

Organs for sale? Propriety, property, and the price of progress

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JUST IN CASE anyone is expecting to read about new markets for Wurlitzers, let me set you straight. I mean to discuss organ transplantation and, especially, what to think about recent proposals to meet the need for transplantable human organs by permitting or even encouraging their sale and purchase. If the reader will pardon the impropriety, I will not beat around the bush: the subject is human flesh, the goal is the saving of life, the question is, "To market or not to market?"

Such blunt words drive home a certain impropriety not only in my topic but also in choosing to discuss it in public. But such is the curse of living in interesting times. All sorts of shameful practices, once held not to be spoken of in civil society, are now enacted with full publicity, often to applause, both in life and in art. Not the least price of such "progress" is that critics of any impropriety have no choice but to participate in it, risking further blunting of sensibilities by plain overt speech. It's an old story: opponents of

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unsavory practices are compelled to put them in the spotlight. Yet if we do not wish to remain in the dark, we must not avert our gaze, however unseemly the sights, especially if others who do not share our sensibilities continue to project them—as they most certainly will. Besides, in the present matter, there is more than impropriety before us—there is the very obvious and unquestionable benefit of saving human lives.

About two years ago I was asked by a journal to review a manuscript that advocated overturning existing prohibitions on the sale of human organs, in order to take advantage of market incentives to increase their supply for transplantation. Repelled by the prospect, I declined to review the article, but was punished for my reluctance by finding it in print in the same journal. Reading the article made me wonder at my own attitude: What precisely was it that I found so offensive? Could it be the very idea of treating the human body as a heap of alienable spare parts? If so, is not the same idea implicit in organ *donation*? Why does payment make it seem worse? My perplexity was increased when a friend reminded me that, although we allow no commerce in organs, transplant surgeons and hospitals are making handsome profits from the organ-trading business, and even the not-for-profit transplant registries and procurement agencies glean for their employees a middleman's livelihood. Why, he asked, should everyone be making money from this business except the person whose organ makes it possible? Could it be that my real uneasiness lay with organ donation or with transplantation itself, for, if not, what would be objectionable about its turning a profit?

Profit from human tissue was centrally the issue in a related development two years ago, when the California Supreme Court ruled that a patient had no property rights in cells removed from his body during surgery, cells which, following commercial genetic manipulation, became a patented cell-line that now produces pharmaceutical products with a market potential estimated at several billion dollars, none of it going to the patient. Here we clearly allow commercial ownership of human tissue, but not to its original possessor. Is this fair and just? And quite apart from who reaps the profits, are we wise to allow patents for still-living human tissue? Is it really necessary, in order to encourage the beneficial exploitation of these precious resources, to allow the usual commercial and market arrangements to flourish?

With regard to obtaining organs for transplantation, voluntary donation rather than sale or routine salvage has been the norm until now, at least in the United States. The Uniform Anatomical Gift Act, passed in all fifty states some twenty years ago, altered common-law practices regarding treatment of dead bodies to allow any individual to donate all or any part of his body, the gift to take place upon his death. In 1984, Congress passed the National Organ Transplantation Act to encourage and facilitate organ donation and transplantation, by means of federal grants to organ-procurement agencies and by the creation of a national procurement and matching network; this same statute prohibited and criminalized the purchase or sale of all human organs for transplant (if the transfer affects interstate commerce). Yet in the past few years, a number of commentators have been arguing for change, largely because of the shortage in organs available through donation. Some have, once again, called for a system of routine salvage of cadaveric organs, with organs always removed unless there is prior objection from the deceased or, after death, from his family—this is the current practice in most European countries (but not in Britain). Others, believing that it is physician diffidence or neglect that is to blame for the low yield, are experimenting with a system of required request, in which physicians are legally obliged to ask next of kin for permission to donate. Still others, wishing not to intrude upon either individual rights or family feelings regarding the body of the deceased, argue instead for allowing financial incentives to induce donation, some by direct sale, others by more ingenious methods. For example, in a widely discussed article, Lloyd Cohen proposes and defends a futures market in organs, with individuals selling (say, to the government) future rights to their cadaveric organs for money that will accrue to their estate if an organ is taken upon their death and used for transplant.

In this business, America is not the leader of the free-market world. Elsewhere, there already exist markets in organs, indeed in live organs. In India, for example, there is widespread and open buying and selling of kidneys, skin, and even eyes from living donors—your kidney today would fetch about 25,000 rupees, or about \$1,200, a lifetime savings among the Indian poor. Rich people come to India from all over the world to purchase. Last summer, the *New York Times* carried a front-page story reporting current Chinese marketing practices, inviting people from Hong Kong to come to China for fixed-price kidney-transplant surgery,

organs—from donors unspecified—and air fare included in the price. A communist country, it seems, has finally found a commodity offering it a favorable balance of trade with the capitalist West.

What are we to think of all this? It is, for me, less simple than I first thought. For notwithstanding my evident revulsions and repugnances, I am prepared to believe that offering financial incentives to prospective donors could very well increase the supply—and perhaps even the quality—of organs. I cannot deny that the dead human body has become a valuable resource which, rationally regarded, is being allowed to go to waste—in burial or cremation. Because of our scruples against sales, potential beneficiaries of transplantation are probably dying; less troubling but also true, their benefactors, actual and potential—unlike the transplant surgeons—are not permitted to reap tangible rewards for their acts of service. Finally, and most troublesome to me, I suspect that regardless of all my arguments to the contrary, I would probably make every effort and spare no expense to obtain a suitable life-saving kidney for my own child—if my own were unusable. And though I favor the pre-modern principle, “One man, one liver,” and am otherwise disinclined to be an organ donor, and though I can barely imagine it, I think I would readily sell one of my own kidneys, were the practice legal, if it were the only way to pay for a life-saving operation for my children or my wife. These powerful feelings of love for one’s own are certainly widely shared; though it is far from clear that they should be universalized to dictate mores or policy in this matter, they cannot be left out of any honest consideration.

The question “Organs for sale?” is compelling and confusing also for philosophical reasons. For it joins together some of the most powerful ideas and principles that govern and enrich life in modern, liberal Western society: devotion to scientific and medical progress for the relief of man’s estate; private property, commerce, and free enterprise; and the primacy of personal autonomy and choice, including freedom of contract. And yet, seen in the mirror of the present question, these principles seem to reach their natural limit or at least lose some of their momentum. For they painfully collide here with certain other notions of decency and propriety, pre-modern and quasi-religious, such as the sanctity of man’s bodily integrity and respect owed to his mortal remains. Can a balance be struck? If not, which side should give ground? The

stakes would seem to be high—not only in terms of lives saved or lost but also in terms of how we think about and try to live the lives we save and have.

How to proceed? Alas, this, too, poses an interesting challenge—for in whose court should one conduct the inquiry? Shall we adopt the viewpoint of the economist or the transplant facilitator or the policy analyst, each playing largely by rational rules under some version of the utilitarian ethic: find the most efficient and economical way to save lives? Or shall we adopt the viewpoint of the strict libertarian, and place the burden of proof on those who would set limits to our autonomy to buy and sell or to treat our bodies in any way we wish? Or shall we adopt a moralist's position and defend the vulnerable, to argue that a great harm—say, the exploitation or degradation of even one person—cannot be overridden by providing greater goods to others, perhaps not even if the vulnerable person gives his less-than-fully-free consent?

Further, whichever outlook we choose, from which side shall we think about restrictions on buying and selling—what the experts call “inalienability”? Do we begin by assuming markets, and force opponents to defend non-sale as the exception? Or do we begin with some conception of human decency and human flourishing, and decide how best to pursue it, electing market mechanisms only where they are appropriate to enhancing human freedom and welfare, but remaining careful not to reduce the worth of everything to its market price? Or do we finesse such questions of principle altogether and try to muddle through, as we so often do, refining our policies on an *ad hoc* basis, in light of successes, costs, and public pressures? Whose principles and procedures shall we accept? And on whom shall we place the burden of what sort of proof?

Because of the special nature of this topic, I will not begin with markets and not even with rational calculations of benefits and harms. Indeed, I want to step back from policy questions altogether and consider more philosophically some aspects of the *meaning* of the idea of “organs for sale.” I am especially eager to understand how this idea reflects and bears on our cultural and moral attitudes and sensibilities about our own humanity and, also, to discover the light it sheds on the principles of property, free contract, and medical progress. I wish, by this means, also to confront rational expertise and policy analysis with some notions outside of expertise, notions that are expressed and imbedded in our untutored repugnance at the thought of markets in human flesh. One would

like to think that a proper understanding of these sentiments and notions—not readily rationalizable or measurable but not for that reason unreasonable or irrational—might even make a difference to policy.

I. Propriety

The non-expert approaching the topic of organ transplantation will begin with questions of propriety, for it is through the trappings of propriety that we normally approach the human body; indeed, many of our evolved conventions of propriety—of manners and civility—are a response to the fact and problem of human embodiment. What, then, is the fitting or suitable or seemly or decent or proper way to think about and treat the human body, living and dead? This is, indeed, a vast topic, yet absolutely central to our present concern; for what is permissible to do to and with the body is partly determined by what we take the human body to be and how it is related to our own being.

I have explored these questions at some length elsewhere, in an essay entitled “Thinking About the Body,”[†] from which I transplant some conclusions without the argument. Against our dominant philosophical outlooks of reductive corporealism (that knows not the soul) and person-body dualism (that deprecates the body), I advance the position of psychophysical unity, a position that holds that a human being is largely, if not wholly, self-identical with his enlivened body. Looking up to the body and meditating on its upright posture and on the human arm and hand, face and mouth, and the direction of our motion (with the help of Erwin Straus’s famous essay on “The Upright Posture”), I argue for the body’s intrinsic dignity:

The dumb human body, rightly attended to, shows all the marks of, and creates all the conditions for, our rationality and our special way of being-in-the-world. Our bodies demonstrate, albeit silently, that we are more than just a complex version of our animal ancestors, and, conversely, that we are also more than an enlarged brain, a consciousness somehow grafted onto or trapped within a blind mechanism that knows only survival. The body-form *as a whole* impresses on us its inner powers of thought and action. Mind and hand, gait and gaze, breath and tongue, foot and mouth—all are part of a single package, suffused with the presence of intelligence. We are *rational* (i.e., *thinking*) animals,

[†]Leon R. Kass, M.D., *Toward a More Natural Science: Biology and Human Affairs* (New York: The Free Press, 1985).

down to and up from the very tips of our toes. No wonder, then, that even a corpse still shows the marks of our humanity.

And, of course, it shows too the marks of our particular incarnation of humanity, with our individual and unique identity.

Yet this is only part of the story. We are *thinking* animals, to be sure, but we are simultaneously also and merely thinking *animals*. Looking down on the body, and meditating on the meaning of its nakedness (with the help of the story of man and woman in the Garden of Eden), we learn of human weakness and vulnerability, and especially of the incompleteness, insufficiency, needy dependence, perishability, self-division, and lack of self-command implicit in our sexuality. Yet while perhaps an affront to our personal dignity, these bodily marks of human abjection point also to special interpersonal relationships, which are as crucial to our humanity as is our rationality:

For in the navel are one's forebears, in the genitalia our descendants. These reminders of perishability are also reminders of perpetuation; if we understand their meaning, we are even able to transform the necessary and shameful into the free and noble.... [The body, rightly considered,] reminds us of our debt and our duties to those who have gone before, [teaches us] that we are not our own source, neither in body nor in mind. Our dignity [finally] consists not in denying but in thoughtfully acknowledging and elevating the necessity of our embodiment, rightly regarding it as a gift to be cherished and respected. Through ceremonious treatment of mortal remains and through respectful attention to our living body and its inherent worth, we stand rightly when we stand reverently before the body, both living and dead.

This account of the meaning of the human body helps to make sense of numerous customs and taboos, some of them nearly universal. Cannibalism—the eating of human flesh, living and dead—is the preeminent defilement of the body; its humanity denied, the human body is treated as mere meat. Mutilation and dismemberment of corpses offend against bodily integrity; even surgery involves overcoming repugnance at violating wholeness and taboos against submitting to self-mutilation, overridden here only in order to defend the imperiled body against still greater threats to its integrity. Voyeurism, that cannibalism of the eyes, and other offenses against sexual privacy invade another's bodily life, objectifying and publicizing what is, in truth, immediate and intimate, meaningful only within and through shared experience. Decent burial—or other ceremonial treatment—of the mortal remains of ancestors and kin pays honor to both personal identity and genera-

tional indebtedness, written, as it were, into the body itself. How these matters are carried out will vary from culture to culture, but no culture ignores them—and some cultures are more self-consciously sensitive to these things than others.

Culture and the body

The Homeric Greeks, who took embodiment especially to heart, regarded failure to obtain proper burial as perhaps the greatest affront to human dignity. The opposite of winning great glory is not cowardice or defeat, but becoming an unburied corpse. In his invocation to the Muse at the start of the *Iliad*, Homer deplors how the wrath of Achilles not only caused strong souls of heroes to be sent to Hades, but that *they themselves* were left to be the delicate feastings of birds and dogs; and the *Iliad* ends with the funeral of Hector, who is thus restored to his full humanity (above the animals) after Achilles's shameful treatment of his corpse: "So they buried Hector, breaker of horses." A similarly high regard for bodily integrity comes down to us through traditional Judaism and Christianity. Indeed, the Biblical tradition extends respect for bodily wholeness even to animals: while sanctioning the eating of meat, the Noachide code—widely regarded as enunciating natural rather than divine law—prohibits tearing a limb from a living animal.

Most of our attitudes regarding invasions of the body and treatment of corpses are carried less by maxims and arguments, more by sentiments and repugnances. They are transmitted inadvertently and indirectly, rarely through formal instruction. For this reason, they are held by some to be suspect, mere sentiments, atavisms tied to superstitions of a bygone age. Some even argue that these repugnances are based mainly on strangeness and unfamiliarity: the strange repels *because* it is unfamiliar. On this view, our squeamishness about dismemberment of corpses is akin to our horror at eating brains or mice. Time and exposure will cure us of these revulsions, especially when there are—as with organ transplantation—such enormous benefits to be won.

These views are, I believe, mistaken. To be sure, as an empirical matter, we can probably get used to many things that once repelled us—organ swapping among them. As Raskolnikov put it, and he should know, "Man gets used to everything—the beast." But I am certain that the repugnances that protect the dignity and integrity of the body are not based solely on strangeness. And they

are certainly not irrational. On the contrary, they may just be—like the human body they seek to protect—the very embodiment of reason. Such was the view of Kant, whose title to rationality is second to none, writing in *The Metaphysical Principles of Virtue*:

To deprive oneself of an integral part or organ (to mutilate oneself), e.g., to *give away* or *sell* a tooth so that it can be planted in the jawbone of another person, or to submit oneself to castration in order to gain an easier livelihood as a singer, and so on, belongs to partial self-murder. But this is not the case with the amputation of a dead organ, or one on the verge of mortification and thus harmful to life. Also, it cannot be reckoned a crime against one's own person to cut off something which is, to be sure, a part, but not an organ of the body, e.g., the hair, although selling one's hair for gain is not entirely free from blame.

Kant, rationalist though he was, understood the rational man's duty to himself as an animal body, precisely because this special animal body was the incarnation of reason:

[T]o dispose of oneself as a mere means to some end of one's own liking is to degrade the humanity in one's person (*homo noumenon*), which, after all, was entrusted to man (*homo phenomenon*) to preserve.

Man contradicts his rational being by treating his body as a mere means.

Respect for the living and the dead

Beginning with notions of propriety, rooted in the meaning of our precarious yet dignified embodiment, we start with a series of presumptions and repugnances *against* treating the human body in the ways that are required for organ transplantation, which really is—once we strip away the trappings of the sterile operating rooms and their astonishing technologies—simply a noble form of cannibalism. Let me summarize these *prima facie* points of departure.

(1) Regarding *living donors*, there is a presumption against self-mutilation, even when good can come of it, a presumption, by the way, widely endorsed in the practice of medicine: Following venerable principles of medical ethics, surgeons are loath to cut into a healthy body not for its own benefit. As a result, most of them will not perform transplants using kidneys or livers from unrelated living donors.

(2) Regarding *cadaver donation*, there is a *beginning* presumption that mutilating a corpse defiles its integrity, that utilization of its parts violates its dignity, that ceremonial disposition of the total remains is the fitting way to honor and respect the life that once

this body lived. Further, because of our body's inherent connection with the embodied lives of parents, spouses, and children, the common law properly mandates the body of the deceased to next of kin, in order to perform last rites, to mourn together in the presence of the remains, to say ceremonial farewell, and to mark simultaneously the connection to and the final separation from familial flesh. The deep wisdom of these sentiments and ways explains why it is a strange and indeed upsetting departure to allow the will of the deceased to determine the disposition of his remains and to direct the donation of his organs after death: for these very bodily remains are proof of the limits of his will and the fragility of his life, after which they "belong" properly to the family for the reasons and purposes just indicated. These reflections also explain why doctors—who know better than philosophers and economists the embodied nature of all personal life—are, despite their interest in organ transplantation, so reluctant to press the next of kin for permission to remove organs. This, and not fear of lawsuit, is the reason why doctors will not harvest organs without the family's consent, even in cases in which the deceased was a known, card-carrying organ donor.

(3) Regarding the *recipients of transplantation*, there is some primordial revulsion over confusion of personal identity, implicit in the thought of walking around with someone else's liver or heart. To be sure, for most recipients, life with mixed identity is vastly preferable to the alternative, and the trade is easily accepted. Also, the alien additions are tucked safely inside, hidden from sight. Yet transplantation as such—especially of vital organs—troubles the easygoing presumption of self-in-body, and ceases to do so only if one comes to accept a strict person-body dualism or adopts, against the testimony of one's own lived experience, the proposition that a person is or lives only in his brain-and-or-mind. Even the silent body speaks up to oppose transplantation, in the name of integrity, selfhood, and identity: its immune system, which protects the body against all foreign intruders, naturally rejects tissues and organs transplanted from another body.

(4) Finally, regarding *privacy and publicity*, though we may celebrate the life-saving potential of transplantation or even ordinary surgery, we are rightly repelled by the voyeurism of the media, and the ceaseless chatter about this person's donation and that person's new heart. We have good reason to deplore the coarsening of sensibilities that a generation ago thought it crude of Lyndon Johnson

to show off his surgical scar, but that now is quite comfortable with television in the operating suite, requests for organ donation in the newspaper, talk-show confessions of conceiving children to donate bone marrow, and the generalized talk of spare parts and pressed flesh.

I have, I am aware, laid it on thick. But I believe it is necessary to do so. For we cannot begin in the middle, taking organ transplantation simply for granted. We must see that, from the point of view of decency and seemliness and propriety, there are scruples to be overcome and that organ transplantation must bear the burden of proof. I confess that, on balance, I believe the burden can be easily shouldered, for the saving of life is indeed a great good, acknowledged by all. Desiring the end, we will the means, and reason thus helps us overcome our repugnances—and, unfortunately, leads us to forget what this costs us, in coin of shame and propriety. We are able to overcome the restraints against violating the integrity of dead bodies; less easily, but easily enough for kin, we overcome our scruple against self-mutilation in allowing and endorsing living donation—though here we remain especially sensitive to the dangers of coercion and manipulation of family ties.

How have we been able to do so? Primarily by insisting on the principle not only of voluntary consent but also of *free donation*. We have avoided the simple utilitarian calculation and not pursued the policy that would get us the most organs. We have, in short, acknowledged the weight of the non-utilitarian considerations, of the concerns of propriety. Indeed, to legitimate the separation of organs from bodies, we have insisted on a principle which obscures or even, in a sense, denies the fact of ultimate separation. For in a *gift* of an organ—by its living “owner”—as with any gift, what is given is not merely the physical entity. Like any gift, a *donated* organ carries with it the donor’s generous good will. It is accompanied, so to speak, by the generosity of soul of the donor. Symbolically, the “aliveness” of the organ requisite for successful transplant bespeaks also the expansive liveliness of the donor—even, or especially, after his death. Thus, organ removal, the partial alienation-of-self-from-body, turns out to be, in this curious way, a *reaffirmation* of the self’s embodiment, thanks to the generous act of donation.

We are now ready to think about buying and selling, and questions regarding the body as property.

II. Property

The most common objections to permitting the sale of body parts, especially from live donors, have to do with matters of equity, exploitation of the poor and the unemployed, and the dangers of abuse—not excluding theft and even murder to obtain valuable commodities. People deplore the degrading sale, a sale made in desperation, especially when the seller is selling something so precious as a part of his own body. Others deplore the rich man's purchase, and would group life-giving organs with other most basic goods that should not be available to the rich when the poor can't afford them (like allowing people to purchase substitutes for themselves in the military draft). Lloyd Cohen's proposal for a futures market in organs was precisely intended to avoid these evils: through it he addresses only increasing the supply without embracing a market for allocation—thus avoiding special privileges for the rich; and by buying early from the living but harvesting only from the dead he believes—I think mistakenly—that we escape the danger of exploiting the poor. (This and other half-market proposals seeking to protect the poor from exploitation would in fact cheat them out of what their organs would fetch, were the rich compelled to bid and buy in a truly open market.)

I certainly sympathize with these objections and concerns. As I read about the young healthy Indian men and women selling their kidneys to wealthy Saudis and Kuwaitis, I can only deplore the socioeconomic system that reduces people to such a level of desperation. And yet, at the same time, when I read the personal accounts of some who have sold, I am hard-pressed simply to condemn these individuals for electing apparently the only non-criminal way open to them to provide for a decent life for their families. As several commentators have noted, the sale of organs—like prostitution or surrogate motherhood or baby-selling—provides a double-bind for the poor. Proscription keeps them out of the economic mainstream, whereas permission threatens to accentuate their social alienation through the disapproval usually connected with trafficking in these matters.

Torn between sympathy and disgust, some observers would have it both ways: they would permit sale, but ban advertising and criminalize brokering (i.e., legalize prostitutes, prosecute pimps), presumably to eliminate coercive pressure from unscrupulous middlemen. But none of these analysts, it seems to me, has faced

the question squarely. For if there were nothing fundamentally wrong with trading organs in the first place, why should it bother us that some people will make their living at it? The objection in the name of exploitation and inequity—however important for determining policy—seems to betray deeper objections, unacknowledged, to the thing itself—objections of the sort I dealt with in the discussion of propriety. For it is difficult to understand why someone who sees absolutely no difficulty at all with transplantation and donation should have such trouble sanctioning sale.

True, some things freely giveable ought not to be marketed because they cannot be sold: love and friendship are prime examples. So, too, are acts of generosity: it is one thing for me to offer in kindness to take the ugly duckling to the dance, it is quite another for her father to pay me to do so. But part of the reason love and generous deeds cannot be sold is that, strictly speaking, they cannot even be *given*—or, rather, they cannot be given *away*. One “gives” one’s love to another or even one’s body to one’s beloved, one does not donate it; and when friendship is “given” it is still retained by its “owner.” But the case with organs seems to be different: obviously material, they are freely alienable, they can be given and given away, and, therefore, they can be sold, and without diminishing the unquestioned good their transfer does for the recipient—why, then, should they not be for sale, of course, only by their proper “owner”? Why should not the owner-donor get something for his organs? We come at last to the question of the body as property.

Whose body?

Even outside of law and economics, there are perhaps some common-sense reasons for regarding the body as property. For one thing, there is the curious usage of the possessive pronoun to identify my body. Often I do indeed regard my body a tool (literally, an organ or instrument) of my soul or will. My organism is organized: for whose use?—why, for my own. My rake is mine, so is the arm with which I rake. The “my-ness” of my body also acknowledges the privacy and unsharability of my body. More importantly, it means also to assert possession against threats of unwelcome invasion, as in the song “My Body’s Nobody’s Body But Mine,” which reaches for metaphysics in order to teach children to resist poten-

tial molesters. My body may or may not be mine or God's, but as between you and me, it is clearly mine.

And yet, I wonder. What kind of *property* is my body? Is it mine or is it me? Can it—or much of it—be alienated, like my other property, like my car or even my dog? And on what basis do I claim property *rights* in my body? Is it really “my own”? Have I labored to produce it? Less than did my mother, and yet it is not hers. Do I claim it on merit? Doubtful: I had it even before I could be said to be deserving. Do I hold it as a gift—whether or not there be a giver? How does one possess and use a gift? Are there limits on my right to dispose of it as I wish—especially if I do not know the answer to these questions? Can one sell—or even give away—that which is not clearly one's own?

The word property comes originally from the Latin adjective *proprius* (the root also of “proper”—fit or apt or suitable—and, thus, also of “propriety”), *proprius* meaning “one's own, special, particular, peculiar.” Property is both that which is one's own, and also the right—indeed, the exclusive right—to its possession, use, or disposal. And while there might seem to be nothing that is more “my own” than my own body, common sense finally rejects the view that my body is, strictly speaking, my property. For we do and should distinguish among that which is *me*, that which is *mine*, and that which is mine as *my property*. My body is me; my daughters are mine (and so are my opinions, deeds, and speeches); my car is my property. Only the last can clearly be alienated and sold at will.

Philosophical reflection, deepening common sense, would seem to support this view, yet not without introducing new perplexities. If we turn to John Locke, the great teacher on property, the right of property traces home in fact to the body:

Though the earth and all creatures be common to all men, yet every man has a property in his own person; this nobody has a right to but himself. The labour of his body and the work of his hands we may say are properly his.

The right to the fruits of one's labor seems, for Locke, to follow from the property each man has in his own person. But unlike the rights in the fruits of his labor, the rights in one's person are for Locke surely inalienable (like one's inalienable right to liberty, which also cannot be transferred to another, say, by selling oneself into slavery). The property in my own person seems to function rather to limit intrusions and claims possibly made upon me by others; it functions to exclude me—and every other human being—

from the commons available to all men for appropriation and use. Thus, though the right to property stems from the my-own-ness (rather than the in-commons-ness) of my body and its labor, the body itself cannot be, for Locke, property like any other. It is, like property, exclusively mine to use; but it is, unlike property, not mine to dispose of. (The philosophical and moral weakness in the very idea of property is now exposed to view: Property rights stem from the my-own-ness of my labor, which in turn is rooted in the my-own-ness of my body; but this turns out to be only relatively and politically my own.)

Yet here we are in trouble. The living body as a whole is surely not alienable, but parts of it definitely are. I may give blood, bone marrow, skin, a kidney, parts of my liver, and other organs without ceasing to be me, as the by-and-large self-same embodied being I am. It matters not to my totality or identity if the kidney I surrendered was taken because it was diseased or because I gave it for donation. And, coming forward to my cadaver, however much it may be me rather than you, however much it will be *my* mortal remains, it will not be me; my corpse and I will have gotten divorced, and, for that reason, I can contemplate donating from it without any personal diminution. How much and what parts of the bodily me are, finally, not indispensably me but merely mine? Do they thus become mine as my property? Why or why not?

The analysis of the notion of the body as property produces only confusion—one suspects because there is confusion in the heart of the idea of property itself, as well as deep mystery in the nature of personal identity. Most of the discussion would seem to support the common-sense and common-law teaching that *there is no property in a body*—not in my own body, not in my own corpse, and surely not in the corpse of my deceased ancestor. (Regarding the latter, the common-law courts had granted to next of kin a quasi-property right in the dead body, purely a custodial right for the limited purpose of burial, a right which also obliged the family to protect the person's right to a decent burial against creditors and other claimants. It was this wise teaching that was set aside by the Uniform Anatomical Gift Act.) Yet if my body is not my property, if I have no property right in my body—and here, philosophically and morally, the matter is surely dubious at best—by what *right* do I give parts of it away? And, if it be by right of property, how can one then object—in principle—to sale?

Liberty and its limits

Let us try a related but somewhat different angle. Connected to the notion of private property is the notion of free contract, the permission to transfer our entitlements at will to other private owners. Let us shift our attention from the vexed question of ownership to the principle of freedom. It was, you will recall, something like the principle of freedom—voluntary and freely given donation—that was used to justify the gift of organs, overcoming the presumption against mutilation. In contrast to certain European countries, where the dead body now becomes the property of the state, under principles of escheatage or condemnation, we have chosen to stay with individual rights. But why have we done so? Is it because we want to have the social benefits of organ transplantation without compromising respectful burial, and believe that leaving matters to individual choice is the best way to obtain these benefits? Or is the crucial fact our liberal (or even libertarian) belief in the goodness of autonomy and individual choice *per se*? Put another way, is it the dire need for organs that justifies opening a freedom of contract to dispose of organs, as the best—or least bad—instrument for doing so? Or is the freedom of contract paramount, and we see here a way to take social advantage of the right people have to use their bodies however they wish? The difference seems to me crucial. For the principle of autonomy, separated from specific need, would liberate us for all sorts of subsequent uses of the human body, especially should they become profitable.

Our society has perceived a social need for organs. We have chosen to meet that need not by direct social decision and appropriation, but, indirectly, through permitting and encouraging voluntary giving. It is, as I have argued, generosity—that is, more the “giving” than the “voluntariness”—that provides the moral ground; yet being liberals and not totalitarians, we put the legal weight on freedom—and hope people will use it generously. As a result, it looks as if, to facilitate and to justify the practice of organ donation, we have enshrined something like the notions of property rights and free contract in the body, notions that usually include the possibility of buying and selling. This is slippery business. Once the principle of private right and autonomy is taken as the standard, it will prove difficult—if not impossible—to hold the line between donation and sale. (It will even prove impossible, philo-

sophically, to argue against voluntary servitude, bestiality, and other abominations.) Moreover, the burden of proof will fall squarely on those who want to set limits on what people may freely do with their bodies or for what purposes they may buy and sell body parts. It will, in short, be hard to prevent buying and selling human flesh not only for transplantation, but for, say, use in luxury nouvelle cuisine, once we allow markets for transplantation on libertarian grounds. We see here, in the prism of this case, the limits and, hence, the ultimate insufficiency of rights and the liberal principle.

Astute students of liberalism have long observed that our system of ordered liberties presupposes a certain kind of society—of at least minimal decency, and with strong enough familial and religious institutions to cultivate the sorts of men and women who can live civilly and responsibly with one another, while enjoying their private rights. We wonder whether freedom of contract regarding the body, leading to its being bought and sold, will continue to make corrosive inroads upon the kind of people we want to be and need to be if the uses of our freedom are not to lead to our willing dehumanization. We have, over the years, moved the care for life and death from the churches to the hospitals, and the disposition of mortal remains from the clergy to the family and now to the individual himself—and perhaps, in the markets of the future, to the insurance companies or the state or to enterprising brokers who will give new meaning to insider trading. No matter how many lives are saved, is this good for how we are to live?

Let us put aside questions about property and free contract, and think only about buying and selling. Never mind our rights, what would it mean to fully commercialize the human body even, say, under state monopoly? What, regardless of political system, is the moral and philosophical difference between giving an organ and selling it, or between receiving it as a gift and buying it?

Commodification

The idea of commodification of human flesh repels us, quite properly I would say, because we sense that the human body especially belongs in that category of things that defy or resist commensuration—like love or friendship or life itself. To claim that these things are “priceless” is not to insist that they are of infinite worth or that one cannot calculate (albeit very roughly, and then only with aid of very crude simplifying assumptions) how much it

costs to sustain or support them. Rather it is to claim that the bulk of their meaning and their human worth do not lend themselves to quantitative measures; for this reason, we hold them to be incommensurable, not only morally but factually.

Against this view, it can surely be argued that the entire system of market exchange rests on our arbitrary but successful attempts to commensurate the (factually) incommensurable. The genius of money is precisely that it solves by convention the problem of natural incommensurability, say between oranges and widgets, or between manual labor and the thinking time of economists. The possibility of civilization altogether rests on this conventional means of exchange, as the ancient Greeks noted by deriving the name for money, *nomisma*, from the root *nomos*, meaning "convention"—that which has been settled by human agreement—and showing how this fundamental convention made possible commerce, leisure, and the establishment of gentler views of justice.

Yet the purpose of instituting such a conventional measure was to facilitate the satisfaction of *natural* human needs and the desires for well-being and, eventually, to encourage the full flowering of human possibility. Some notion of need or perceived human good provided always the latent non-conventional standard behind the nomismatic convention—tacitly, to be sure. And there's the rub: In due course, the standard behind money, being hidden, eventually becomes forgotten, and the counters of worth become taken for worth itself.

Truth to tell, commodification by conventional commensuration always risks the homogenization of worth, and even the homogenization of things, all under the aspect of quantity. In many transactions, we do not mind or suffer or even notice. Yet the human soul finally rebels against the principle, whenever it strikes closest to home. Consider, for example, why there is such widespread dislike of the pawnbroker. It is not only that he profits from our misfortunes and sees the shame of our having to part with heirlooms and other items said (inadequately) to have "sentimental value." It is especially because he will not and cannot appreciate their human and personal worth and pays us only their market price. How much more will we object to those who would commodify our very being?

We surpass all defensible limits of such conventional commodification when we contemplate making the convention-maker—the

human being—just another one of the commensurables. The end comes to be treated as mere means. Selling our bodies, we come perilously close to selling out our souls. There is even a danger in contemplating such a prospect—for if we come to think about ourselves like pork bellies, pork bellies we will become.

We have, with some reluctance, overcome our repugnance at the exploitative manipulation of one human body to serve the life and health of another. We have managed to justify our present arrangements not only on grounds of utility or freedom but also and especially on the basis of generosity, in which the generous deed of the giver is inseparable from the organ given. To allow the commodification of these exchanges is to forget altogether the impropriety overcome in allowing donation and transplantation in the first place. And it is to turn generosity into trade, gratitude into compensation. It is to treat the most delicate of human affairs as if everything is reducible to its price.

There is a euphemism making the rounds in these discussions that makes my point. Eager to encourage more donation, but loath to condone or to speak about buying and selling organs, some have called for the practice of “rewarded gifting”—in which the donor is rewarded for his generosity, not paid for his organ. Some will smile at what looks like double-talk or hypocrisy, but even if it is hypocrisy, it is thereby a tribute paid to virtue. Rewards are given for good deeds, whereas fees are charged for services, and prices are paid merely for goods. If we must continue to practice organ transplantation, let us do so on good behavior.

Anticipating the problem we now face, Paul Ramsey twenty years ago proposed that we copy for organ donation a practice sometimes used in obtaining blood: those who freely give can, when in need, freely receive. “Families that shared in premortem giving of organs could share in freely receiving if one of them needs transplant therapy. This would be—if workable—a civilizing exchange of benefit that is not the same as commerce in organs.” Ramsey saw in this possibility of organized generosity a way to promote civilized community and to make virtue grow out of dire necessity. These, too, are precious “commodities,” and provide an additional reason for believing that the human body and the extraordinary generosity in the gift of its parts are altogether too precious to be commodified.

III. The price of progress

The arguments I have offered are not easy to make. I am all too well aware that they can be countered, that their appeal is largely to certain hard-to-articulate intuitions and sensibilities that I at least believe belong intimately to the human experience of our own humanity. Precious though they might be, they do not exhaust the human picture, far from it. And perhaps, in the present case, they should give way to rational calculation, market mechanisms, and even naked commodification of human flesh—all in the service of saving life at lowest cost (though, parenthetically, it would be worth a whole separate discussion to consider whether, in the longer view, there are not cheaper, more effective, and less indecent means to save lives, say, through preventive measures that forestall end-stage renal disease now requiring transplantation: the definitions of both need and efficiency are highly contingent, and we should beware of allowing them to be defined for us by those technologists—like transplant surgeons—wedded to present practice). Perhaps this is not the right place to draw a line or to make a stand.

Consider, then, a slightly more progressive and enterprising proposal, one anticipated by my colleague, Willard Gaylin, in an essay, "Harvesting the Dead," written in 1974. Mindful of all the possible uses of newly dead—or perhaps not-quite-dead—bodies, kept in their borderline condition by continuous artificial respiration and assisted circulation, intact, warm, pink, recognizably you or me, but brain dead, Gaylin imagines the multiple medically beneficial uses to which the bioemporium of such "neomorts" could be put: the neomorts could, for example, allow physicians-in-training to practice pelvic examinations and tracheal intubations without shame or fear of doing damage; they could serve as unharmable subjects for medical experimentation and drug testing, provide indefinite supplies of blood, marrow, and skin, serve as factories to manufacture hormones and antibodies, or, eventually, be dismembered for transplantable spare parts. Since the newly dead body really is such a precious resource, why not really put it to full and limitless use?

Gaylin's scenario is not so far-fetched. Proposals to undertake precisely such body-farming have been seriously discussed among medical scientists in private. The technology for maintaining neomorts is already available. Indeed, in the past few years, a pub-

licly traded corporation has opened a national chain of large, specialized nursing homes—or should we rather call them nurseries?—for the care and feeding solely of persons in persistent vegetative state or ventilator-dependent irreversible coma. Roughly ten establishments, each housing several hundred of such beings, already exist. All that would be required to turn them into Gaylin's bioemporia would be a slight revision in the definition of death (already proposed for other reasons)—to shift from death of the whole brain to death of the cortex and the higher centers—plus the will not to let these valuable resources go to waste. (The company's stock, by the way, has more than quadrupled in the last year alone; perhaps someone is already preparing plans for mergers and manufacture.) Repulsive? You bet. Useful? Without doubt. Shall we go forward into this brave new world?

Forward we are going, without anyone even asking the question. In the twenty-five years since I began thinking about these matters, our society has overcome longstanding taboos and repugnances to accept test-tube fertilization, commercial sperm-banking, surrogate motherhood, abortion on demand, exploitation of fetal tissue, patenting of living human tissue, gender-change surgery, liposuction and body shops, the widespread shuttling of human parts, assisted-suicide practiced by doctors, and the deliberate generation of human beings to serve as transplant donors—not to speak about massive changes in the culture regarding shame, privacy, and exposure. Perhaps more worrisome than the changes themselves is the coarsening of sensibilities and attitudes, and the irreversible effects on our imaginations and the way we come to conceive of ourselves. For there is a sad irony in our biomedical project, accurately anticipated in Aldous Huxley's *Brave New World*: We expend enormous energy and vast sums of money to preserve and prolong bodily life, but in the process our embodied life is stripped of its gravity and much of its dignity. This is, in a word, progress as tragedy.

In the transplanting of human organs, we have made a start on a road that leads imperceptibly but surely toward a destination that none of us wants to reach. A divination of this fact produced reluctance at the start. Yet the first step, overcoming reluctance, was defensible on benevolent and rational grounds: save life using organs no longer useful to their owners and otherwise lost to worms.

Now, embarked on the journey, we cannot go back. Yet we are increasingly troubled by the growing awareness that there is

neither a natural nor a rational place to stop. Precedent justifies extension, so does rational calculation: We are in a warm bath that warms up so imperceptibly that we don't know when to scream.

And this is perhaps the most interesting and the most tragic element of my dilemma—and it is not my dilemma alone. I don't want to encourage; yet I cannot simply condemn. I refuse to approve; yet I cannot moralize. How, in this matter of organs for sale, as in so much of modern life, is one to conduct one's thoughts if one wishes neither to be a crank nor to yield what is best in human life to rational analysis and the triumph of technique? Is poor reason impotent to do anything more than to recognize and state this tragic dilemma?