property right that a person has to have over an object in order to own it. Rather, a rationale needs to be given why a person owns, and further what particular property rights she has in, an object, such as the moral argument I have given why a person *should* own her body parts.

So, if it *were* established that a person should not be permitted to sell her body parts, this may be sufficient to take steps to prohibit such transactions. My proposal could, however, still be adopted with the slight modification that the rights a person had in relation to her body parts in virtue of owning them would preclude those rights a person needs to have in an object before she is permitted to sell it. When a person owns an object in a restricted sense, it is usually clear which rights a person *does not* have in that object. This, however, may not be the case with a person's body parts.

Those who argue against human body parts being treated as commodities, and so would object to my proposal, at the same time seek to promote the donation of body parts for transplantation. Yet donating, giving away or indeed selling an object are all just different methods of alienation. Further, in some schemas of the various rights a person could have in an object she owns, for example Honore's incidents of ownership, it is the same right, or incident, that permits a person to alienate the object in various ways. So if the sole restriction on a person's owning her body parts is she should not be permitted to sell them, then she may only be restricted from exercising a particular property right in a particular way over her body parts.

My proposal that it should be recognised that a person owns her body parts can accommodate the concerns of those who object to human body parts being treated as commodities, namely, a person would own her body part in a *restricted sense*. The particular restriction, though, would not be that a person was not permitted to exercise
a particular incident (right) or ownership over her body parts, but rather that she is not permitted to exercise a particular incident in a particular way. It is possible, then, for a person to own her body parts, so that her prerogatives in relation to them will be recognised, but still be precluded from selling them. The question remains, though, whether there has to be such a restriction on the sense in which a person owns her body parts.

**CONCLUSION**

Usually, if a person owns something, she can sell it, although this is not always the case. Nevertheless, it is this connection between owning and selling that provides the basis for a moral objection that will probably be made against my argument that it should be recognised that a person owns her body parts. It is difficult, though, to identify what exactly is wrong with a person's selling her body parts. Even the more detailed philosophical arguments for this position do not explain how selling human body parts would contrary to a person dignity. Without such an explanation, objecting to a person's owning her body parts because she could then sell them does not constitute a substantial objection to my proposal. Should such an explanation be given at some later time, however, such concerns could be accommodated by my proposal, since a person could own her body parts in a sense which ensure recognition of her various prerogatives over her body parts, whilst also avoiding the predicted undesirable consequences of a potential market for human body parts. That is, a person could own, but not sell, her body parts. Either way, my proposal remains intact against the commodification objection.
CONCLUSION

In giving my argument why a person should be recognised as owning her body parts, I have only considered two specific medical uses of human body parts, though perhaps the most common ones: experimentation and transplantation. The only other way of treating human body parts I have discussed is destroying those parts that have been removed for therapeutic reasons. Further, I have limited my discussion to very specific sources of human body parts to be used for these purposes—the former using body parts removed from a person's body for therapeutic reasons, and the latter using parts from cadavers. Given that the underlying motivation for my argument is to ensure recognition of a person's prerogatives to determine what happens to her body parts, it may have broader implications.

Throughout this thesis I have discussed various aspects of the Moore case. The circumstances surrounding, the legal rulings relating to, and subsequent debate about, recommendations resulting from that case have provided a useful case study for determining the nature of, and basis for, a person's claims in relation to an excised part of her body. Consider, though, a variation on the circumstances of that case. Whilst a person who had one or two of her body parts removed for therapeutic reasons may be willing to consent to those parts being used for experimental purposes, she may also want to know the details of the proposed experiment and what, if any, other ways her excised body parts could be used.

If a person were concerned about what would happen to an object she owned when deciding whether to relinquish it for a particular purpose, she might make some enquiries. For example, someone who was asked to donate a family heirloom to a museum because it was historically significant may want to ensure the object was
suitably preserved or displayed rather than just being left in a box and allowed to
deteriorate. Further, she may insist on some form of contract to ensure the object is
treated in accord with her wishes. Whilst the person would relinquish her rights to
that object, such a contract would give her some form of redress if subsequently the
object was not treated accordingly.

So if it were recognised a person owned her body parts, then her prerogative to
determine what happens to any part removed for therapeutic reasons would go beyond
requiring her consent to a proposed use for that part. If, for example, there were
competing claims from different researchers to use that part, then *the person from
whose body the part has been removed* (rather than research committees) could choose
between the different projects. In making that choice she may consider the worthiness
of the various research proposals (for example if it aimed to prevent a non-preventable
childhood disease rather than a self-inflicted disease such as lung cancer), whether the
research was consistent with her beliefs and values, and whether any of the predicted
implications or consequences of the project reflected or were contrary to her beliefs.
Moreover, the legitimacy of that choice, as well as any request for further information
prior to making a choice, would be clarified if it was recognised that a person owned
her body parts.

In previous chapters, I discussed and tentatively endorsed the practice of designated
cadaver organ donation, that is where immediately prior to death a prospective donor
designates the recipient of one or more of her organs. I suggested that this practice
would allow a person greater flexibility if she chose to exercise her prerogative to
determine what happens to her body parts after her death, since she could not only
choose whether to make her body parts available for transplantation after her death but
also choose the recipients.
More generally, allowing a person to put restrictions on using her body parts for transplantation after her death, such as nominating the recipients or restricting which body parts could be used, would allow a person to better fulfil any interest she may have concerning what happens to her body parts after her death. I argued previously that there were certain similarities between a person giving directives as to how her body parts should be treated after her death and a bequest she may make in, for example, a will. A person is permitted to put restrictions on bequests, for example that a beneficiary has to obtain a certain age or fulfil certain requirements before receiving the object of the bequest. So, if it was recognised that a person owned her body parts, then not only would her directives concerning the use of her body parts for transplantation after her death be more likely to adhered to, but so would any restrictions that she chose to put on such bequests.

At the end of chapter two, I suggested the discrepancies between organ procurement policies and what happen in practice are a result of uncertainty about the relationship between a person and her body parts. I have argued that a person may have a morally significant interest in determining what happens to her body parts in certain circumstances. Further, these interests, and the associated prerogatives a person has in virtue of them, need to protected and promoted as part of respecting her autonomy and dignity. I contend that the best way of achieving this is to recognise a person owns her body parts. Whilst some of the reasons I have given in support of my contention are pragmatic, I suggest this type of relationship between a person and her body parts—that is, ownership—is both conceptual defensible and, for reasons given above, morally desirable.
BIBLIOGRAPHY


Chapman, F., 'The Life-and-Death Question of an Organ Market', *Fortune*, June 11, 1984, pp. 82-86


Dodds, S. Property and Persons: Arguments for Property Rights in the Liberal Tradition, PhD thesis, La Trobe University, 1993.


