

## Custodians of the Body

*Alan Rubenstein*

New medical technologies offer humanity increasing power to use and manipulate the human body. Techniques for precisely editing the human genome and for assembling human life at its earliest stages raise urgent questions about how we understand the human body and the appropriate limits on what medical science may do with it. But to answer these questions, we must first understand the commonplace biotechnologies that have already altered the way we think about the human body. One of the signal achievements of modern medicine is our ability to collect and transplant organs from one human body to another, a practice that raises vexing moral and philosophical problems—about the just distribution of organs to those who need them, about how to respect the wishes of donors and their families, about the integrity of the human body, and even about what death is.

In the United States, as in most other parts of the world, our laws and norms for dealing with the practical challenges of organ transplantation are grounded in an understanding of the transplanted organ as a gift. The very name of the law that has governed the practice for over fifty years—the Uniform Anatomical Gift Act—instructs us about the importance of thinking of transplanted organs as freely given gifts of the body. This system has long faced critics, for whom the shortage of organs for transplantation is a crisis that must be alleviated by a radical reform in how we procure organs. One proposal for such radical reform is to introduce a regulated market in organs. Allowing body parts to be treated as marketable property for sale would increase their supply and thereby save lives. The current system of donation, the argument goes, already implies that body parts are property we own, and as owners we should have a right to sell what we own.

Beyond the contingent risks of an organ market—most importantly the threat that the poor will be exploited for their body parts—we must ask what such a change in our legal regime would imply about what philosopher Hans Jonas, in the context of genetic engineering, described as our “image of man.” In a time of increasing technological control over the

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human body, Jonas argued, there is nothing more urgent for our understanding than reflecting upon that image. What image of ourselves would be implied by our treating the human body as property that can be sold? What image of ourselves would we lose if we abandoned our understanding of transplanted organs as gifts?

Our gift-based system is derived from the perennial understanding that my body, although it is “mine,” is not merely an object; it is also subject, and even after death it retains some critical part of the dignity due to a human person. Organ giving, rather than selling, can preserve this understanding, incentivizing generosity of spirit rather than financial gain.

### “Custodial about the Body”

A fruitful approach to understanding the meaning of the body is to think of how it can be “objectified” in different contexts than that of organ transplantation. There are other situations, brutal and grotesque, in which severed body parts serve no *instrumental* use but where they can very well have a profound *symbolic* use or value, such as in beheading or scalping, or other sorts of ritual dismembering of the human form. We find these practices abhorrent because the human body, even when it is dead, retains something like the dignity that it possessed when it was alive. To help us reflect on this timeless truth, let us turn to an ancient story—a classic case of objectifying a human body.

In the final book of Homer’s *Iliad*, the corpse of the Trojan prince Hector is among the possessions of the Greek hero Achilles, who killed Hector in battle before the gates of Troy. After the fight, Achilles drags Hector’s body back to his tents by the shoreline, denying the Trojan the dignity of having his corpse brought home to his grieving royal family for ceremonial care. This great disgrace is motivated by Achilles’ bitter anger at the Trojan for his killing of Patroclus, Achilles’ dearest friend and comrade. For twelve days Achilles has kept Hector’s body by his tents, lying among his other material spoils of war. Each morning, Achilles ties the corpse to the back of his chariot and drags it around the tomb of Patroclus, only to then

...rest again in his shelter, and throw down the dead man  
and leave him to lie sprawled on his face in the dust.

The possibility has always been open to human beings to show disrespect for the humanity of the body by treating it as if it were a mere thing. Of course, the potential to show disrespect is testimony to the truth that the body is not a mere thing—if it were, the gesture would be

meaningless. In a similar way, our contemporary power to instrumentalize the dead body will never overcome the truth that a body part—even a useful body part—will never really be a mere instrument.

We might say that, when the possibility of viewing the corpse as an object with medical *potential* was not in the picture, it was easier to see the line between the proper and improper handling of a corpse. Now that we can harness the work of body parts taken from the dead, some lines are blurred. But do we not, even today, find resonant the ancient sense of impropriety in treating a corpse without reverential regard? Can't we find the same ancient sense lingering in the heart of a family member who must contemplate parting with the body of a loved one who has just died so that the eviscerating surgery can go forward for the procurement of organs?

Poet and mortician Thomas Lynch, in a June 2006 meeting with the President's Council on Bioethics, was asked to comment on why, if dead bodies don't feel anything, they can nevertheless be disgraced. One of the council members, Leon Kass, referred specifically to the *Iliad* for illustration. Lynch's response is illuminating:

You don't have to go to...the ancient Greeks for what can be done to bodies. We can go to the daily news and the current war to find out how abhorrent it is. We can take a death count, but that the bodies would be brutalized, beheaded, undone in this way is despicable in a way that is hard for us to articulate, although we all sense—and you are absolutely right to understand—that while the dead don't feel it, the living who are in custody of the dead, either by kinship or by legal responsibility or by neighborliness or by nuptials, whatever it is, the one who is responsible feels custodial about the body, and we ought to.

The evidence of symbolic brutality toward dead bodies is still with us and should serve as a reminder that we *do* and *should* care about the dignity of the corpse. Treating the body as mere stuff should horrify us, though certain circumstances might lead us to partially repress this feeling.

### Retrieving Hector

Hector's father and mother, Priam and Hecuba, watched from the towers of Troy as their son was cut down by Achilles. Homer gives us a heart-rending picture of the king and queen devastated and mourning and hopeless inside the walls of the city. Priam then goes on an outrageously dangerous mission: He will travel across the plain between the city of Troy and the Greek ships with only a single, elderly charioteer as

a companion. He will somehow—he has no plan for how—sneak past the guards of the Greek encampment and find Achilles’ tent. There he, the greatest king of his time, will throw himself at Achilles’ feet and beg for the return of his son’s body, supplicating himself before the man he hates beyond all reckoning.

Priam makes it to Achilles’ encampment and persuades the raging hero to return Hector’s body. Hector is brought back to Troy, where his wife and mother make their laments with their hands upon him—they “touched his head”—calling him by name, and, eventually, seeing him ritually burned and his bones laid in the earth.

All of this might seem to be very remote from the questions of organ transplantation. But in at least two respects the story can help deepen our sense of what we already, intellectually, know. First, in Priam and Hecuba’s mourning and the great concern they have over their son—even though he is dead—we can be reminded that it is not right to simply say



Priam Supplicating Achilles for the Body of Hector  
(ca. 1815–25) by *Giuseppe Girometti*

The Milton Weil Collection, 1940 (public domain)

that the human being who has died is beyond all harm. Thomas Lynch in his remarks to the council said, “The dead don’t care; you can take that to the bank. But the dead do matter.”

The dead cannot be made more dead and cannot be hurt, in most ordinary meanings of that term. But in death no less than in life, there is a “doubleness” of the body: It is a physical thing—a structure of interconnected organs and a system of biochemical processes—but it, he or she, is also an embodied presence; it is both object and subject. The existence of the body as both a material thing and as the place of a life’s presence persists beyond death. The grieving family knows that the person or, perhaps, the echo of the person, is still there, at least as the focal point of mourning and reflection on the life that was. If, in opposition to this ancient lesson, we were to adopt a more “hard-headed” view that the body is not the person and that, certainly, the body after death is nothing but so much body-stuff, we risk deforming the experience of a proper encounter with death. In this encounter, the switch in the body between being a *someone* and being a *mere thing* does not occur in the flash of an instant but in a space of time within which—with the aid of ceremonial treatment—the echo of a life can ring true, quiet, and finally still.

The second lesson we can take away from the story of Hector’s body is subtler but, in some ways, even more directly related to organ procurement from dead bodies. Consider Homer’s description of the moment when Achilles makes up his mind to give the body of Priam’s son back to him. Priam has just made his plea, beginning with the request to Achilles to

remember your father, one who  
is of years like mine, and on the door-sill of sorrowful old age.

When Priam finishes his plea, Homer writes:

So he spoke, and stirred in the other a passion of grieving  
for his own father. He took the old man’s hand and pushed him  
gently away, and the two remembered, as Priam sat huddled  
at the feet of Achilles and wept close for manslaughtering Hektor  
and Achilles wept now for his own father, now again  
for Patroklos.

What we find here—surprisingly—is very reminiscent of what is often described by those who request of a family that they give the “gift of life” at the moment when they are captured by the sorrow of their own loss. These families are asked to think of another’s suffering—to remember

that just as they are suffering from the grievous presence of death, some other human being is suffering with the fear of an imminent death; just as they are wondering how they can go on, some other family is anticipating the tearing hole that losing their father, son, wife, daughter, or friend will leave. Achilles gives back Hector's body as an expression of his respect for Priam and his courage. But even more, he does so because he has been moved by the common humanity he and his enemy share, brought home to both men as they weep together over loved ones who have been taken by death. Reflecting on this story can deepen our sense of why *giving up* the body for organ procurement is truly a fitting way to redeem the troubling mutilation of the body that such procurement requires.

But the larger story of Hector's corpse, insofar as it rings true to our modern ears, also reminds us that there are perennial goods, and that we interfere with them when we deal with a human body, living or dead, as a mere resource. With these perennial goods in mind, we now turn to our own world to think about whether they fit within our system of organ procurement.

### What Sort of Gift?

In the United States, we have a system defined by requiring consent and prohibiting sale. This system is often referred to as one that is based on a "gifting" model—someone is vested with authority to make the decision about surrendering the organs and, for this to occur, the person (or the person's family members) must make a legal gift of the organs to the common store without compensation. Our reflections on the *Iliad* would already suggest that there are good reasons for finding this approach appropriate, at least with regard to organs taken from the deceased. The mourning family has an opportunity to feel a fellowship with other human sufferers and make a sacrifice with regard to the care they owe the dead body, in order to make the good of healing come from their loss. Offering the family the opportunity to financially profit from their position of control—in possession of a valuable resource that there is a "market for"—would be severely dissonant with the dirgeful melody played by their circumstances.

It would be too simplistic, however, to say that we have a gift-giving or altruistic system of exchange. Signing up to be an organ donor or assenting to procurement from a dying family member is certainly no ordinary gift-giving scenario. For one thing, the givers of organs, in almost all cases, do not know who the recipient will be. It is thus appropriate that they are

not usually referred to as “givers,” but as “donors.” One donates organs in the same sense that one donates money to a charity—trusting that the stewards of the donation will combine it with other such donations to bring about a good aggregate outcome. Contrast this with a more typical case of giving where the individual transfers the object in question knowing that it will affect the relationship between him and his recipient. Thomas Murray, now president emeritus of The Hastings Center, made a useful distinction between giving and selling that clarifies how we typically think of a gift. In *Organ Transplantation: Meanings and Realities* (1996), Murray wrote:

Although services, tangible items, or even money might be transferred in either markets or gifts, in the market the relationship exists in the service of the transaction; in gifts, the transaction is in the service of the relationship. Perhaps the simplest way to put it is to say that markets are principally about goods and money; gifts are about human relationships.

Organ donation cannot be strictly motivated by a desire to influence some particular relationship. It is not like giving a poem or a flower to a sweetheart in order to make her know your feelings, or like giving a cousin a Christmas present because you fear reproving looks from the aunt who has sent you a check every year since you were a child. In these cases, Murray’s insight seems just right: The gift is in the service of the relationship, and that relationship is part of a web of social ties. But with organ donation after death, one is acting much more out of a desire to help an unknown individual and, in this way, out of a desire to improve the lot of humanity, or of the community of human beings of which one is a part.

We can thus defend the position that our current system has the merit of offering human beings an opportunity to be generous and big in spirit. This position implicitly acknowledges the seriousness—even the impropriety—of what is being asked of them. It communicates the feeling that this is not a mere trifle they are being asked to agree to, but a significant invasion. It is an invasion, always, of the body and, in the case of a deceased person, also of the family’s time of grief. It also conveys the community’s sense that such an invasion is warranted—even to the point of creating organizations dedicated to convincing as many people as possible to donate their organs—by the pull that comes from being able to do so much good for someone else who is suffering. Ultimately, the family is asked to make this connection between their own plight and someone else’s, but it is also given the respectful option of declining this opening to a generous, but not morally obligatory or financially lucrative, gesture.

## Donor Motivation

Our system based on generosity does not depend for justification on the right motivation being present in every donor. One can imagine situations where a voluntary, uncompensated donation is not made out of a sentiment of generosity—say, a case where the family members with the right to decide agree to donation because they hated the person who died and are happy to see his corpse cut into, or a more ordinary case where a donor had “checked the box” on his driver’s license not out of true generosity but a desire to appear generous in front of the DMV clerk. Clearly, individual motivations will always be complex, and it would be folly to try to design a system to control them.

But while there are surely exceptions to generosity in individual organ-procurement scenarios, the ethical question for those who design a system is to ask, “What is the underlying meaning of the act that this system makes possible?” The definitive features of an act of free donation are that the decision-maker must weigh competing goods and make a choice that is as free as possible from coercion. It thus conveys respect for the sacrosanctity of the encounter with death and for the good of the whole human body treated as something worth preserving for its own sake. Refusal or reluctance must be met with tactful persuasion rather than with circumventive moves to buy or presume consent. In this way, hesitations are not treated as merely superstitious or irrational but rather as the voice, so to speak, of other goods that compete with the call of generosity.

Even though justification for our donation system for transferring organs does not depend on making sure everyone acts out of pure generosity, studies of donor motivation are still useful. We should expect not that every donor family reports the same motivations, but that what a majority feels is resonant with the intrinsic meaning of the act. Indeed, when families who had chosen organ donation were asked why they said yes in a 2007 study by Case Western Reserve University researchers, the most common answer they gave—besides honoring the deceased person’s wishes—was a desire to do good for another suffering human being. This is testimony to a kind of success in our policy that is more subtle than a count of lives saved or prolonged.

## Why Not Organs for Sale?

It is now worth addressing more directly the question of why an organ-procurement system based on gift-giving needs to be guarded against the option of selling. One might think that once we have allowed

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a person to make a gift of part of her body or that of a family member, we have tacitly conceded that the body is a piece of property that someone owns. So how can we defend a law that says that the owner cannot sell it?

There are, to put it simply, two theoretical options for acquiring useful body parts for transplant: taking and asking. Since the system we have chosen in this country is, thankfully, one based on asking, it may seem to some that we have enshrined a sort of right of property in the body. As bioethicist Stephen Wilkinson writes in the *Stanford Encyclopedia of Philosophy*, “Let us say that someone objects to organ sale (even where there is consent and distributive justice) on the grounds that the seller’s body (organ) or the seller herself is objectified or instrumentalised. This immediately raises the question of why the very same consideration does not apply to (free) donation.” Or, as two legal scholars more simply put it in a 2008 article in *Clinical Ethics*, “gifts are not valid where the donor has no ‘disposing power.’ One cannot give what one does not have.”

A living person can agree to be a kidney donor—thus making a contract to have this body part severed and to allow someone else to control its fate from there. A person decides to be a registered post-mortem donor—thus making a contract to have all the organs and tissues that are found to be useful taken out at the point of death. A family is approached about donating the organs in the “brain-dead” body of their loved one who is being maintained on a ventilator—thus, again, someone is asked to transfer control of the organs to another party. In all these cases, there is an appearance that the body parts in question are the *property* of the person who is asked for permission or a promise. In spite of all this, our laws about this transfer stipulate that the party whose role it is to agree or disagree to procurement cannot receive compensation in exchange for an affirmative answer. It is useful, even after years of living with this system, to sort out whether it is conceptually sound, not least to defend it against those who wish to overthrow it.

The relatively novel utility of body parts has given a salience to the question “Who owns the body?” that it has not had in previous times. It was central, of course in the era of slavery—but there it was not quite the same question, about the separated body, but rather about the ownership of the whole person including his body, his living labor and liberty. The question has also been faced before with regard to corpses. Here, our legal system, based on English common law, recognizes what is known as a “quasi-property” right that the next of kin has over the corpse of the deceased. This is a purely custodial right—and obligation—for the limited purposes of seeing to the ceremonial care of the body. It is instilled

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largely to protect the dead person's right to a decent burial or cremation against creditors, such as an undertaker demanding payment for funeral expenses. The qualifier "quasi" is attached to this kind of property because the particular rights that are recognized as belonging to the family are not nearly as extensive as the set of rights that would accompany ordinary property.

Although the rights over the corpse vested in the family are particularly limited, we see in this case an illustrative example of what is, in fact, the general rule for what it means to call something "property." It does *not* mean that the person who is said to "have a property right" can do whatever he or she wants with the thing. Legal scholars, in discussing property, refer to a property interest as "a bundle of rights," indicating that "property" is a secondary sort of designation that sums up a group of more primary rights.

Which sticks are in the bundle—that is, what rights over an object a person actually has in a given case—will depend on legal precedent for the type of thing in question. To give a few examples: Your car is your property, but you can only drive it with a license and then only according to the rules of the road. Your stereo is yours, but you can't play it at any volume you want in the middle of the night if you have neighbors close by. Your dog is yours, but you can't treat him cruelly, or train him to bite the people he meets on his walks. The river behind your house is part of your property, but you can't dump toxic waste into it and you might not be able to preclude certain kinds of traffic from proceeding along the stretch that belongs to you. In all these cases the designation of something as someone's property does not give the person *every* right to use the object at will.

The question of whether body parts should be allowed to be sold cannot then be answered by settling whether the body is property. Thus, even if our system of gifting did imply that the "gifter" is the owner (or "quasi-owner") of the body or of its parts, it does not follow that such a person must, out of consistency, be allowed to exercise rights of control over the body in any way he wishes. Instead of pretending to settle the matter with appeals to the idea of property, we must ask the question directly: Given the prospect of a market for organs, should we respond by "getting out of the way" of organ selling? Or are there compelling reasons to keep this particular group of potentially marketable goods from being exchanged in this way?

There certainly are such reasons: In the case of deceased donors, most people would find it repugnant in the extreme to ask family members to think about agreeing to interfere with a loved one's dead body out of

greed rather than generosity. And in the case of living donors, there are many dangers to be anticipated in making routine the co-opting of surgical know-how to violate the integrity of a healthy person's body in order to allow that person to make a one-time score out of a second kidney or other "marketable" part.

There is more to be said about the dangers and evils of a market in organs, but the point here is simply this: One falls into no contradiction by advocating for a personal choice in making a gift of an organ but against allowing money to be offered in exchange for that choice. To think otherwise is to mistake effect for cause—to be misled by the fact that we allow people to *choose* to make a gift of their bodies. We allow this because gifting is, by its nature, a morally salutary way to approach the transfer of organs with all its attendant moral dangers—not because gifting is just one more thing we are forced to permit by a prior commitment to treating the body as a possession that the owner can do with as he wishes.

We might even say that one of the primary drawbacks of our gifting system is that it can so easily encourage the false impression that the body is ordinary property. The question of whether we should permit a trade in human parts is a deeper matter than the question of settling rights of possession and defending the right to do with one's possession as one sees fit. We must be on our guard to not learn the wrong lesson from the solution we have found to this strange modern dilemma of useful body parts. In a time when biomedical technology offers such radical power over the body, it is more urgent than ever that we not make the mistake of imagining ourselves to be the separate and sovereign overlords of our bodies. It is true that our bodies are material things, and useful ones at that. But if we are to exercise our growing biomedical power over them wisely and not capriciously, we must respect the integrity of the body as a moral subject, and not as a mere thing.