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My Body, My Property

by Lori B. Andrews

Two recent cases raise the question: Should the body be considered a form of property? Patients generally do not share in the profits derived from the applications of research on their body parts and products. Nor is their consent for research required so long as the body part is unidentified and is removed in the course of treatment. A market in body parts and products would require consent to all categories of research and ensure that patients are protected from coercion and given the chance to be paid fairly for their contributions. Such a market might force us to rethink our policies prohibiting organ sales. Donors, recipients, and society will benefit from a market in body parts so long as owners—and no one else—retain control over their bodies.

In 1984 John Moore, a leukemia patient, had his spleen removed at the University of California at Los Angeles School of Medicine.¹ Moore claims that, without his knowledge or explicit consent, his physicians used his blood to develop the patented

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and commercially valuable Mo cell line. He began to suspect that his blood was being used for purposes beyond his personal care when the UCLA cancer specialists offered to pay his airfare and hotel expenses to Los Angeles in order to take further blood samples.² The physicians claimed that Moore waived his interest in his body parts when he signed a general consent form giving the UCLA pathology department the right to dispose of removed organs. This dispute is currently in litigation.

Moore's case is not unique. At the University of California, San Diego, Hideaki Hagiwara, a post-doctoral biology student, suggested to faculty member Ivor Royston that a human monoclonal antibody be made with cancer cells from Hagiwara's mother. Once the new cell line was created, Dr. Hagiwara felt his family had an economic interest in the new cell line since he had proposed the project and his mother had provided the original cells. Dr. Royston disagreed, since he and his colleagues had invented the procedure and created the parent cell line that made the production of the human monoclonal antibodies possible. A settlement was ultimately reached, giving the University of California the patent and the Hagiwaras an exclusive license for the cell line in Japan and Asia.

Should a patient have a right to control what will be done to his or her body parts and receive compensation when they are put to research, diagnostic, or therapeutic uses? The issue has been debated in recent professional symposia³ and congressional hearings,⁴ and inspired the formation of an Office of Technology Assessment working group.⁵ According to a survey conducted by a House subcommittee,⁶ about half of the eighty-one responding medical schools now use patients' fluids or tissues for research, accounting for one-fifth of the patent applications the schools had filed in the previous five years. Overall, the schools reported a 300 percent increase in patents with origins in patients' tissues or fluids from 1975-1979 to 1980-1984. One way to grapple with questions of control and compensation is to consider the body as a form of property.

Tangible items are generally considered to be property. As new potentials for body parts unfold in research, diagnostics, and therapy, the question arises—should they be considered property as well? Current policy allows people to donate solid organs, but not to sell them. A federal law forbids sales of organs for transplant in interstate commerce⁷ and certain state laws ban payment for specified organs as well.⁸ This perspective—that bodily parts and products are gifts, not compensable items of property—underlies researchers' use of a patient's tissue to produce potentially marketable products.

The Property Approach and Individual Control

Throughout the legal lore, judges have reacted with horror to the idea that body parts may be property. Nevertheless, many legal decisions treat the body as a type of property. The law allows me to make gifts of certain body parts and even to destroy my body entirely. Not only do I have a property-like interest in my own body, I may have rights that could be considered property rights in other people's bodies. Tort law allows me to recover for harm to my child, much as it allows me recovery for damage to my car. In most instances, I can collect damages if an autopsy is performed on my next of kin without my consent.

Since the legal treatment of bodies and body parts sounds suspiciously like property treatment, why is there such a reluctance to label it as such? One major fear is that bodily property could be transferred to others (the legal term is alienable) and we could become slaves, not in a market for our bodies, but in a market for body parts. However, characterizing body parts as property does not mean that they must be completely transferrable. As Susan Rose-Ackerman points out, many forms of property have restrictions on alienability.⁹ There may be restrictions on who holds them, what actions are required or forbidden, and what kinds of transfers are permitted. Some types of properties can be given as gifts, but not sold (items made of the fur or feathers of endangered species, for example). Other types of properties (such as the holdings of a person who is bankrupt) can be sold, but not given as gifts.

Even under current policy, the body can be considered property, the kind of property that can be transferred without payment, but not sold. However, restraints on payment need strong moral and legal justification. The Ontario Law Reform Commission recently faced the issue of paying for body parts in the context of artificial reproduction. After deciding that donating sperm, eggs, or embryos was ethically, morally, and socially acceptable, the Commission noted that any restriction on available services (for example, by prohibiting commercial banks for gametes and embryos) "must be scrutinized very carefully; it would be futile and frustrating to give with one hand, only to take with the other."¹⁰

The property approach recognizes people's interest in controlling what happens to their body parts. It provides a legal basis for a remedy as theories of privacy, autonomy, or assault do not when inappropriate actions are taken with respect to extracorporeal bodily materials. The presumption that the authority belongs to the individual who provided the body parts would be a starting point, which would at least assure that the regulatory and

institutional policies developed be measured against some standard.

Without characterizing the body as some form of property, theft or other harm to dead bodies or extracorporeal body parts is difficult to prosecute. Early American cases dealing with the disinterment of bodies recognized this problem and created the category of quasi-property to deal with it. For example, the court in an 1872 Rhode Island case noted:

That there is no right of property in a dead body, using the word in its ordinary sense, may well be admitted. Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by the universal feelings of mankind to be discharged by someone towards the dead; a duty, and we may also say a right, to protect from violation; it may, therefore, be considered as a sort of *quasi* property, and it would be discreditable to any system of law not to provide a remedy in such a case....¹¹

The Supreme Court of Minnesota in 1891 went one step further by holding that, to the person who has the right to possess the cadaver for burial, it "is his property in the broadest and most general sense of the term...."¹²

If the body is not treated as property or at least quasi-property, we may be without remedies in some instances. Paul Matthews, pointing out that dead bodies and body parts are not considered goods under English law for purposes of the torts act or commercial code asks, "If the ashes of X, a celebrity, are without consent 'removed' and (say) later auctioned at a London auction-house, can anything be done by X's next-of-kin, or personal representatives?"¹³ Matthews argues that dead bodies and body parts should be characterized as property so that interference with them could be considered a tort.

People have an interest in what will happen to their extracorporeal body parts, while they are alive and even after they die. Yet protection of that interest now tenuously rests on precarious doctrines that protect people from emotional distress. In a 1973 case, physicians at Columbia Presbyterian Hospital in New York City attempted to fertilize a woman's egg with her husband's sperm. Without consultation with the physicians or the couple, the department chairman removed the culture from the incubator and destroyed it. The couple, Mr. and Mrs. Del Zio, sued the department chairman and the hospital's trustees, charging conversion of personal property and intentional infliction of emotional distress.¹⁴ The jury rejected the property claim but awarded plaintiffs damages for the emotional distress. Mrs. Del Zio

was awarded \$50,000 for emotional distress and Mr. Del Zio was awarded \$3.00. It is ironic that Mr. Del Zio was compensated so poorly and that the contents of the petri dish were not considered property since sperm is sold; thus Mr. Del Zio's contribution could have been viewed as having had a market value exceeding \$3.00.

Advances in reproductive technology now frequently require people to entrust their gametes or embryos to the care of the physician, laboratory worker, or health care facility. Yet if body parts are not considered property, there may be little protection for people who entrust their bodily materials to others. Traditionally, courts have allowed people to receive damages for emotional harm only if it accompanied an actual physical injury or physical impact to the party. If negligence brings about the loss of an embryo or other extracorporeal body part, there will be a cause of action only in nine states;¹⁵ the rest allow recovery only if the negligence caused a physical impact on the plaintiffs. Even if the harmful action was intentional, at least twelve states do not award damages absent physical impact.¹⁶ In addition, there may be a cap on the amounts recoverable for emotional distress; thus the individual or couple may not be adequately compensated.

In the absence of a property approach, attempts have been made to limit the control people have over their extracorporeal body parts. Thus proposals have been made for transferring organs from a cadaver when the person did not grant consent before death or expressly refused consent. This apparently is already done without specific authorization in many instances in which physicians remove cartilage, tendons, bones, or corneas from cadavers.¹⁷ In Hawaii, consent to an autopsy allows the physician to use the removed tissue, including fetal material, "for necessary or advisable scientific investigation, including research, teaching and therapeutic purposes."¹⁸ Such takings may assault religious convictions and personal beliefs. Their proponents fall into the trap of considering the body as the sum of its physical parts without considering the emotional, intellectual, and religious nature of people before their deaths.

As policies covering inheritance make clear, our society recognizes the important psychological benefit to people when they are alive of determining what will happen to their property after death. There is a similar psychological benefit to them, and often to their relatives, in knowing that society will honor their wishes about disposing of their bodies after death.¹⁹ The inappropriate treatment of a cadaver can cause psychological harm to relatives. In one incident, Mrs. Lott, an Orthodox Jew, and Mrs. Tumminelli, a Roman Catholic, died within an hour

at the same hospital. The bodies were mixed up and Mrs. Lott's corpse was embalmed, made up with cosmetics, and put in a coffin with a rosary and crucifix. Mrs. Tumminelli's body was prepared for an Orthodox Jewish burial. The relatives of each woman sued and recovered damages for mental suffering.²⁰

Joel Feinberg dismisses the psychological harm to dying people and their relatives of taking organs from a loved one. He argues that "it is difficult to understand how the thought of bodies having their organs removed before burial can be more depressing than the thought of them festering in the cold ground or going up in flames."²¹ He criticizes people who object to routine organ salvaging as overly sentimental or superstitious. But this overlooks the importance that beliefs, acculturation, and values have on people's choices. From childhood, people grow accustomed to a certain view of how the dead should be treated, a view shaped by their familial and religious upbringing. Someone who has lived with a view that might emphasize the wholeness of the body at interment for a proper afterlife could understandably object to being condemned to a radically different fate.²²

In a Gallup poll, 20 percent of respondents said they would not donate organs because they did not like the idea of being cut up after they died.²³ Psychological concern for body parts may be even greater among people who have undergone surgery. In one case, a patient's left eyeball had been surgically removed and was about to be examined for cancer when it was lost down a sink drain. The Texas Court of Civil Appeals, in acknowledging that the patient had a cause of action for negligence, recognized that individuals can be emotionally traumatized to the point of physical injury by the way their extracorporeal body parts are treated.²⁴

Some lawyers and researchers argue that there is no need to inform people that body parts removed in the course of treatment may be used for research or commercial purposes, so long as the patient is not exposed to any additional physical risk due to the research. Currently, under federal regulations covering federally funded research, consent is not required to do research on such pathological or diagnostic specimens, so long as the subjects cannot be identified.²⁵ In such cases, consent is given under the general hospital admission form, which states that the part may be used for teaching or research before it is destroyed. But the hospital consent form does not say that the patient may refuse to allow bodily materials to be used and still retain the patient/physician relationship and be treated. Only when the human material is taken primarily for research purposes is consent required. Even then,

if the research poses "no more than minimal risk" and involves only collection of some body excretions, including blood, placenta or amniotic fluid, it may be given an expedited review by an Institutional Review Board; while consent is not specifically required, presumably the IRB can seek consent if the subjects are identifiable.²⁶ The failure to extend consent to all categories of research on human body parts and the failure even to raise the issue of compensation puts patients at a distinct psychological and economic disadvantage.

In *The Mother Machine*, Gena Corea raises serious questions about whether doctors have obtained eggs and embryos from women without their consent. She points out that, in the published studies on research using women's eggs, "there is, in almost every case, no indication that the women consented to the extraction of their eggs or even knew that their eggs had been taken."²⁷ In order to give weight to the biological parents' wishes regarding gametes and embryos, the American Fertility Society in its Ethical Statement on *In Vitro* Fertilization specifically refers to sperm, eggs, and embryos as the property of the individuals who provide them.²⁸

The lack of additional physical harm to the patient should not be determinative of the ethical or legal rights of the patient. No physical harm comes to a woman if I snap her photo and sell it commercially, yet the law considers that I have taken something of value from her. It is even considered improper and actionable if a physician publishes a photo in a medical journal without the patient's permission.²⁹

With a tangible body part, it is even easier to see the harm that may result from commercialization without the person's consent. Some researchers argue that the patient need not be told of the possibility of profit since the body part was not of commercial value to the patient. However, there are numerous markets where something valueless to one person is coveted by someone else. (This is the principle behind garage sales.) Moreover, it does not matter that the patient does not have the resources or opportunity to make the same use of the material as the researcher. If a person discovered oil in his back yard, it would not matter that he did not possess a refinery to process it. He would still expect payment for transfer of the resource to an oil company, and would be harmed if he did not receive it.

Nor should it make a difference that people did not expect compensation for body parts in the past. Scientists revel in the example of people wantonly parting with body wastes such as urine and feces all the time. Since people treat these excretions as valueless, they ask, why should scientists have to pay for them? This overlooks the fact that people might

indeed view body products differently if they knew there was a possibility of a commercial market. Once valueless does not imply always valueless. Many markets have developed for seemingly worthless by-products such as sawdust.

Similarly, a patient's right to information before consenting to a treatment is not contingent upon physical harm. Even if a treatment is beneficial, the physician breaches an ethical and legal duty by not providing sufficient information in advance. In some instances, the doctrine of informed consent itself might mandate disclosure of the physician's or colleague's intent to engage in research on, or commercially exploit, the excised organs, tissues, or fluids. One important purpose of the informed consent doctrine is to protect people from unnecessary procedures that serve the physicians' pecuniary or personal motives.³⁰ If a patient learns that her physician is engaged in research, she may legitimately wish to get a second opinion from another physician whose diagnosis is not colored by the need for a large sample size or the promise of commercialization. Or she may wish to have the surgery done by an equally competent physician/researcher who offers to compensate her for her participation in the research. Throughout medical care, the relative costs of alternative treatments or the same treatments performed by competing practitioners are becoming increasingly important.

There is support for informing patients about the potential uses of the body parts, even among groups that now gain commercially from using those parts. The Licensing Executive Society Biotechnology Committee recently surveyed its members, who generally represent organizations that use human tissues, fluids, or cells for research or development purposes. Of those responding, twenty-two believed that research or commercialization should occur *only* with the patient's prior consent; two felt consent was unnecessary. Thirteen felt that a person has a right to receive compensation for the use of his or her fluid, tissues, or cells, while eight did not.

The Market's Effect on Donors

The property approach requires the individual's consent before her body parts can be used by others. But in some instances body parts—such as kidneys or corneas—may be in such short supply or a particular patient may have such a rare tissue or fluid type that the issue of payment to donors will arise, as it did in the Moore and Hagiwara cases.

The criticisms of a market for body parts focus on potential harms to the donor, the recipient, and society. In organ transplantation, Congress and some state legislatures have already decided to

prohibit payment out of fear that poor, minority, or otherwise vulnerable people will be coerced to exchange body parts for money. Is this prohibition justified? And should it apply to the sale of bodily materials in other circumstances?

In its harshest form, allowing payment to living persons who donate solid organs could lead society to view poor people as suddenly having capital and consequently being ineligible for welfare benefits.³¹ (A man with a \$50,000 kidney, like a man with \$50,000 in the bank, would not qualify for welfare.³²) Such a society would include among its citizens walking human carcasses whose need for money has led them to go under the knife. These individuals would be doubly cursed. Not only would they have to give up precious body parts but, to the extent that the operations left them physically disabled or different looking (sans eye or limb, for example), they might be shunned.³³ Given society's deplorable track record in caring for the disabled, creating more disabled individuals seems immoral.

Suppose a person's body parts were not taken into account in determining his or her net worth. Even then there is concern that allowing payment for body parts could unduly coerce the poor to donate. The strongest argument against paying donors is that people in dire straits will consent to debilitating surgeries out of a desperate need for money. But banning payment on ethical grounds to prevent such scenarios overlooks one important fact: to the person who needs money to feed his children or to purchase medical care for her parent, the option of not selling a body part is worse than the option of selling it. Society has not benefited individuals by banning organ sales unless it also provides a means to escape desperate conditions.

Naturally, the need for money is not a justification for any action (we would not want the person to become a contract killer for a fee). But it is difficult to justify a prohibition on payment for what otherwise would be a legal and ethical act—giving up body parts for someone else's valid use. Similarly, the analogy to slavery is inapposite. We do not want people to sell themselves into slavery *nor* do we want them to "give" themselves into slavery without pay. In contrast, with respect to organ donation or the development of a diagnostic or therapeutic product from bodily materials, the underlying activity is one we want to encourage.

Where regenerative bodily products are concerned—blood, sweat, and semen or, arguably, embryos—the criticism is even less justified, assuming that the product can be removed safely. In any paid labor, we are giving our body. For example, in response to the idea that a poor woman may be coerced into serving as a surrogate mother

despite the risks due to the fee, Laurence Karp and Roger Donahue point out that "it seems inconsistent to categorically deny such women this kind of livelihood while we permit and even encourage people to earn money by such dangerous means as coal mining, or racing little cars around a track at 200 miles per hour."³⁴ In some instances—professional boxing—the assaults to the body are obvious. In others they may be more subtle. The scholar chugging coffee in front of a glowering word processor is damaging her body as well.

It is not the payment that harms the body, but the physical risk to the person of removing the body part or the subsequent risk of living without it. Neither of these risks is present where the sale of a body part becomes effective on the person's death. And when a person donates a body part while alive, the physical risks vary considerably depending on what the part is and how it is removed.

How much risk should a paid donor be allowed to run? One way of deciding would be to compare the level of risk people face when they donate organs with the risk of selling another product of their body, their labor. Along those lines, sales of regenerative body parts seem to present less potential physical harm than do many jobs (such as firefighting).

Giving up a heart or other nonregenerative body part that invariably causes death goes beyond the types of sacrifices that paid labor may demand. Arguably, such sacrifices should be prevented, whether for fee or for free. But an intermediary case—giving up kidneys or other nonregenerative body parts, which does not cause death—does not on its face justify such a drastic prohibition. The risk to a healthy thirty-five-year-old in donating a kidney is the same as the risk in driving a car sixteen miles every working day.³⁵ Moreover, allowing a market in body parts could reduce the use of (and thus the physical harms to) living donors, since more people may decide to sell their body parts upon death than currently donate them.

Physicians have adopted an odd view of risks to organ donors. Transplant surgeons traditionally have maintained that removing a kidney from a live donor presents minimal health risks. "However," Arthur Caplan points out, "when the proposal was made to buy and sell kidneys what had historically been deemed 'minimal risks' suddenly escalated into intolerable dangers when profit became an obvious motive!"³⁶ I have found a similar shift in perspective among infertility specialists, who describe as safe the ovarian stimulation, laparoscopy, and anesthesia used to harvest eggs from patients undergoing *in vitro* fertilization. Yet they say that same process is too dangerous to be undertaken by a woman who wishes to be a paid egg donor.

Guarding Against Coercion

Part of the concern with selling body parts or doing risky paid labor rests on the belief that people should enter into these transactions voluntarily. Courts do not order specific performance when an individual, such as an opera singer, reneges on a job. Voluntariness should have its counterpart in body part donation as well. In 1890 a man sold the Royal Caroline Institute in Sweden the rights to his body after death. Later, he tried to refund the money and cancel the contract. In the subsequent lawsuit, the court held that he must turn his body over to the Institute and also ordered him to pay damages for diminishing the worth of his body by having two teeth removed.³⁷ In contrast, in the U.S., under the Uniform Anatomical Gift Act, promises to donate body parts upon death are revocable. With living donors, revocation should be allowed up until the time the transfer is made.

Just as we would not condone a labor system that did not allow people to choose their own employers, we should insist that paid donations from living people be voluntary: that is, made by the person himself or herself. It is one thing for people to have the right to treat their own bodies as property, quite another to allow others to treat a person as property. A hospital should not be allowed to take, sell, and use blood or eggs from a comatose woman to help pay her costs of hospitalization. People should be prohibited from selling their relative's body parts when the relative dies (unless the deceased left orders to that effect). Nor should judges be allowed to sentence offenders to pay their fines in body product donations (once the property approach has established a market value for them). If this seems farfetched, consider that there already have been instances in which judges sentenced defendants to give blood transfusions. Similarly, an eighteenth-century British statute allowed judges to order anatomical dissection of hanged murderers.³⁸ It is possible to maintain that people are priceless by not allowing others to treat a person's body commercially either before or after death and by giving people the power to refuse to sell their body parts.

A decision to sell certain types of body parts—nonregenerative ones (such as a kidney) or parts that could give rise to offspring (sperm, eggs, and embryos)—has lifelong implications. With respect to other decisions of long-lasting consequences (such as marriage), society has sometimes adopted added protections to assure that the decision has been carefully made. A similar approach might be used with regard to body parts. In this area, only competent adults should be allowed to decide to sell. There should be a short waiting period (like

the cooling-off period that protects consumers from door-to-door salesmen) between the agreement to sell an organ and its removal, and the donor should be required to observe certain formalities (such as signing a witnessed consent form).

Only the person who owns the body part should be allowed to sell it. This approach has two goals. The first is to assure that others do not treat one's body as property. For example, it will prevent the harms associated with holding the body as security until funeral costs are paid.³⁹ The second is to attempt to assure that the individual is adequately compensated for the body part by limiting the amount any middleman receives. If the middleman cannot "sell" the part, but can only be compensated for bringing together the donor and recipient, the donor may more likely receive adequate compensation and the transaction will less likely be viewed as excessively commercial. There might even be limitations on what the middleman (physician or entrepreneur) receives, similar to the statutory limitation in some states of "reasonableness" in the amount of money an attorney receives in connection with arranging a private adoption.

One state already has adopted an approach similar to the one I am advocating here. A California statute prohibits a person from knowingly acquiring, receiving, selling, or promoting the transfer or otherwise transferring any organ for transplantation for valuable consideration. The law is directed against brokering organs rather than the direct selling from a donor to a recipient. There is an exception to the ban on selling and buying for "the person from whom the organ is removed, [or]... the person who receives the transplant, or those persons' next-of-kin who assisted in obtaining the organ for purposes of transplantation."⁴⁰

This approach may also have the additional benefit in rare instances of preventing crimes. Much of the original horror with recognizing commercial value in the body or its parts resulted from cases in which people fell prey to murderers who sold their bodies to medical schools for research. Even in the past decade, there have been cases where mortuary technicians have illicitly sold tissues and organs of corpses.⁴¹ Limiting some parties' ability to sell the body parts does not undermine the property approach. Zoning laws restrict the uses that can be made of land, yet it is still considered property. Similarly, restrictions in a closed corporation on who may buy shares of stock or in a cooperative apartment on who may buy a unit do not undermine their status as property.

Giving an individual sole rights over his or her body parts is in keeping with attitudes toward the body held in other areas of law. Attempted suicide

and suicide are no longer considered crimes.⁴² However, aiding and abetting a suicide is a crime. Competent individuals can refuse a readily available lifesaving treatment, but their physicians cannot withhold it. Thus, people are allowed to control what is done to their bodies (even to the point of physical damage) in ways that other individuals are not.

Ironically, our current policy is just the reverse. Other people seem to have property rights in our body parts, but we do not. In a British case, an accused man who poured his urine sample down the sink was found guilty of stealing it from the police department.⁴³ And although an individual has no property interest in his or her cell lines, scientists are quick to claim a property interest in those cell lines. Such a claim was the basis of a six-year conflict between microbiologist Leonard Hayflick and the National Institutes of Health. The conflict was over which side owned a cell line that Hayflick had developed with embryonic living tissue under NIH funding and then sold to scientists around the world.⁴⁴

The notion that other people may own our body parts while we may not has an historical basis. In England, even though courts said people had no property rights in their body, until 1804 creditors apparently had such rights since they could arrest dead bodies for a debt. For example, the poet Dryden's body was arrested as it was being transported for burial.⁴⁵ And in feudal times, it was a crime to maim oneself because this rendered one less able to fight for the king.⁴⁶ Thus, the common law basis for preventing people from voluntarily transferring their body parts (which was later interpreted to prohibit even gratuitous organ donation) may not have its roots in the view that the body is sacred and that people should not be objectified as property. Rather, it may arise from the notion that people were the property of the Crown.

The Market's Effect on Recipients

We can protect potential donors from the market's effect by attempting to assure that donations are voluntary and by limiting donations to body parts that do not unreasonably affect the person's ability to function. But how does a market affect potential recipients? The policy of prohibiting payment for body parts and products has been justified as protecting potential recipients by raising the quality of donations and preventing a situation in which body parts are affordable only by the rich.

The work of Richard Titmuss on policies governing blood donation raised serious questions of quality control, when blood is sold.⁴⁷ Among other

things, he argued that paid donors have an incentive not to disclose illnesses or characteristics that might make their blood of dubious quality. Subsequent work by Harvey Sapolsky and Stan Finkelstein⁴⁸ challenged Titmuss's conclusions. They pointed to a Government Accounting Office study in which some voluntary groups in the United States reported hepatitis rates as high as the worst paid groups; and some commercially collected blood was nearly as good as the best of the volunteer blood.

Even if paid donors are more likely to misrepresent their condition than are volunteer donors, payment need not be banned on quality control grounds since tests are available to assess the fitness of the donor. In this country we allow payment for blood and sperm, although it is easy to lie about their quality; yet we do not allow payment for body organs such as kidneys, although organ transplantation offers more independent checks on quality. Nor is banning payment the only mechanism to enhance quality, since if known risks are not disclosed, liability may follow. While this may not offer sufficient protection to the recipients of blood (since donors may not be solvent), organ donors would be better paid and a portion of that money could be used to buy insurance. When a person sells organs contingent on death, payment to an estate could be withheld if it was clear that he failed to disclose a known harmful condition. Already, the Ontario Law Reform Commission has recommended enacting a criminal law prohibiting people selling their gametes from knowingly concealing infectious and genetic disorders.

A market in solid organs is also thought harmful to potential recipients because of the possibility that only the rich will be able to afford organs. On the issue of the poor selling and the rich buying body parts, Thomas Murray says, "Our consciences can tolerate considerable injustice, but such naked, undisguised profiteering in life would be too much for us."⁴⁹ Yet other equally troublesome but less visible inequities are already occurring in allocating other kinds of medical care. When a drug company prices a medication necessary for someone's life beyond a person's reach or a physician with unique skills refuses to accept patients who receive Medicare, that is also profiteering in life, but the injustice may be overlooked. Currently at least fifty different types of artificial body parts (such as artificial blood vessels and joints) have been designed to substitute for human ones.⁵⁰ It is as important ethically to address discrimination between rich and poor recipients with respect to those products as it is with respect to human body parts. A visible market in body parts may lull people out of complacency to address more general issues of allocation in health care.

If we were to ban payment for all body parts (including blood) in this country, we could not sit back, assured that we had eliminated coercion of the poor. Even today, American drug companies undertake plasma collection in Third World countries throughout Latin America and Asia to meet the needs for plasma products here. People in poor countries are giving of their bodies for people in rich countries. Perhaps we should struggle to assure noncommercialization of human body products in all countries. But if this reduced the blood supply, doctors might have to turn down some patients who needed surgery. Would proponents of total market bans support that outcome?

Quality and cost issues raised by the sale of body parts are similar to issues raised by other medical treatments. Thus they should be handled in the same way with attempts to enhance the quality of care, the informed consent process, access to medical services, and so forth. A market for solid organs may even diminish risks to the recipient. If more organs were available, it would become easier to avoid rejection and recipients who would have died for lack of an organ might gain a chance to live.

The Market's Effect on Society

Will a market in body parts harm society by creating an attitude that people are commodities? The body is a symbol of the whole person and degrading it can be viewed as an assault to the whole person. Our distaste with viewing the body as property is, in part, a reaction to our belief that human beings should have no price.

Certainly people are more than the sum of their parts.⁵¹ But treating the body as property does not mean it is a person's only property. Cognitive functions can be included within the property characterization. Indeed, they already are, for example, under the legal doctrine of copyright, patent, and other so-called "intellectual property" rights. I view my uniqueness as a person as more related to my intellectual products than my bodily products. (Definitions of personhood, for example, rarely revolve around the possession of body parts, but rather focus on sentience or other cognitive traits.) Arguably it commercializes me less as a person to sell my bone marrow than to sell my intellectual products. Thus, I do not view payment of body parts as commercializing people. The danger I see in the sale of a physical (as opposed to a mental) bodily product comes from the potential for physical harm in removing the bodily material or living without it. This danger can be handled by limiting the types of body parts that can be sold and the circumstances under which they can be sold.

Selling body parts has also been criticized as harmful to society because it could diminish altruism. But in our society, the basics of life—food, shelter, health care—are already sold. Nevertheless, many people continue to act altruistically, devoting time, money, or goods to provide needy people with those basics. The possibility of selling tissue or organs seems only a modest further step toward a market, unlikely to change vastly the impulse toward altruism. Even people who take advantage of the market may engage in altruistic behavior. One patient, Ted Slavin, received up to \$10.00 per milliliter from commercial enterprises for his blood, which was used in manufacturing diagnostic kits for hepatitis B virus. At the same time, he provided additional blood—at no charge—to a research project at the Fox Chase Cancer Center, which used it to develop a vaccine against hepatitis B.⁵²

Where a family member or friend is concerned, donation is likely to remain purely voluntary even if payment is allowed; thus the ban on payment cannot be justified as promoting personal altruism based on family or friendship ties. In contrast, donation to strangers is, as Kenneth Arrow notes, a "diffuse expression of confidence by individuals in the workings of society as a whole." Arrow questions whether there is merit to advancing that form of giving since "such an expression of impersonal altruism is as far removed from the feelings of personal altruism as any market place."⁵³

Moreover, an argument can be made that neither personal nor societal altruism is furthered by a ban on payment. Are people really more virtuous when they perform a particular act once the temptation to perform a contrary act has been removed by law? As Milton wrote in *Areopagitica*, "I cannot praise a fugitive and cloistered virtue... that never sallies out and sees her adversary."

Allowing individuals to treat parts of their bodies as property is also said to be conducive to allowing others to treat them as property. According to this argument, if we view the primary object, the body part, as marketable, this will lead us to treat the secondary object, the individual person, as a commodity. As Joel Feinberg points out, however, "The weakness of the argument consists in the difficulty of showing that the alleged coarsening effects really do transfer from primary to secondary objects."

The issue of commodification goes far beyond the question of payment for human organs, tissues, and waste products. A variety of components of our social and legal structure have been criticized as commodifying people. The idea that biological parents have a greater right to control over their children than do other members of the community

has been criticized by some feminists as treating children as property. Richard Abel, in a far-ranging critique of the American tort system, has argued that damages should not be allowed for pain and suffering because that inappropriately commodifies our emotions.⁵⁴

To guard against the appearance that people are commodities we must not let other people treat one's body parts as property. Body parts will thus not be salable in the sense of cars, farm animals, or baseball cards. There will be no means for a tax man or physician to put a lien against a person's body parts. Nor can relatives choose to sell a person's parts after his or her death. This might better be called a quasi-property approach. However, it differs from previous notions of quasi-property by recognizing the right of an individual to compensation for certain types of body parts. Under this approach human beings have the right to treat certain physical parts of their bodies as objects for possession, gift, and trade, but they do not become objects so long as others cannot treat them as property.

The Market's Effect on the Doctor/Patient Relationship

The treatment of body parts as property will help curtail activities by physicians, researchers, and their attorneys that deny individuals information about or control over body parts that will be removed.

Implicit in many arguments made by physician/researchers is that the removed body part belongs to the doctor, not the patient. Why do physicians feel that way? I can only speculate that it is because society allows medical practitioners to do things to a patient's body (for example, cut it up) that no one else (other than the patient) is allowed to do. Perhaps this gives physicians the feeling that the patient's body belongs in some sense to them.

Physicians argue that getting patients' permission to use their body parts and products would change the relationship between patients and physicians or researchers. Some argue that discussing the research with the patient may imply that a patient has a right to direct the scope or direction of the study. But that is absurd. Just because IBM is required to make certain disclosures to me when I buy a share of stock does not mean that I can set policy for the operation of the company.

Related to this is an argument that paying for the patient's cells, tissue, fluids, or organs would tie up physicians in endless negotiation with their patients. But when payment for human biological material is required, it is no more disastrous to the research enterprise than payment for pipettes, microscopes, animals, or laboratory equipment. It

may represent a modest increase in the cost of doing business (just as an increase in fuel prices would raise the costs of lighting the laboratory). But the money paid would go to a good cause, slightly enhancing the resources of medical patients at a time when they need money to pay for medical care. If the patient is unwilling to sell rights to the biological materials, the physician need not barter; she can simply avoid using that specimen and approach other patients. Moreover, we allow the patient to pay the physician for services without being concerned that it will lead to endless negotiations.

It is time to start acknowledging that people's body parts are their personal property. This is distinguishable from the past characterizations of people as property, which were immoral because they failed to take into account the nonbodily aspects of the individual (blacks and women were deemed incapable of rational thought) and they created the rights of ownership of others (masters, husbands, parents). Allowing people to transfer and sell their own body parts, while protecting them from coercion, does not present those dangers.

Just as physicians raise the price of their services to cover rising malpractice insurance rates, so they will charge slightly more for the right to use the specimens of some patients for research. If it strikes you as unfair (it does me) to force patients to pay for the research by increasing medical costs, consider that under the current system the "cost" of the human specimens is borne entirely by the patients who own them and who do not even get in return a right to refuse to participate.

Another reason has been advanced against disclosure: it would decrease patient-physician trust if the patient were aware that the physician might develop a commercial product from the patient's body parts. Yet this begs the question of whether the information is relevant. It might diminish the patient's trust to know the success rate and unnecessary surgery rates of a practitioner or health care facility; yet this information is clearly relevant to patient decision making.

There is a similar concern that disclosing the commercial potential of human body parts may tarnish the image of the researchers by making it appear that profit rather than scientific knowledge is their goal. However, the media is already informing the public about the relationship between

researchers and the corporate sector. "The public cannot help but see that the goals of some scientists—clinical or basic—are different than in the past," says Leon Rosenberg, dean of the Yale University School of Medicine. "The biotechnology revolution has moved us, literally or figuratively, from the class room to the board room and from the *New England Journal* to the *Wall Street Journal*."⁵⁵

Finally, people point to the difficulty of assigning values to body parts as an implicit barrier to the property approach. But the value of many items that are currently bought and sold (such as paintings or jewels) is difficult to assess. This is no reason to prohibit the market from developing a particular price.

Arguments about the difficulty in assessing the value of a patient's contribution to research take a variety of forms. Some argue that the patient's contribution is too small to warrant compensation compared to the contribution of researchers and other participants. Yet if a person designs and makes a car, she expects to have to pay for even the smallest screw she uses—though her contribution and the contribution of the other materials vastly overwhelms the role of the screw. Others argue that so many people contribute to a particular advance (for example, 7,000 pituitary glands were used to research the molecular structure of ACTH⁵⁶) that it would be difficult to compensate all of them. Yet large companies have little trouble devising a means to allocate payment among thousands of employees, suppliers, and stockholders. It is also argued that it may be unfair to compensate the patient whose bodily material is used to make a commercially exploitable product, since many other patients' materials were used in research leading up to this advance (and thus it is difficult to measure that particular patient's contribution). That criticism has no more merit than claiming that a scientist should not be paid since he or she is building upon work done by previous researchers.

In fact, determining worth is problematic only when the contribution is evaluated after the fact. There is no compelling reason why before-the-fact contracts should not be made in which the buyer and seller themselves agree on a price (as they do in many other market transactions). Unless the contract involves unconscionable coercion, there is no ethical reason to intervene in the bargain struck between them. Nor does it seem appropriate for policy makers to grapple around in advance for a formula by which to set the price (such as a formula based on how much the bodily material had been altered by the scientist).

In a variation on the value argument physician/researchers seem to imply that the patient has

already been paid for the body part by receiving the benefits of the surgery. John Moore, for example, was allegedly helped by his treatment at UCLA. (This argument is harder to make when the patient dies or otherwise does not recover.) But patients may feel they have already paid for their health benefits in the price of the surgery. The patient has a right to know about the research so that she can choose the "price" she is willing to pay for the surgery. Perhaps she would rather choose a surgeon whose price is set solely in terms of dollars and insurance coverage rather than one who commercially exploits, say, her ovaries.

The Future of the Body as Property

Some of the finest advances in society have resulted from a refusal to characterize human beings (blacks, women, children) as property. Why, then, am I arguing for a property approach here? Let me emphasize that I am advocating not that people be treated by others as property, but only that they have the autonomy to treat their own parts as property, particularly their regenerative parts. Such an approach is helpful, rather than harmful, to people's well-being. It offers potential psychological, physical, and economic benefits to individuals and provides a framework for handling evolving issues regarding the control of extracorporeal biological materials.

It is time to start acknowledging that people's body parts are their personal property. This is distinguishable from the past characterizations of people as property, which were immoral because they failed to take into account the nonbodily aspects of the individual (blacks and women were deemed incapable of rational thought) and they created the rights of ownership by others (masters, husbands, parents). Allowing people to transfer and sell their own body parts, while protecting them from coercion, does not present those dangers.

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