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## ON THE HUMAN BODY AS PROPERTY: THE MEANING OF EMBODIMENT, MARKETS, AND THE MEANING OF STRANGERS

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Thomas H. Murray\*

*Darius, after he had got the kingdom, called into his presence certain Greeks who were at hand, and asked what he should pay them to eat the bodies of their fathers when they died. To which they answered, that there was no sum that would tempt them to do such a thing. He then sent for certain Indians, of the race called Callatians, men who eat their fathers, and asked them, while the Greeks stood by . . . what he should give them to burn the bodies of their fathers at their decease. The Indians exclaimed aloud, and bade him forbear such language.<sup>1</sup>*

Herodotus took this as proof of Pindar's judgment that "[l]aw [or custom, or mores] is the king o'er all."<sup>2</sup> But we will take it as proof that for all their differences about what constituted respectful treatment of the dead bodies of their fathers, the Greeks and the Callatians were equally horrified at the prospect of treating them disrespectfully. Darius ruled, however, over the Persians as well. They were so disdainful of the body that they would not bury one of their dead until the corpse had been torn by a dog or a bird of prey. In our dealings with the body, we must decide whether we have more in common with the Greeks and Callatians, or with Darius's Persians.

For as long as I can recall, newspapers have published brief items in which someone has calculated what the human body is "worth" on the open market. The value of the body—as reduced to its chemical components—was never more than a few dollars. A more accurate accounting, though, would include the market value of transplantable organs and tissues, as well as the potential bonanza to be had should a cell line cultured from that body

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1. HERODOTUS, *HISTORY OF THE GREEK AND PERSIAN WAR* 137 (W. Forrest ed. 1963); see also L. KASS, *TOWARD A MORE NATURAL SCIENCE* 281 (1985).

2. HERODOTUS, *supra* note 1, at 138.

prove valuable to the biotechnology industry. The bottom line could be anywhere from tens of thousands to perhaps millions of dollars.

Unfortunately, this more "realistic" accounting of the body's worth destroys the humor latent in those earlier efforts. What made us chuckle at those stories was the obvious ludicrousness of imposing one concept of "value" (monetary price as determined by markets) upon an object (the human body) for which it is wholly inappropriate. We knew that the worth of our bodies was not remotely gauged by such calculations. We may not have been certain why. Now that body parts may become a lucrative economic asset (for many of us, our single most valuable asset), we can no longer afford to leave unexamined the source of our body's worth. Scholars are proposing that we ought to be allowed to sell off pieces of our bodies,<sup>3</sup> and entrepreneurs are looking for legal openings permitting them to create markets in human body parts.<sup>4</sup> Before subscribing to such schemes, we need to examine what is at stake.

Both moral and legal questions arise. Would it be a good practice for people to be buying and selling their body parts? What attitude should the law take towards potential markets in human body parts? This Article will focus on the moral question, although both common and statutory law governing the treatment of the body are in part manifestations of prevailing moral views about the body, and will be discussed as such.

Proponents of markets in human body parts argue, like Darius, that the moral outrage towards what we regard as misuse of the human body is mere superstition and sentimentality.<sup>5</sup> Looking closely at the arguments, they find no good reason to interfere with the liberty of individuals to buy and sell body parts.<sup>6</sup> The promarket supporters are correct in asserting that society should not infringe on liberty without good reason, but they err in dismissing the broad and strong moral sentiment against such markets as having no reasonable grounds. There are at least three broad reasons for opposing markets in human body parts. The first rests on the moral significance of the human body—the meaning of embodiment.<sup>7</sup> The second comes from an analysis of

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3. Andrews, *My Body, My Property*, HASTINGS CENTER REP., Oct. 1986, at 28-38.

4. See, e.g., Annas, *Life, Liberty, and the Pursuit of Organ Sales*, HASTINGS CENTER REP., Feb. 1984, at 22-23.

5. See Feinberg, *The Mistreatment of Dead Bodies*, HASTINGS CENTER REP., Feb. 1985, at 31-37.

6. See H. ENGELHARDT, *THE FOUNDATIONS OF BIOETHICS* 127-35 (1986).

7. See *infra* notes 20-83 and accompanying text.

the pros and cons of plausible markets in body parts, and the effects of such markets on the common good and on justice.<sup>8</sup> The third reason focuses upon the uses of certain human body parts to assuage human needs, and the role of gifts, including impersonal gifts, in promoting solidarity within a large, bureaucratic society.<sup>9</sup>

## I. RECENT DEVELOPMENTS AFFECTING THE COMMERCIALIZATION OF THE HUMAN BODY

Social controversies never appear in a vacuum. To set the stage for a discussion of these theoretical issues, we must describe the practical context in which questions about the commercializability of the body have arisen.

Although debates over the appropriateness of markets in human materials, particularly blood, date back almost two decades, two relatively recent phenomena have sharpened the controversy: the prospect of markets in human organs, and the discovery that human biomaterials may have considerable market value to the biotechnology industry.

### A. *Markets in Human Organs*

The increasing success rate for organ transplantation, coupled with the inadequacy of prevailing methods for obtaining transplantable organs, resulted in a shortage of organs and prompted the emergence of a market in human organs. Advertisements appeared in American publications offering organs for sale, and one Virginia entrepreneur went so far as to obtain a license for the import and export of human organs.<sup>10</sup> Kidneys are of special interest because they are transplanted with the most success of all major organs, and because humans are born with two but need only one healthy one to live.<sup>11</sup>

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8. See *infra* notes 84-109 and accompanying text.

9. See *infra* notes 110-27 and accompanying text.

10. Engel, *Va. Doctor Plans Company to Arrange Sale of Human Kidneys*, Wash. Post, Sept. 19, 1983, at A9, col. 1.

11. One would-be vendor offered to sell his liver, until it was pointed out to him that, alas, he had no spare. This story was related to the author by Arthur L. Caplan, Director of the Center for Biomedical Ethics at the University of Minnesota. Dr. Caplan received a phone call from this individual.

In 1968, the Commissioners on Uniform State Laws approved a model Uniform Anatomical Gift Act, which, as the title implies, addresses *gifts* of the body or its parts for transplantation, medical research, and education.<sup>12</sup> The Act, adopted mostly intact by all states and the District of Columbia, is mute on the subject of commerce in the body. Filling this gap, Congress enacted the National Organ Transplant Act in 1984.<sup>13</sup> The Act prohibits the purchase for transplantation of human livers, kidneys, hearts, lungs, pancreases, bone marrow, corneas, eyes, bone, or skin. A number of states have passed laws with similar provisions banning the commercialization of transplantable human organs and tissues in intrastate commerce as well.<sup>14</sup> Although the new laws may have settled for now the legality of such sales, the debate over the ethics of markets in transplantable organs remains lively.

### *B. The Biotechnology Lottery and the Mo Cell Line*

One of the strangest fruits of biotechnology is the case of the Mo Cell Line. Biologists, in recent years, have improved greatly their ability to create and sustain so-called "immortal" cell lines derived from human cells. These cell cultures earn the honorific "immortal" because, unlike normal human cells that divide a finite number of times and then perish, these cells continue to grow and divide indefinitely.

Occasionally, an immortal human cell line is developed that has commercial value to the emerging biotechnology industry. Such may have been the case in the Mo Cell Line, developed from the cells of John Moore who suffered from a rare cancer of the blood known as hairy cell leukemia.<sup>15</sup> As a side effect of the disease, Moore's spleen became dangerously enlarged. To foreclose the possibility that his spleen would rupture and kill him, Moore's physician at the time, Dr. David Golde, recommended that Moore have his spleen removed; that was done. Dr. Golde

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12. UNIF. ANATOMICAL GIFT ACT, 8A U.L.A. 15 (1985).

13. Pub. L. No. 98-507, 98 Stat. 2339 (1984) (codified at 42 U.S.C. §§ 273-274e (Supp. III 1985)).

14. *E.g.*, CAL. PENAL CODE § 367f (West Supp. 1988); MD. HEALTH-GEN. CODE ANN. § 5-408 (1982 & Supp. 1987); MICH. COMP. LAWS ANN. § 333.10204 (West Supp. 1987); N.Y. PUB. HEALTH LAW § 4307 (McKinney 1985); VA. CODE ANN. § 32.1-289.1 (1985).

15. See *The Use of Human Biological Materials in the Development of Biomedical Products: Hearing Before the Subcomm. on Investigations and Oversight of the House Comm. on Science and Technology*, 99th Cong., 1st Sess. 240-78 (1985) (statement of John Moore, leukemia patient/research subject).

arranged for material from Moore's spleen to be sent to his laboratory for research purposes. At this point Dr. Golde's and Mr. Moore's accounts diverge.

According to Mr. Moore, he made approximately a dozen trips from Seattle to Los Angeles to see Dr. Golde during which samples of his blood were taken. All these visits were at Mr. Moore's expense until April 1983 when, after Mr. Moore suggested the samples be taken locally, Dr. Golde offered to pay his expenses. At this visit, Mr. Moore was presented with a new consent form that read in part "I (do, do not) voluntarily grant to the University of California any and all rights I, or my heirs, may have in any cell line or any other potential product which might be developed from the blood and/or bone marrow obtained from me."<sup>16</sup> Moore signed this form, circling "do." On his next (and last) visit, Moore claims he was again given the same form to sign; this time he circled "do not." This apparently led to some consternation in Dr. Golde's lab, and despite calls and letters requesting him to sign the form with "do" circled, Moore opted instead to go in search of a lawyer.

The source of the consternation was the rights to an immortal cell line that scientists in Dr. Golde's lab had cultured from Mr. Moore's cells. Moreover, this cell line—dubbed the "Mo Cell Line"—produced significant quantities of a group of biologically important proteins called lymphokines that act as messengers to tell cells to mature, divide, or do any of a number of things.<sup>17</sup> Normal human cells produce such small quantities of lymphokines that they cannot be isolated in useful amounts. Possibly because of a defect in their genetic control mechanisms, the T-lymphocytes (a kind of white blood cell crucial in fighting infection, the same kind destroyed by the AIDS virus) from Moore's body produced prodigious quantities of a number of lymphokines.

Moore's diseased cells, thanks to the ingenuity of Dr. Golde's research team, had the potential to be a scientific bonanza. But external events soon took the Mo Cell Line, its scientific midwives, and its progenitor beyond the laboratory. By the late 1970's, biotechnology had begun to attract attention and money. Researchers began to realize that biological research could have great commercial value. In this heady atmosphere, Dr. Golde re-

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16. *Id.* at 268.

17. See OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, NEW DEVELOPMENTS IN BIOTECHNOLOGY: OWNERSHIP OF HUMAN TISSUES AND CELLS 31-46 (1987) [hereinafter OTA].

ported to UCLA's patent office that he had a potentially valuable, patentable cell line.<sup>18</sup> On March 20, 1984, the United States Patent Office granted patent number 4,438,032 for a "Unique T-Lymphocyte Line and Products Derived Therefrom."<sup>19</sup>

By April 1984, Mr. Moore had found his lawyer, and the legal battle began over the ownership of the cell line and the patents derived from it. Is the cell line rightfully the property of Dr. Golde and his institution, because it was his recognition of its significance and the admixture of his skill and art that led to the patent? Or, because it was a part of Mr. Moore's body, indeed a living part, and because it may have been put to uses not contemplated by him when he consented to its use in research, does he still retain some interest in it? Is Mr. Moore entitled to a share in profits derived from the Mo Cell line? Although all these questions are significant, the chief issue I will discuss is whether and in what forms the human body, its parts, or its products is a fit object for commercial trade.

## II. THE MORAL SIGNIFICANCE OF EMBODIMENT

Human individuals exist, so far as we know, only as embodied beings. What to make of this cold fact, though, has posed an intellectual challenge at least as old as our earliest written traditions. For some, the body is morally insignificant or worse—an impediment to the attainment of higher goods. For others, our bodies are as much a part of our core moral selves as our minds (or souls). In this section, I will examine several answers to the question: What is the moral significance of the body? I will look at the answers given in Anglo-American common law, and by classical and contemporary, secular and religious thinkers.

### A. *Anglo-American Law and the Body: An Informal Moral Archaeology*

As a social creation, the law, at least in part, reflects the moral convictions of its creators. When courts occasionally refer to offenses against public sensibilities, it is difficult to imagine what else such references might mean if not that some action or prac-

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18. Letter from David W. Golde, M.D. to Roger G. Ditzel (Aug. 17, 1979) (accompanying Report on Possibly Patentable Device, Process, Product, or Plant).

19. U.S. Patent No. 4,438,032 (Mar. 20, 1984) to Golde.

tice contravenes deeply held beliefs about what is good or acceptable.<sup>20</sup> Any effort to interpret common law or statute as having normative, rather than merely descriptive, moral connotations must proceed cautiously, however. For example, if friendship between blacks and whites in the antebellum South offended the sensibilities of genteel whites, that is hardly a convincing moral reason to condemn interracial friendships. But we can learn something about our moral beliefs by looking at the law's response to moral dilemmas. If the pattern revealed in our laws is consistent with good reasons to hold specific moral beliefs, we can see ethics and law as mutually supportive. I believe this is true of our ethics and law regarding the treatment of the body.

*Pierce v. Proprietors of Swan Point Cemetery*<sup>21</sup> provides an opportunity to test my theory. The case involved a dispute between a wife and daughter over burial. The Rhode Island Supreme Court noted "[t]hat there is no right or property in a dead body, using the word in its ordinary sense . . . . 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."<sup>22</sup> The court then determined the body to be quasi property

to which certain persons may have rights, as they have duties to perform towards it arising out of our common humanity. But the person having charge of it cannot be considered as the owner . . . he holds it only as a sacred trust for the benefit of all who may from family or friendship have an interest in it.<sup>23</sup>

There must be some analytic scheme under which people may find redress, or be punished, when the body or its parts are stolen, disinterred, or otherwise mistreated. The concept of property—or better, “quasi property”—indeed may be the most convenient one, but only insofar as it refers to a strictly limited subset of the “rights, duties, power, liabilities and so on”<sup>24</sup> that apply to full-fledged property. Neither decedents nor their fami-

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20. See Note, *The Sale of Human Body Parts*, 72 MICH. L. REV. 1182, 1242-45 & nn.400, 403 & 416 (1974) (discussing *The Queen v. Scott*, 114 Eng. Rep. 97 (Q.B. 1842); *The King v. Lynn*, 100 Eng. Rep. 394 (K.B. 1788); *Dust to Dust*, 9 SOL. J. 3 (1864)).

21. 10 R.I. 227 (1872).

22. *Id.* at 237-38.

23. *Id.* at 242-43.

24. Matthews, *Whose Body? People As Property*, 36 CURRENT LEGAL PROBS. 193, 194 (1983).

lies have any right to benefit commercially from the sale of bodies. Yet, they have a clear right to seek compensation for emotional distress resulting from mistreatment of a body. Together, these observations suggest that it is the symbolic human meaning of the body, rather than any commercial interest, that leads us even to use the fiction of "property" in order to assure that legal remedies are available for offenses against the body, an object of rich moral significance.<sup>25</sup> The recent laws banning organ sales also attest to strong and widely-held moral convictions about the importance of the body.<sup>26</sup>

The relationship of the material body to whatever it is that is morally important about us—whether soul, capacity for reason, personhood, or something else—has long been a subject of concern and speculation. Although some writers and traditions have viewed the body as inseparable from that which possesses moral significance, other thinkers and traditions take an attitude of indifference or even antagonism towards the body. To those dissenting views we now turn.

### *B. The Body As Impediment or As Object Without Significance*

The human body, with its appetites and propensities for malfunctioning, has always been problematic for those who quested after purity, whether of reason or conduct.

For Plato, as for others who preceded him, the body was a tomb in which the soul was forced to dwell temporarily. In the *Phaedo*, Plato argued that the soul's aim is to rid itself of the body, which stands in the way of true knowledge of the ideal "Forms."<sup>27</sup> The body, for him, was an impediment.

25. W. PROSSER & W. KEETON, *THE LAW OF TORTS* § 12, at 63 (5th ed. 1984). Prosser writes:

In most of these cases [dealing with dead bodies] the courts have talked of a somewhat dubious "property right" to the body, usually in the next of kin, which did not exist while the decedent was living, cannot be conveyed, can be used only for the one purpose of burial, and not only has no pecuniary value but is a source of liability for funeral expenses. It seems reasonably obvious that such "property" is something evolved out of thin air to meet the occasion, and that in reality the personal feelings of the survivors are being protected, under a fiction likely to deceive no one but a lawyer.

*Id.* (citations omitted).

26. See *supra* notes 12-14 and accompanying text.

27. PLATO, *PHAEDO* (R. Hackforth trans. 1955); see also Long, *Psychological Ideas in Antiquity*, in 4 *DICTIONARY OF THE HISTORY OF IDEAS* 3 (P. Wiener ed. 1973).

Religious questers as well often have held harsh attitudes towards the body. For Gnostics—searchers after *gnosis* or true knowledge—the body was a barrier to their quest, to be surmounted either by self-denial or by licentious attentiveness to bodily desires.<sup>28</sup> Both extremes share the same fundamental attitudes that the corporeal body is not to be trusted and has no moral worth. In the third century A.D., the Manicheans practiced severe forms of asceticism in order to free the “particles of light” that Satan had stolen and imprisoned in man’s brain.<sup>29</sup> The Cathari, or Albigensians, who lived between the eleventh and thirteenth centuries, believed that all matter was evil, forbade marriage, and prescribed for the holiest among themselves *endura*, suicide by starvation.<sup>30</sup>

In Rene Descartes’ philosophy, the split between body and soul widened. Although Descartes was motivated by a desire to prove the existence of God and the immortality of the soul, his efforts to show that material things and things of the spirit are fundamentally distinct were more successful than his attempts to wring theological proofs out of that split. Refusing to believe anything of which he could be less than absolutely certain, he rejected as illusionary all but one proposition: that there had to be an “I” who did the skeptical thinking. Thus came his famous first principle, “I think, therefore I am.” From this beginning, it was but a short distance to the most fundamental split between that which thinks, *res cogitans*, and the material world, *res extensa*.<sup>31</sup>

The propensity to dismiss the body as morally insignificant or, worse, as a positive barrier to fulfilling humankind’s purpose, has a long history in religious and philosophical traditions. What attitude we should take towards the body is a question with which every culture must grapple. There are available only variants of a few possible choices, one of the most common being to reject the body’s moral significance either through promiscuous

28. Petrement, *Dualism in Philosophy and Religion*, in 2 *DICTIONARY OF THE HISTORY OF IDEAS*, *supra* note 27, at 42.

29. *THE OXFORD DICTIONARY OF THE CHRISTIAN CHURCH* 848-49 (F. Cross ed. 1957).

30. *Id.* at 30.

31.

I knew that I was a substance whose whole essence or nature consists entirely in thinking, and which, for its existence, has no need of place, and is not dependent on any material thing; so that this I, that is to say, the soul, by which I am what I am, is entirely distinct from the body, and is indeed more easy to know than the body, and would not itself cease to be all that it is, even should the body cease to exist.

R. Descartes, *Discourse on Method*, pt. 4, in *DESCARTES’ PHILOSOPHICAL WRITINGS* 141 (N. Smith trans. 1952).

gratification or self-mortification. It is not surprising, then, that echoes of earlier choices may be heard in contemporary ideas about the body.

Because much of the intellectual energy in the current debate over the body as property has come from scholars in the loosely-defined field of bioethics (which includes law, religion, and philosophy among other disciplines), it is appropriate to trace out the ideas of representative thinkers. Two important writers who reject the moral significance of the body are Joseph Fletcher, a theologian, and H. Tristram Engelhardt, a philosopher.

1. *Reason, personhood, and the celebration of control: Joseph Fletcher's moral theology*— The theologian Joseph Fletcher wants to give biology its due, but not assign much, if any, moral significance to it. To Fletcher, the body is merely a necessary condition for the pursuit of the truly important possibilities in being human. Its significance is only instrumental, not essential.<sup>32</sup>

To Fletcher, mere bodily life is not particularly important to human worth or personhood. For this reason, Fletcher is not morally opposed to euthanasia. "To prolong life uselessly, while the personal qualities of freedom, knowledge, self-possession and control, and responsibility are sacrificed is to attack the moral status of a person."<sup>33</sup> When the "person" suffers as a result of physical pain, the body becomes an impediment to the pursuit of important moral goods.

A recurrent theme in Fletcher's work is a preference for human control over natural processes, for design and choice over chance, for reason over those things indifferent to reason. Discussing contraception, he asserts "the moral stature of men, their truly human status, is measured by their knowledge of their circumstances, including physical nature, and by their ability to control those circumstances toward chosen rather than fatally determined ends."<sup>34</sup> His consideration of artificial insemination begins with "the pivot principle of ethics, that man's moral nature, his quality as a moral being, depends first upon

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32. Typical of Fletcher is his attack on Roman Catholic teaching on contraception. He dismisses it as a throwback "to that counter-Reformation version of the Natural Law as something *physiologically* determined, which we have previously described as a denial of true morality, and as a submission to *fatality* and to physical (material) determinism." J. FLETCHER, *MORALS AND MEDICINE* 159 (1960).

33. *Id.* at 191.

34. *Id.* at 93.

his possession of freedom of choice and, second, upon his knowledge of the courses of action open to his choice.”<sup>35</sup>

Fletcher’s equation of artifice and control with moral stature advocates the “least natural course” as the most morally elevated one, that the artificiality of certain means of conception makes them, for that reason, preferable to natural means. Fletcher is even more explicit about this when he declares, “To be a person, to have moral being, is to have the capacity for intelligent causal action. It means to be free of physiology!”<sup>36</sup> Further, “it is precisely persons—and not souls or bodies or glands or human biology—that count with God and come first in ethics.”<sup>37</sup>

Fletcher’s article about “indicators of personhood” reinforces the relative unimportance of the body to moral personhood.<sup>38</sup> He names fifteen positive and five negative criteria. Fourteen of the fifteen positive criteria are descriptions of various capacities—e.g., self-awareness, curiosity, concern for others. Only one directly addresses the body—a functioning neocortex. It is clear from the context that the neocortex is important only because it is the physiological substratum—the enabling condition—of the other fourteen criteria.

Of the five negative criteria—those things that he asserts are not central to moral personhood—three may be taken to pertain to the human body: that persons are not “non- or anti-artificial”; that they are not “essentially sexual”; and that they are not “essentially parental.”<sup>39</sup>

A later article, reflecting further on “Indicators for Humanhood,” accentuates Fletcher’s desire to move the body outside of our moral compass. He now notes that “neocortical function is the key to humanness, the essential trait, the human *sine qua non*. . . . Only this trait or capability is necessary to all of the other traits which go into the fullness of humanness. . . . As Robert Williams . . . puts it, ‘Without mentation the body is of no significant use.’”<sup>40</sup>

The split between the morally significant “stuff”—reason—and the morally insignificant body could hardly be more

35. *Id.* at 100.

36. *Id.* at 218.

37. *Id.* at 219.

38. Fletcher, *Indicators of Humanhood: A Tentative Profile of Man*, HASTINGS CENTER REP., Nov. 1972, at 1-4.

39. *Id.* at 3-4.

40. Fletcher, *Four Indicators of Humanhood—The Enquiry Matures*, HASTINGS CENTER REP., Dec. 1974, at 4, 6.

radical. Fletcher's desire to control and master the body shares much with Plato and the Manicheans, though without the latter's leaning towards self-mortification. Fletcher would have us conquer the body with the aid of technology rather than tame it with our will.

Given Fletcher's views about the moral insignificance of the body and his celebration of control and artifice, he could not have any objection to the commercialization of the body or its parts based on any intrinsic dignity the body might possess. He could have other objections, but they would have to be on quite different grounds. His view of the body and its relation to the moral person could not support any strong objection to using it for commercial gain.

2. *H. Tristram Engelhardt and the incidental, commercializable body*—Engelhardt's secular view of the body has much in common with Fletcher, the theologian. Society has no interest, he says, in preserving "mere biological life." In contrast to the brain, and particularly the neocortex, the body is "a complex, integrated mechanism that sustains the life of the brain, which sponsors the life of a person."<sup>41</sup>

The body is more incidental than essential, except in a morally unimportant causal sense. Engelhardt acknowledges that "[p]ersons, if they are not free of spatiotemporal extension (e.g., angels or gods), will be subject to the difficulty of integrating various experiences as their own," for example, sleeping and wakefulness.<sup>42</sup> Engelhardt has no difficulty counting the computer HAL in the movie *2001* as a person.<sup>43</sup> Consistent with this are his views on personhood and brain transplants (personhood goes with consciousness, with the brain and not the body)<sup>44</sup> and on the proper definition of death, agreeing with Fletcher that in humans the "person" does not survive the destruction of the neocortex.<sup>45</sup>

From all this, it is clear that for Engelhardt the body is morally important only in an incidental and derivative way. If mental life could exist without a body (as in HAL or angels, or the *res cogitans* of Descartes), or should the body no longer support mental life, then the body itself retains no moral significance. "Talking about persons as spatiotemporally extended entities will therefore mean regarding their intact embodiment as

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41. H. ENGELHARDT, *supra* note 6, at 206.

42. *Id.* at 121.

43. *Id.* at 205.

44. *Id.* at 124.

45. *Id.* at 215.

them, as long as that embodiment maintains the full capacities that are the physical substrata of moral agents."<sup>46</sup> We may need our bodies in order to be functioning moral persons, but only in the same sense that we need food or water. The "person" could not long exist without them, but they have no moral importance in themselves.

This does not give us leeway to do whatever we please to the bodies of other "persons in the strict sense," as Engelhardt labels rational, fully-functioning adults. "One cannot respect other moral agents, while willing to destroy their unique place in the world, their embodiment."<sup>47</sup> Respect for persons, then, does provide a minimal protection against physical violence to the bodies of "persons in the strict sense." But that protection does not extend to less-than-full persons—the severely retarded, the senile, infants, and fetuses—nor does it endow the body with any moral significance of its own.

Engelhardt has explicit views on commercialization of the body. His views contrast sharply with thinkers such as Ramsey and Kass, for whom the special dignity of the body places it outside the realm of "property," of those things that may be bought and sold. Engelhardt cites Hegel and Locke to support his claim that the human body is the quintessential example of property, of that which we have a right to trade commercially.<sup>48</sup>

But Engelhardt does not stop here. He extends the idea of embodiment to encompass those things which we own: "Embodiment in this world does not stop at the edges of one's body, but is extended into other objects marked by one's will. . . . Once such a right is acquired, it may then be freely sold or otherwise transferred to others, just as persons may transfer rights over themselves."<sup>49</sup> Engelhardt thus squarely equates the body with other property we might hold. He makes clear his belief that, if anything, our right to trade other material objects is inferior to and less clear than our right to trade our bodies. This right would permit indentured servitude, if not outright slavery.

For Engelhardt, everything hangs on consent: "Persons own themselves and own other persons insofar as they have agreed to

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46. *Id.* at 122.

47. *Id.* at 123.

48. Of Hegel he writes, "[h]is paradigm example of possession is our possession of ourselves." *Id.* at 128. He quotes Locke: "Every man has a property in his own person: this nobody has any right to but himself." *Id.* He declares "[o]ne's body, one's talents, and one's abilities are similarly primordially one's own." *Id.*

49. *Id.* at 130-31.

be owned.”<sup>50</sup> He explicitly denies the authority of governments to forbid commercial trade in bodies and their parts: “The authority of governments is suspect, insofar as they . . . [r]estrict the choice of free individuals without their consent (e.g., attempts to forbid the sale of human organs).”<sup>51</sup> Should the state try to prevent such transactions, he defends a “fundamental moral right to participate in the black market.”<sup>52</sup> We own our bodies and may commercialize them as we wish, according to Engelhardt. There exists no state authority for interfering in that commercialization, and there is a moral right to defy any such efforts at state control.

Against the view that the body is unconnected with whatever gives moral significance to persons are an array of philosophical and religious traditions that affirm the moral importance of the body.

### C. *The Person Has/Is A Body*

Aristotle, Plato’s student, held that the body is intimately and perhaps unseverably connected to the soul, the source of moral significance. For Aristotle, body and soul were two aspects of a single entity: “a body which possesses life.”<sup>53</sup>

The Hebraic understanding of the body is much closer to Aristotle than to Plato. There is no strict correspondence between the Hebrew word for “body,” *basar*, and the Greek words for “body,” *soma*, and “flesh,” *sarc*. The mismatch is so great that eleven different Hebrew words in the Septuagint are translated into *soma*, while *basar* is more often translated as *sarc* than *soma*.<sup>54</sup> The Greek idea of humankind as “an angel in a slot machine”<sup>55</sup> contrasts with the “Hebrew idea of personality” as “an animated body, and not an incarnated soul.”<sup>56</sup>

According to one commentator, Saint Paul subscribed to the Hebrew conception of the body even as he used the Greek language to express this conception. The person has different aspects, but it is always one and the same person. The fleshly body

50. *Id.* at 134.

51. *Id.* at 144.

52. *Id.* at 135.

53. Long, *supra* note 27, at 4.

54. J. ROBINSON, *THE BODY: A STUDY IN PAULINE THEOLOGY* 11-12 (Studies in Biblical Theology No. 5, 1952).

55. *Id.* at 14.

56. Robinson, *Hebrew Psychology*, in *THE PEOPLE AND THE BOOK* 362 (A. Peake ed. 1925).

is intimately bound up with the source of moral importance, the soul.<sup>57</sup>

Hellenic philosophy, as well as Judaism and Christianity, embrace a tradition that refuses to separate radically the body from the "person." The works of two modern writers, the first a theologian, the second, secular, explore how this tradition deals with contemporary debates over the commercial exploitation of the body.

1. *Ensouled body, embodied soul: personhood and the body in the moral theology of Paul Ramsey*— "Just as man is a sacredness in the social and political order, so he is a sacredness in the natural, biological order. He is a sacredness in bodily life. He is an embodied soul or ensouled body."<sup>58</sup> So argues Paul Ramsey in the preface to *The Patient As Person*. For Ramsey, a Christian theologian, respect for the human body as an inseparable part of the person is an important moral duty grounded in the respect due to all persons created by God.

Ramsey's respect for the body leads to reservations about the morality of organ donations by living donors. Anticipating the objection of excessive "physicalism," he responds that we cannot avoid giving due weight to the physical harm done the donor because "the only human life we know to respect, protect, and serve in medical care is irremediably physical, and presented to us with its moral claims solely within the ambience of a bodily existence."<sup>59</sup>

Ramsey has equally deep qualms about policies that would remove organs from the newly dead without the consent of the donor while living and the family upon death. Even *with* consent, he cautions that we cannot "think of our bodies as an ensemble of parts left behind, like old clothes, to be given away or taken or—worst of all—sold. . . . Proper respect for the body is irremovably a part of respect for the sanctity of the life of all flesh."<sup>60</sup> Ramsey is profoundly concerned about humankind's propensity to regard the body as an instrument, as incidental to the moral person:

[T]here are many refined and subtle ways by which men may be encouraged or allowed to treat themselves as parts only, or collections of parts, in the service of medical progress or societal value to come. In terms of our vi-

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57. J. ROBINSON, *supra* note 54, at 18.

58. P. RAMSEY, *THE PATIENT AS PERSON* xiii (1970).

59. *Id.* at 191.

60. *Id.* at 208.

sion of man and his relation to community, there may be little to choose between the blood and soil, organic view of the Nazis and the technological, "spare parts," mechanistic analogies of the present day.<sup>61</sup>

Ramsey criticizes those Protestant and Catholic theologians who, he believes, give too little emphasis to the fact of our embodiment. These theologians contribute to the "technological" view of human bodily existence. Their writings

simply baptize the Cartesian mentalism and dualism of mind (soul, person) and body that is endemic to the modern mentality and an epidemic afflicting almost all contemporary outlooks. Our culture is already prepared for technocratizing the bodily life into collections of parts in which consciousness somehow has residence for a time. . . . The contagious dualism of modern culture has already placed . . . [man], as a spiritual overlord, too far above his physical life. To most of us a part of the body or the bodily life as a whole is already only a thing-in-the-world, not to be identified with the person.<sup>62</sup>

Ramsey is implacably opposed to commercialization of the human body, or, at least, its vital organs. This stems from his view of the body's irrevocable connection to the person, that the body is a "sacredness" in the biological order. The body's sacred state requires that it be treated with respect; it also makes the commercialization of the body morally repugnant.

Ramsey discusses the notion of a kin's "quasi-property right" to control the disposition of the body for burial in Anglo-American common law. He argues persuasively that this right "was 'quasi' in that possession for commercial purposes was still denied. . . . [The body] was a sort of 'property' in that possession for a certain human and familial purpose was assigned and legally protected. The latter was the positive human value and interest at stake"<sup>63</sup>—not permitting commercial exploitation, not even at the wish of the person whose body it is, or was.

Should the body become the object of commercial trade, Ramsey paints an ugly portrait:

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61. *Id.* at 168.

62. *Id.* at 193.

63. *Id.* at 204.

No longer will survivors "possess" the body for a sacred trust that possesses them, namely the right and duty to give decent burial, to which have been added the clear right and perhaps the duty to give organs of the decedent, as another sort of sacred trust, to prolong the lives of others.<sup>64</sup>

Lest there be any uncertainty about his position, Ramsey warns against a situation where "the bodies of our fellow men have been reduced to the property of another, or that the so-called 'consent' to premortem or postmortem organ donation was coerced or tempted by commercial gain. . . . We cannot too strongly oppose 'the potentially dehumanizing abuses of a market in human flesh.'"<sup>65</sup>

Although Ramsey's discussion of cadaver organs does not directly address what to do with other, nonvital parts of living bodies, there is little reason to believe that he would regard other commercial uses any more favorably. His opposition to commercialization is grounded in both a belief in the sacredness of the body as an essential part of the sacred person, and a conviction that sacred things must not be made the object of commerce. So committed is he to the idea of sacredness and bodily integrity that he proposes, only half-facetiously, that organs donated by living donors be regarded as merely on "loan," to be returned to the giver upon the death of the recipient.<sup>66</sup> Ramsey makes this proposal to emphasize the importance of bodily integrity and the wrong done when integrity is violated, even for such a great good as preserving the life of another. For him, only a great preponderance of good could justify harming a live donor.

Ramsey gives reasons that suggest he would have strong objections to the profanation of the body for commercial gain. His discussion of living organ donors asks, does the body belong to the person? His answer: yes. For living or cadaver donors, may parts of the body be sold? His answer: no.

2. *Leon Kass and the "more natural science"*— Leon Kass, a physician and philosopher, calls to task both corporealists, who view the body as all important, and theorists of personhood, consciousness, and autonomy, who discount the value of the body. Kass notes that the corporealist "seeks to capture man for

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64. *Id.* at 214.

65. *Id.* at 215 (quoting Ledenberg, *Biological Future of Man*, in *MAN AND HIS FUTURE* 268 (G. Wolstenholme ed. 1963)).

66. *Id.* at 195 n.42.

dumb and mindless nature" while "the latter treats man in isolation, even from his own nature."<sup>67</sup>

In his book, *Toward a More Natural Science*,<sup>68</sup> Kass attempts to develop a philosophy of medicine and a medical ethics based upon what he believes are insights that come from a correct understanding of the body. Both are thoroughly secular, and in that respect distinct from both Ramsey and Fletcher. But in his rejection of Cartesian dualism, his suspicion of artifice, and his embrace of a concept of the body that stresses its dignity, Kass has much in common with Ramsey and little in common with Fletcher or Engelhardt. He finds part of his inspiration in the way physicians regard the body: "Doctors respect the integrity of the body not only because and if the patient wants or allows them to. They respect and minister to bodily wholeness because they recognize, at least tacitly, what a wonderful and awe-inspiring—not to say sacred—thing the healthy living human body is."<sup>69</sup> Kass echoes Ramsey's sentiments, with a secular overtone, when he writes of "that mystery of mysteries which is its own ground: the being of an embodied mind or a thoughtful body."<sup>70</sup>

On secular rather than theological grounds (though without eschewing theological language), Kass agrees with Ramsey in tying our embodiment to our moral worthiness:

Our dignity 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.<sup>71</sup>

Kass finds a suitable example of his theory in the experiences of medical students upon confronting, for the first time, the cadaver they will be dissecting. Their comments revealed that "[t]hey understood and felt that they were engaged in something fundamentally disrespectful—albeit in a good cause."<sup>72</sup> But "all these responses—perfectly natural ones to a layman—are entirely inappropriate and unreasonable . . . on the scientific view

67. L. KASS, *supra* note 1, at 277.

68. L. KASS, *supra* note 1.

69. *Id.* at 198.

70. *Id.* at 295.

71. *Id.* at 294.

72. *Id.* at 278.

of the body that our medical students are taught and to which they adhere."<sup>73</sup> Science regards the body as "[e]xtended matter in necessary and purposeless motion, organized by necessity on an inherited plan and functioning as pure mechanism."<sup>74</sup> In life, the body is "no object for shame, awe, or respect. And in death, it is a gradually decaying, inoperative, worthless heap of finally homogeneous stuff."<sup>75</sup>

For Kass, the body has profound significance. "[E]ven the dead body . . . is more than our present science can say."<sup>76</sup> The living body needs to be appreciated as "an organic whole; as lively and self-moving; as a personal center of awareness, felt need, and self-concern; as a vehicle of individuated self-presentation and communication."<sup>77</sup>

What is the relationship of the human being to this body: that of the owner to property? Kass poses a series of questions:

What kind of *property* is my body? Is it mine or is it *me*? Can 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? 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? Is it mine to dispose of as I wish—especially if I do not know the answer to these questions?<sup>78</sup>

Kass makes clear his skepticism about treating the body as commercial property. Discussing reproductive technologies in general and surrogate motherhood for pay specifically, Kass objects: "The buying and selling of human flesh and the dehumanized uses of the human body ought not to be encouraged."<sup>79</sup> "Appreciating the meaning of our embodiment, institutionalized already in our taboos on cannibalism and incest, would lead us to oppose the buying and selling of human organs . . ."<sup>80</sup> This position is tied to his general repugnance at the notion of owning "living nature" per se, as his doubts about the wisdom of

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 283.

79. *Id.* at 114.

80. *Id.* at 348.

permitting the patenting of life illustrate. He worries about individuals owning entire living kinds, for example, microorganisms. He sees no natural stopping place between Chakrabarty's bacterium<sup>81</sup> and homo sapiens, once we permit the ownership of living nature. He asks: "If a genetically engineered organism may be owned *because* it was genetically engineered, what would we conclude about a genetically altered or engineered human being?"<sup>82</sup>

Kass's adamant refusal to separate the body from what gives us our dignity (indeed, his premise that we can learn a great deal about human dignity and moral conduct from looking carefully at what the body means), coupled with his reluctance to permit commercializing of the body or treating "living nature" in general as something that should be reduced to mere property, together create a secular argument that strongly links the body to human dignity. It also raises doubts about the moral acceptability of commercializing the human body.

#### D. *The Body and Moral Dignity*

If we follow the traditions that portray the body as unessential to moral personhood, we cannot find anything *intrinsic* to the body that makes it unsuitable for commerce. If, on the other hand, we follow those traditions that refuse to separate the body from what is morally important about us, there is a strong *prima facie* moral argument against markets in the body and its parts.

We could interpret the common law dealing with dead bodies and body parts as well as recent state and federal statutes forbidding commercial trade in transplantable organs as evidence that our culture has opted for the view that the body, at least as a whole or in its symbolically significant manifestations, has a moral "dignity" and therefore should not become an object of commerce. But there is other evidence that we do not view all trade in body parts with the same seriousness—e.g., hair, nail-clippings, plasma, and semen. Even if we resort to the fiction with plasma and semen that we are trading in a service rather than a commodity,<sup>83</sup> it is clear that some markets in body products are tolerated. To understand the importance of markets in

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81. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980).

82. L. KASS, *supra* note 1, at 151.

83. OTA, *supra* note 17, at 76. Payment for semen and plasma is treated as a sale of a *service* rather than a *commodity* for the purpose of avoiding product liability actions.

bodies or their parts, we must examine the moral underpinnings—and limitations—of markets.

### III. COMMERCIALIZING THE BODY AND THE COMMON GOOD

Aside from their contribution to liberty, the most important moral argument in favor of markets is that they promote the common good by permitting each individual to choose that action most likely to maximize his or her own good. In philosophical shorthand, markets are believed to promote *beneficence*.<sup>84</sup>

As in the case of arguments based on respect for persons, most beneficence-based arguments on commercializing the human body focus on transplantable organs. This introduces some important disanalogies with the most probable uses of human tissues in biotechnology—that, compared to, say, transplantable kidneys, most such tissues will not need to be taken by intrusive means, will not pose major risks to the person supplying the tissue, and will not be so dramatically lifesaving to the recipient. These disanalogies will not affect the arguments in favor of permitting commercialization, but they may weaken some of the arguments against commercialization, particularly those that depend either on the harm done the supplier, or on the lifesaving nature of the good. Some strong beneficence-based objections will remain, however.

#### A. *Some Needed Distinctions Among Types of Markets*

Anticipating all the kinds of markets in human biological materials that might arise were commercialization permitted is an awesome task. The various “goods” that could be traded might affect our view of the consequences of permitting such a market. For one thing, body-goods vary in their “cost” to the supplier. At one extreme, we could imagine a person selling a vital, nonduplicated organ, such as a liver or heart. At the other end of the scale are transactions in human materials that do not impose any significant risks on the supplier, and may be so innocuous that supplying them is no more than an inconvenience. Human waste anchors this end of the scale, with blood some small distance up. Bone marrow removal entails pain or the

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84. See, e.g., T. BEAUCHAMP & J. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 148-79 (2d ed. 1983).

need for anesthesia, but the prospect of long-term harm is minimal. Thus, bone marrow probably falls in the middle of the scale. Kidneys probably sit near the higher end of the scale in terms of harm (pain, incapacitation during recuperation) and risk (the chance of the remaining kidney becoming dysfunctional).

Body-goods could also vary in their "value" to recipients, either in the usual sense of monetary value, which markets are efficient in handling, or in nonmonetary, lifesaving value, which monetary markets may not produce or distribute in efficient or acceptable ways.

The distinction between "cost" to supplier and "value" to recipient alerts us to a distinction between the procedures used to determine *how much* of a good to produce, which I will call a *production market*, and the procedures used to *distribute* the good, which I will call an *allocation market*.

It is quite possible to use a market for production but not for allocation, or vice versa. For example, we could have a market to "produce" (acquire) transplantable kidneys, but distribute them according to some nonmonetary judgments of neediness. Or we could procure kidneys through some nonmarket system such as what we now have, but sell them to the highest bidders. I am not advocating either of these approaches, but it is crucial to understand that beneficence-based objections to markets in organs can focus on either production or allocation markets, or both. For example, objections to markets in transplantable kidneys may emphasize that the wealthy are more likely to receive kidneys (allocation) or that the poor are more likely to sell them (production).

To escape from some of the peculiar characteristics of the production and allocation of transplantable kidneys, consider a possible market in bone marrow for transplantation. Marrow is replenishable; although donation is painful and onerous, it does not carry significant long-term risks. Should bone marrow transplantation become perfected and its efficacy proven, then it could become a life-prolonging or even lifesaving good for recipients. In a production market for bone marrow, we could reasonably suppose that the poor would be more willing to undergo the pain of marrow extraction than would the wealthy, as is the case with the sale of plasma.

This correlation of wealth with the willingness to sell need not bother market proponents, because all the usual arguments about markets allowing each individual to pursue his or her own good would still apply. As long as sellers participate voluntarily,

market advocates can maintain that they do so because the sellers believe selling their marrow maximizes benefits to themselves.

### *B. Benefits from Commercialization*

Advocates of the market argue that allowing rational individuals the freedom to conduct whatever transactions they wish will promote beneficence.<sup>85</sup> Rational, free individuals will agree only to those transactions that they believe will maximize their own good. A society of individuals free to engage in such markets will maximize beneficence more effectively than a society that restricts this freedom.<sup>86</sup>

The argument that beneficence is promoted by permitting market transactions is a strong one. Even allowing for imperfections, a market in human biologicals could come closer to accomplishing what efficient markets do than would alternative schemes for determining production and allocation. The market permits the quantity produced to match the quantity demanded at an equilibrium price. This price reflects the economic value of the material to sellers and buyers. Are there any beneficence-based reasons to object to this?

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85. For a sophisticated discussion of ethics and markets, see A. BUCHANAN, *ETHICS, EFFICIENCY, AND THE MARKET* (1985).

86. This is, of course, a version of the "invisible hand" theory of Adam Smith. Not all economists believe it in its pure form. Paul Samuelson, for example, suggests that were Smith alive today, he would reformulate his doctrine to take into account at least four ways in which markets do not "successfully channel individuals who selfishly seek their own interest into promoting the 'public interest' . . . ." P. SAMUELSON, *ECONOMICS* 634 (10th ed. 1976). These amendments include:

(1) the assumption that "abilities and dollar-wealth votes were distributed in 'an ethically optimal manner'—and kept so distributed by nondistorting, nonmarket interventions";

(2) the admission that "the demands of people in the marketplace sometimes do not reflect their true well-beings as these would be interpreted by even the most tolerant and individualistic observers";

(3) that "monopolistic imperfections . . . produce deviations from ideal competitive marginal-cost pricing . . ." and are "practically inevitable" in certain situations; and

(4) that external economies and diseconomies sometimes create a "prima facie case" for intervening in the market.

*Id.* at 634-35.

### C. *Beneficence-Based Objections to Commercialization*

There are two types of beneficence-based objections to commercialization. The first focuses on the assumptions of the market model, such as freedom and rationality; the second grants the assumptions, but argues that wider, indirect effects of commercialization are preponderantly negative.

1. *Assumptions of the market model*— Individuals may not maximize their own well-being through market transactions. First, the assumption that people are rational consumers is dubious. Ample evidence exists of irrational human behavior. Although this is not a great problem when the commodity being traded is a VCR or a cake mix, irrational trade in human biological materials is a more serious matter.

Second, although the assumptions of freedom and rationality might be warranted for most adults, there are large classes of people, including children, the mentally ill, and the mentally disabled, for whom the assumptions are clearly unjustified. These people might participate in body part production or allocation markets. Given their inability to consent to the use of their bodies, including invasive procedures necessary to obtain commercially valuable materials, their participation as sellers seems morally questionable. Society must decide whether to ban such people as suppliers, make provisions for their limited participation, or endure the spectacle of unlimited use of the bodies of such nonconsenting suppliers.

Third, abuse is likely. In every human interaction, including all market interactions, there is the possibility of abuse—fraud, misrepresentation, coercion, etc. This is not peculiar to markets in human materials, but it may be that abuse in this realm is more morally repugnant than it would be with other goods.

Lastly, there may be a discrepancy between what people *desire* and what they *need*,<sup>87</sup> that is, between what even rational and free consumers might pursue in a market, and what those individuals need to promote their genuine well-being. If it is morally important to satisfy human needs, and to promote human flourishing, then the inability of markets to distinguish between needs and desires is a problem.

Taken together, the assumptions that consumers are always rational, the existence of frankly nonautonomous participants,

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87. Daniels, *Health Care Needs and Distributive Justice*, in *IN SEARCH OF EQUITY: HEALTH NEEDS AND THE HEALTH CARE SYSTEM* 1, 8-9 (R. Rayer, A. Caplan & N. Daniels eds. 1983).

the specter of abuses, and the discrepancy between need and desire create doubts about whether body markets will, in fact, enhance beneficence.

2. *Wider problems with the market model*— The second type of beneficence-based objections ask about the wider effects of commercialization, particularly of the human body. They evoke “externalities,” in the economist’s lingo, though not externalities that are translatable into money. The “costs” are moral rather than monetary. Paul Ramsey anticipated this type of objection when he wrote:

Survivors may have gained a lucrative asset in the body. How lucrative will depend on supply and demand, the maldistribution or fortunate location of potential donors and needy recipients, the wealth and social status of recipients, the strength of their will to live, and the cunning of family members when they give telephonic consent.<sup>88</sup>

Implicit in Ramsey’s comment is an objection that commercialization of the body will lead to disrespect, devaluation, and desecration of the human body. This argument is not especially persuasive to those who believe that the biological body does not deserve such special respect in the first place—modern Cartesians, such as Fletcher and Engelhardt, or other body market proponents.<sup>89</sup>

A second objection implicit in Ramsey’s remarks is that commercialization will somehow threaten our ideals of equality, not through any explicit declaration in favor of inequality, but because, in a society where wealth is unequally distributed, the costs of production and benefits of allocation will be unequally distributed as well. Whether such *inequalities* come to be seen as morally unacceptable *inequities* will depend on a number of factors having to do with the regnant ideals of the culture, the history of related decisions, and the nature of the good being allocated. When inequalities lead de facto to distributions of production costs and allocation benefits that correlate with other, morally unacceptable forms of unequal treatment, then society is likely to find its fundamental values threatened. For example, when the poor are the suppliers of human biological materials and the wealthy are the beneficiaries of their alloca-

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88. P. RAMSEY, *supra* note 58, at 214.

89. See *supra* notes 3, 32-52 and accompanying text.

tion, the resulting correlation between risks and poverty, wealth and benefit, would challenge a very important conception of equality in the United States.<sup>90</sup>

Third, some commentators react to Ramsey's assertion that "a society would be better and more civilized [if man] joined together routinely in making cadaver organs available to prolong the lives of others [rather than doing it] for the monetary gain of the 'donor.'" <sup>91</sup> Joel Feinberg, a legal and moral philosopher, for example, objects strenuously to Ramsey's thesis:

On the one side of the scale is the saving of human lives; on the other is the right of a person—not simply to grant or withhold his consent to the uses of his body after his death . . . —but his power by the use of a symbolic ritual to convert his consent into genuine "gift." Even in this extreme confrontation of interest with symbol, Ramsey gives the symbol more weight. If the subject were not itself so grim I might be tempted to charge him with sentimentality.<sup>92</sup>

Although Feinberg was responding specifically to Ramsey's opposition to the routine taking of organs, his objection to preferring sentiment over genuine interests would apply with equal force against the argument in favor of preferring gift transactions over market ones, if the market increased the supply of transplantable organs. It is true that Ramsey's argument relies upon an unprovable empirical premise—that moving from gift to market in human organs carries with it such important losses to the common good that the losses will, on the whole, outweigh the benefits. Although Ramsey's premise may not be proven easily, neither is it absurd or easily disproven.<sup>93</sup>

A final beneficence-based objection relates to the specific case of human biological materials donated for research to charitable

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90. G. CALABRESI & P. BOBBITT, *TRAGIC CHOICES* 24-25 (1978). William May, a prominent moral theologian, describes a part of what is meant here when, in discussing the sale of human tissues, he refers to "the tawdriness of a social system that reduces people to that kind of action." May, *Religious Justifications for Donating Body Parts*, *HASTINGS CENTER REP.*, Feb. 1985, at 41. His obvious disgust, which we could assume would be shared by many individuals, is an "externality" implicit in any commercialization of human biological materials.

91. P. RAMSEY, *supra* note 58, at 215.

92. Feinberg, *supra* note 5, at 32.

93. For a more thorough discussion of what may be lost when markets are substituted for donation systems and when the "commodity" in question is blood, transplantable organs, or tissues, see Murray, *Gifts of the Body and the Needs of Strangers*, *HASTINGS CENTER REP.*, Apr. 1987, 30-38.

institutions, for example, university-based biomedical research. The shift from a gift to a market basis could have damaging consequences in the cost and availability of such materials, public perception of and generosity towards biomedical researchers, and increased suspicion of the motives of health providers who seek to use one's biological materials.<sup>94</sup>

Markets can be very efficient means for producing and distributing commodities. But there are ample reasons to worry whether they are the best means of "producing" or distributing bodies or body parts. One of the most important considerations is the impact of commercialization on justice.

#### *D. Justice and the Commercialization of the Human Body*

There are distinct questions of justice in both production and allocation processes. To complicate matters further, there are many accounts of justice, each of which commands a certain amount of respect and a set of adherents. Calabresi and Bobbitt, in their influential book *Tragic Choices*,<sup>95</sup> correctly say that a society such as ours subscribes to several, incompatible ideals of justice.<sup>96</sup> Indeed, each individual probably holds multiple and competing notions of justice. Society cannot "read off" the ethical implications of commercializing human biologicals from a "correct" theory of justice. It is possible, though, to contrast two important, opposed views.

Libertarian theorists, on the one hand, emphasize the processes of exchange, and deny that the unequal distributions resulting from a series of "fair" exchanges could be unjust. Robert Nozick has provided much of the recent intellectual energy for this view,<sup>97</sup> and H. Tristram Engelhardt has elaborated the implications of Nozick's theory for issues such as whether a market in human organs would be just. We will examine Engelhardt's views on justice and the commercialization of the human body.

On the other hand are theorists, such as Rawls,<sup>98</sup> who believe that there are constraints on permissible exchanges in addition to freedom, and who also believe that there may be specific limi-

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94. Murray, *Who Owns the Body?: On the Ethics of Using Human Tissue for Commercial Purposes*, IRB, Jan./Feb. 1986, at 1, 1-5.

95. G. CALABRESI & P. BOBBITT, *supra* note 90.

96. *Id.* at 38-40.

97. R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974).

98. J. RAWLS, *A THEORY OF JUSTICE* (1971).

tations on the institutions a just society may have. Other theorists such as Daniels<sup>99</sup> and Vlastos<sup>100</sup> focus on the distribution of at least some goods—especially those goods necessary to the fulfillment of basic human needs. Vlastos's theory, rather than the more familiar one of Rawls (or Daniels' elaboration of it for health care policy), offers a more direct contrast with libertarian views in its account of what it means to properly respect persons.

Engelhardt's views on justice and the commercialization of the body are tied intimately to his notions of respect for persons and private property. His views rest on the fundamental importance of autonomy, understood as the free choice of rational persons, and his idea of property, having as its paradigm case the ownership of one's own body.<sup>101</sup> It should be clear that, given these premises, interfering with commercial trade in one's own biological materials—including organs—would be perhaps the clearest and gravest affront to justice imaginable.<sup>102</sup>

Engelhardt is unconcerned if this free market results in the poor selling and the rich buying. Interfering with the free choices of individuals is a violation of justice. The pattern of distribution is not relevant to justice; indeed, the very notion of "distributive" justice, of unjust patterns of distribution obtained from exchanges not in themselves unjust, seems incoherent in this theory.

This result follows almost unavoidably from the concept of the person as a radically individual satisfaction-maximizer, and from the notion that respecting persons means, most of all, not interfering in transactions to which rational, satisfaction-maximizing individuals agree. The libertarian theory of justice says in effect that commercial trade in body parts is the essence of justice, and that those who would interfere with it have an exceedingly heavy burden of proof on their shoulders. The more traditional maxims of distributive justice—to each according to need,

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99. N. DANIELS, *JUST HEALTH CARE* (1985).

100. Vlastos, *Justice and Equality*, in *SOCIAL JUSTICE* 31-72 (R. Brandt ed. 1962).

101. For a discussion of Engelhardt's work, see notes 41-52 and accompanying text.  
102.

Since selling oneself freely to another does not involve a violation of the principle of autonomy, such transactions should fall within the protected privacy of free individuals on the basis of the principle of autonomy. In addition, if one sells oneself at the right price and under the proper circumstances, one would suspect that one could maximize one's balance of benefits over harms. But the point in principle is that free individuals should be able to dispose of themselves freely.

H. ENGELHARDT, *supra* note 6, at 366.

worth, merit, or work—are replaced by to each according to the agreements he has freely made.

In contrast to libertarians such as Engelhardt, Vlastos defends an egalitarian theory of justice. His theory has the merit of being based on a powerful and clear view of respect for persons. In its emphasis on respect for persons, Vlastos's theory of justice shares a fundamental presumption with libertarians such as Engelhardt, but reaches very different conclusions.

It is not possible here to lay out the whole of Vlastos's theory of equalitarian justice, but a few central points can be noted. First, his theory rests on a concept of natural or human rights, "which are human not in the trivial sense that those who have them are men, but in the challenging sense that in order to have them they need only be men."<sup>103</sup> These human rights are *prima facie* claims, to be respected even when not explicitly invoked. There are also other moral rights—for example, the rights attaching to an elected office—that have similar moral force but do not stem from the mere fact of one's humanity.

Second, these human rights emerge from a concept of individual moral worth as inalienable and as not admitting of degrees in the way judgments of excellence or merit must. All humans are of equal, and everywhere immeasurable, moral worth. Vlastos argues for the propositions that "one man's well-being is as valuable as any other's" and "one man's freedom is as valuable as any other's."<sup>104</sup> From these reasonable propositions, he claims that "the *prima facie* equality of men's *right* to well-being and to freedom" follows.<sup>105</sup>

Third, he offers this definition of justice: "An action is *just* if, and only if, it is prescribed exclusively by regard for the rights of all whom it affects substantially."<sup>106</sup> This definition is broad enough to encompass theorists as far from Vlastos as Engelhardt. Their disagreement will come over what rights must be considered. Libertarians will elevate freedom, including the freedom to own and transfer property, over all other rights. Equalitarians like Vlastos argue that other rights have equally strong claims.

Fourth, Vlastos argues that some inequalities can be justified precisely on the grounds of justice; that is, that the very reasons for saying that we have equal moral worth and equal rights to

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103. Vlastos, *supra* note 100, at 91.

104. *Id.* at 51 (emphasis omitted).

105. *Id.* at 52.

106. *Id.* at 53.

well-being and freedom can also, under certain empirical circumstances, justify limited forms of inequality. He gives the example of “merit-praise”—praise for excellence. Because all persons have equal worth, and therefore equal right to the means of well-being, it would be unjust to refuse a practice like merit-praise when that practice would increase the general availability of the means to well-being by spurring people onto excellence and productivity in all spheres.<sup>107</sup>

Finally, by showing that certain inequalities may be justified within an equalitarian theory of justice, Vlastos both establishes the credibility of such a theory, and shows how society can identify and condemn *unjustified* inequalities. Society does this by examining practices to see if the practices deny or diminish the equal moral worth of individuals or groups of persons, or if they otherwise enhance or impede satisfaction of the demands of justice.

Vlastos gives the following example: “Any practice which tends to so weaken and confuse the personal self esteem of a group of persons—slavery, serfdom or, in our own time, racial segregation—may be morally condemned” on the grounds that “men may be made to feel that they are the human inferiors of others, that their own happiness or freedom has inferior worth.” This, he says, “would be a grave injustice.”<sup>108</sup>

To the extent that commercial trade in human biologicals makes people feel that “they are the human inferiors of others,” that practice would be unjust. Permitting an allocation market in lifesaving or life-prolonging human biologicals would probably have this effect by allowing the wealthy to outbid the poor for life itself. A production market in the body and its parts could also have this effect if, as it seems probable, it would lead to the poor selling more than the rich.

Ironically, we seem to have come full circle. If we are confirmed Cartesians, believing that the body is merely an incidental appurtenance to what is morally significant about persons—their rationality—then those aspects of commercialization likely to lead to differential participation in the body-market will not seem offensive, precisely *because* the body is not particularly connected to our moral worth. If, on the other hand, we believe respect for persons includes respect for the human body,

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107. *Id.* at 63-64.

108. *Id.* at 71.

then those empirical properties of the market do pose a grave threat to justice.<sup>109</sup>

Justice, though, is not the only moral category relevant to our interrelationships. It may be that the fact of our shared embodiment is one of the most significant bonds holding us together in the face of the powerful centrifugal forces of mass bureaucratic society.

#### IV. COMMUNITY, THE BODY, AND THE NEEDS OF STRANGERS

No society exists solely through market relationships. Not everything should be put up for sale. Even in a thoroughly market dominated society, justice must not be dispensed to the highest bidder, lest the very foundations of that society be threatened.<sup>110</sup> The law and economics movement may find a market based analysis a useful tool, procrustean in its flexibility, but pleas for universal markets are still rare. Few, if any, advocate selling children or selling oneself into slavery. Some things, it appears, should not be left to the vicissitudes of the market. The question here is: Is the body, or at least some of its parts, unsuitable for the market?

Proponents of markets in human body parts argue that the freedom to buy and sell organs and the like is an exercise of individual liberty that the law ought to endorse, or at least not prohibit.<sup>111</sup> They fail to recognize that, as the historian Michael Ignatieff has said, "We need justice, we need liberty, and we need as much solidarity as can be reconciled with justice and liberty."<sup>112</sup> Gifts of the body are one of the most significant means mass societies have to affirm the solidarity, or community, that humans need in order to mature and to flourish as individuals.<sup>113</sup>

A crucial distinction is that between *gift* and *contract*. The contract is a device constructed to regulate a class of human interactions where the goal is to trade goods or services while *minimizing* the entanglements of personal relationships. It is difficult to imagine massive market societies conducting their business without contracts. The mistake made by some champi-

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109. Murray, On the Ethics of Commercializing the Human Body (Apr. 1986) (paper prepared for the U.S. Congress Office of Technology Assessment).

110. See, e.g., Arrow, *Gifts and Exchanges*, 1 PHIL. PUB. AFF. 343 (1972).

111. See, e.g., *supra* notes 3, 48-50, 52 and accompanying text.

112. M. IGNATIEFF, *THE NEEDS OF STRANGERS* 141 (1985).

113. Murray, *supra* note 93, at 35-37.

ons of the market is to take the idea of contract, designed as it is to minimize the relational aspects of human encounters, and use it as a metaphor for thinking about and governing the full range of human relationships.<sup>114</sup>

In fact, contract is a very poor metaphor for many types of human relationships. The realm of personal relationships, for example, is regulated by the "ethics" and the "economics" of gifts, rather than by contracts.<sup>115</sup> By gifts, I do not mean the thin notion in Anglo-American jurisprudence described, for example, in *The Oxford English Dictionary* as "[t]he transference of property in a thing by one person to another, voluntarily and without any valuable consideration."<sup>116</sup> Nor do I mean the apparently onerous conception manifest in Ralph Waldo Emerson's essay on gifts: "It is not the office of a man to receive gifts. How dare you give them? We wish to be self sustained. We do not quite forgive a giver."<sup>117</sup> Rather, I want to emphasize the constructive role gift exchanges play as a powerful social practice regulating the initiation and maintenance of personal relationships.

Anthropologists have studied the central role gifts play in traditional societies.<sup>118</sup> Although the function of gifts in contemporary industrialized societies may be less obvious, a close study of gift practices shows that they retain their crucial role in regulating personal relationships, and that we have a highly nuanced ethic and etiquette of gift-exchange, even if we often are oblivious to its importance.<sup>119</sup>

More problematic is the phenomenon of *impersonal* gifts—gifts to strangers. We can understand personal gifts in terms of their value in creating and sustaining personal relationships. The motivation for such personal gifts is a combination of generosity and self-interest. But what could motivate impersonal gifts, and what function could they serve? Despite the difficulty in explaining them, examples of impersonal gifts abound. Americans give extensively to charities of many types, from umbrella

114. Engelhardt appears to make this mistake. H. ENGELHARDT, *supra* note 6, at 85, 87. See generally *id.* at 66-103.

115. See *supra* notes 41-52, 113 and accompanying text.

116. THE OXFORD ENGLISH DICTIONARY 156 (1961).

117. R. EMERSON, *Gifts*, in COLLECTED ESSAYS OF RALPH WALDO EMERSON 159, 162 (1979).

118. The *locus classicus* for anthropological discussions of gifts is M. MAUSS, *THE GIFT* (1967). More recent discussions may be found in M. SAHLINS, *STONE AGE ECONOMICS* (1972), and in L. HYDE, *THE GIFT* (1983).

119. See, e.g., Camenisch, *Gift and Gratitude in Ethics*, 9 J. RELIGIOUS ETHICS 1 (1981); L. HYDE, *supra* note 118.

organizations such as the United Way, to food banks, churches, colleges and universities, and many other organizations. Perhaps most remarkable among the impersonal gifts is the gift of blood.

Approximately eight million Americans donate one or more units of blood every year.<sup>120</sup> In 1971, Titmuss published a controversial study comparing the blood procurement system in England and the United States.<sup>121</sup> At that time, much of the United States' blood supply came through "blood insurance" programs in which donors were promised that blood would be available to them and their families if needed; in addition, some came through paid donors, and some from volunteers. England, by contrast, relied exclusively on volunteer donors. Titmuss claimed that not only was the British system morally superior, but it yielded blood of better quality. A decade later Drake and colleagues published a defense of the United States' blood procurement system, calling into question a number of Titmuss's claims.<sup>122</sup> More important for this analysis, though, are the conclusions Drake reached with respect to the motivation of blood donors in the United States. In the 1970's, the United States went from a blood procurement system premised on self-interest to one based on individuals' willingness to give. By 1982, only three to four percent of whole blood was obtained from paid donors and that percentage was declining.<sup>123</sup> Where local efforts were well organized, volunteers met the need for blood.<sup>124</sup>

Drake found that Americans were strongly opposed to using paid donors, and overwhelmingly preferred to use volunteers.<sup>125</sup> When asked why they gave blood, American donors cited a general awareness of the continuing need.<sup>126</sup> Drake concludes that "participation in the whole-blood supply is the natural, unforced response of a great many people once they are exposed to a mild degree of personal solicitation and some convenient donation opportunities."<sup>127</sup>

The intellectual problem is to explain why Americans, committed as they are to individual liberty, reject a market for whole blood and instead participate in massive numbers in a system of gifts. As a step towards such an explanation, we might

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120. A. DRAKE, S. FINKELSTEIN & H. SAPOLSKY, *THE AMERICAN BLOOD SUPPLY* 4 (1982).

121. R. TITMUSS, *THE GIFT RELATIONSHIP* (1971).

122. A. DRAKE, S. FINKELSTEIN & H. SAPOLSKY, *supra* note 120, at 3-4.

123. *Id.* at 6.

124. *Id.*

125. *Id.* at 107-11.

126. *Id.* at 97.

127. *Id.* at 99.

remember Ignatieff's claim that we need solidarity—community—along with liberty and justice. Perhaps we do feel “connected” in some way to the strangers in whose midst we conduct the daily round of life. One of the most powerful and certain sources of the connectedness is our shared embodiment, and the experience of illness and bodily neediness common to all.

There are certain needs, having to do with health, that can be met *only* by one person sharing his or her body with another. Although this could be accomplished through markets, we have a strong, intelligible, and, I believe, defensible preference for meeting those needs through gifts: gifts of tissue such as blood or bone marrow; gifts of organs such as kidneys (from living or cadaver donors), livers, hearts, or lungs. We affirm our solidarity when we give of ourselves—literally—to fellows in need. We give out of generosity *and* because we need community; we need to affirm our connectedness in the face of the many forces in mass society that drive us apart.

### CONCLUSION

The body, in its lifesaving and health-affirming manifestations, ought to remain “quasi property” in the eyes of the law. It should not be treated as ordinary commodity-property like VCR's or designer jeans.

The body, in its significant manifestations, is not suitable for markets because our most important religious and secular traditions treat it as “dignity-property” or “sacra,” as an integral part of the person who is the locus of moral concern and moral worth. It should not be traded in markets because markets in body parts, like all markets, will be subject to inequities and abuses. But these inequities and abuses will have special significance in body markets, because it is the morally significant body (and health, and life) that is being traded off, and because wealth-sensitive markets in which the wealthy purchase life and health from the poor will be especially repugnant to our ideal of justice, which tolerates some, but by no means all inequalities. Lastly, we should reject body markets because our need to affirm community requires a realm of gifts by which we may minister to one another's needs. Gifts of the body, powerfully symbolic of our shared embodiment, are especially important.