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DO WE OWN OUR BODIES?

Guido Calabresi†

This article was based on a lecture Dean Calabresi gave as the Schroeder Scholar-in-Residence at Case Western Reserve University. The Schroeder Scholar-in-Residence program honors the founder of the Case Western Reserve University Law-Medicine Center, Professor Emeritus Oliver C. Schroeder, Jr., by bringing to the law school each year a distinguished scholar who conducts faculty workshops, meets with students, and delivers a formal public address, known as the Schroeder Lecture.

DO WE OWN our own bodies? That seems like a silly question. Of course we do. But do we? Not long ago in Pennsylvania there was a case in which a man needed a bone marrow transplant or he would die.¹ The only person who had suitable bone marrow was his cousin. His cousin had nothing against McFall, the person who needed the marrow. In fact, he liked him. But he was scared. He was scared because although the operation to obtain the bone marrow was not life threatening, it was quite painful. He refused to donate the marrow, and McFall did what any red-blooded American would do—he went to court. He sued for an injunction to order his cousin to give him the bone marrow.²

The court denied the injunction, stating that the precedents did not authorize it, as an equity court, to order the injunction. The court expressly made no comment on what would happen if the dying man sought damages from his cousin for failing to agree to the transplant. Nor, despite some very purple language indicating deep revulsion,³ did the court decide the constitutionality of a law

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1. *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (1978).

2. McFall did not offer to compensate his cousin for undergoing the procedure and giving him the bone marrow. The court could, however, have required such compensation, as it has done in some nuisance cases, in which an injunction was issued against “the nuisance,” but the *plaintiff* was required to pay damages to the defendant, “nuisancor” to compensate it for having to cease its activity. See, *Spur Industries v. Del E. Webb Development Co.*, 108 Ariz. 178, 494 P.2d 700 (1972).

3. “For a society which respects the rights of *one* individual, to sink its teeth into the jugular vein or neck of one of its members and suck from its sustenance for *another* member, is revolting to our hard-wrought concepts of jurisprudence. Forcible extraction of living body tissue causes revulsion to the judicial mind. Such would raise the spectra of the swastika and the Inquisition, reminiscent of the horrors this portends.” *McFall v. Shimp*, 10 Pa. D. & C. 3d 90, 92 (1978).

requiring such transplants to be given, should one be enacted.⁴

The man who needed the bone marrow died forgiving his cousin. His cousin, who did not give the bone marrow, has not, to my knowledge, been heard from since. I do not know if he is suffering the pangs of remorse, toasting in hell, or living it up with his good bone marrow.

The case raises three issues. First, was the court correct in its view of precedent? Was it in fact the case that the court did not have the authority to order donation of the bone marrow? Second, even if it was correct in terms of precedent, what about the constitutional issue? Would it be constitutional for the state to order us to give our body parts to those who need them? Can a legislature come along and say: "Guido, you've got wonderful hair, you must give it to those who need it?"⁵ And finally, if a law like this is constitutional, when should the legislature require such donations? What are the situations in which body parts should belong to those who need them, rather than to those who possess them?

I think that the Pennsylvania court was probably right on the precedent issue, but the question is not as clear as I would have thought. Its decision was probably right because our society is still based on an autonomistic, rather libertarian philosophy, and this individualistic point of view remains at the root of much of our law. In other legal systems, there are elements of what is referred to in Italy as *solidarietà*: solidarity with others, communitarian or collectivist values.⁶ But as far as I know no one goes as far as Marx, who said: "From each according to his ability, to each according to his utility functions."⁷ In Marx's terms, it is not what you possess that counts because you do not own that. Rather, it belongs to the state, or if the state determines, to someone else in need. In our society, however, there are relatively few of these Good Samaritan-type duties.

Although there are not many situations where we say that a person must do something to help out another, there are some. In a

4. *Id.*

5. The author recognizes that his hair has seen better days.

6. See ITALIAN COST. art. II (addressing individual rights and their need to take cognisance of the unavoidable duties of political, economic and social solidarity), and *id.* art. XXXXII (addressing private and communal property rights).

7. What Marx actually said was, "From each according to his ability, to each according to his need." Marx, *Critique of the Gotha Program*, in MARX & ENGELS: BASIC WRITINGS ON POLITICS & PHILOSOPHY 119 (Lewis S. Feuer ed. 1959). However, lawyer-economists would doubtlessly tell us that this is too vague and that we should prefer their more sterile terminology.

regime which forbids abortion, ask any woman whether she owns her own body totally or whether, to some extent, her body is required for life-preserving service. Some people might object to my saying that forced continued pregnancy is a life-preserving service, but that is not the issue here. My point is that anti-abortion laws require, at least to some extent, that women be Good Samaritans. Consider, also, more recent cases that suggest that women have a duty to look after themselves so that their unborn children will be born healthy.⁸ These too can be considered Good Samaritan duties.

Another possible precedent the Pennsylvania court could have used is the situation in which the state calls upon us for military service. In the case of conscription, our bodies are suddenly not our own anymore. We are obligated to go because our bodies belong to the collective. Whether it is for the common good or the common bad depends on one's view of the particular situation in which one is called upon to fight. I'm old enough so that I go back to the Second World War when most of us thought that it was for the common good. Leaving that aside, it certainly was not up to me, as an individual, to decide whether or not I would go.

More recently, there was a case arising out of an incident in which soldiers were subjected to experiments with LSD without their knowledge or consent.⁹ As a result of these experiments, they were quite badly injured. Eventually, when one of the soldiers found out, he sued for compensation. Note that the issue in the case was not whether the soldiers owned their bodies or whether the government had a right to do this to them. That was taken almost for granted. Rather, the issue was whether they could at least receive compensation from the government for the harm that was done to them. In an extraordinary opinion, from my point of view, Justice Scalia said that there was no duty to compensate them.¹⁰ Their bodies, in that sense, belonged to the state.

8. Roberts, *The Bias in Drug Arrests of Pregnant Women*, N.Y. Times, Aug. 11, 1990, at 25, col. 2. District attorneys across the country have adopted a policy of prosecuting women who use drugs during pregnancy. There have been more than 50 prosecutions for "prenatal crime" since 1987. For an overview on the current status of criminalization of prenatal maternal drug and alcohol abuse, see Schierl, *A Proposal to Illinois Legislators: Revise the Illinois Criminal Code to Include Criminal Sanctions Against Prenatal Substance Abuse*, 23 J. MARSHALL L. REV. 393, 402-07 (1990).

9. *United States v. Stanley*, 483 U.S. 669 (1987). Master Sergeant Stanley, who volunteered to participate in a program to test protective clothing for use with chemical warfare, was secretly given LSD pursuant to an army research plan to study the effects of LSD on human subjects. He suffered significant personality problems and unsuccessfully sued the federal government for violation of his constitutional rights.

10. *Id.* at 684 (Court held servicemen cannot recover for injuries that "arise out of or are

Another situation in which we may not own our own bodies relates to the use of experimental drugs. My brother, who is an oncologist, was treating some patients who had inoperable cancer. He was using a new drug that was accessible to only two or three doctors in the country. This drug was the only hope for these patients. The appropriate way of treating them was to administer the drug for one week and then discontinue the drug for four weeks. My brother thought this drug might also be a systemic treatment for a certain class of viral diseases. If so, it would be the first time that there would be a systemic treatment for any viral disease.

Because the category of viral diseases that this drug might fight included smallpox, my brother formulated an experiment. The patients were elderly and had not been vaccinated against smallpox in forty or fifty years, if ever. Accordingly, if vaccinated—that is, if exposed to the related cowpox virus—they should develop a characteristic local lesion. If, however, one tried to vaccinate them while the new drug was being concurrently administered, and the drug did indeed operate systemically against this type of viral disease, the inoculation should not produce the cowpox lesion. My brother could then repeat exposure to the virus after the patients had been off the drug for four weeks. The vaccination should then produce the lesion, thus providing evidence that it was the drug that had blocked the earlier development of the lesion, and hence that it did provide systemic protection against some viral diseases.

The only problem with this proposal was that there was no earthly reason why anybody would have vaccinated elderly Americans who had inoperable cancer against smallpox. It was not for their benefit, since it was out of the question that they would contract smallpox in the United States at the time. But it was important for medical research. So my brother told them about his theory. He told them why it was important and explained the risk from the vaccination, which for them could reach as high as one death in ten thousand people vaccinated. (Since these patients were elderly and ill, their risk would be higher than that of the general population.)

I asked my brother if he told his patients that they would continue to be treated with the new drug even if they did not agree to participate in the experiment. He said: “Of course I did, because otherwise they would have had no choice. The drug that I was

in the course of activity incident to service”) (quoting *Feres v. United States*, 340 U.S. 135, 146 (1950)).

treating them with was their only hope of life. It was the only thing that might work against their cancer and they could not get that drug from anyone else. Of course I told them they would still receive treatment.” Then I asked him: “Did they believe you?” “Yes, they believed me,” he said. “I’m a very convincing person.” And he is; he is a very forceful person. I asked him: “How firmly did they believe you?” He considered for a moment and replied: “I don’t know. I guess they may have thought to themselves, ‘Maybe there is one chance in a thousand that he is lying to us.’ But that is still less likely than most of the time when we say that we believe somebody—for there is always a chance that the person may be lying.”

“So, in actuality,” I observed, “they were comparing one chance in a thousand of dying if they said ‘no’ to the experiment against one chance in ten thousand of dying if they agreed to take the vaccine,” and added: “They really had no choice.” My brother said: “Well, they sort of had a choice.” I reiterated that they had no choice. He ended the conversation by saying: “But I did the best I could, and the experiment was important.”

The hospital experiment committee approved the experiment and it went well. No one who was involved in the experiment developed the lesion while on the drug. After the drug was stopped, everyone did. And no one suffered any side effects. The drug worked, and now babies with herpes meningitis and people with certain viral diseases can be treated.

The important point of this story is that when we allow such experiments to take place, where people can be put in a situation in which they have to take a risk, we are, in reality, saying that they must give their bodies for the common good. This too might have served as another precedent for the Pennsylvania court.

The court also could have looked to every-day experience to find a precedent. For example, every time we allow people to drive in ways that may kill us, we are in a way saying that we do not really own our bodies.

There are additional examples. We do not let people sell their bodies. We do not let people sell their kidneys. We frown on letting women sell their wombs in cases of surrogate motherhood.¹¹

11. See *In the Matter of Baby M*, 109 N.J. 396, 537 A.2d 1227 (1988) (surrogate mother contract conflicted with state public policy and laws prohibiting use of money in connection with adoptions, but custody awarded to biological father and his wife with visitation rights to the biological mother.) See also Kasindorf, *And Baby Makes Four: Johnson v. Calvert Illustrates Just About Everything That Can Go Wrong In Surrogate Births*, L.A.

We do not let people sell their hearts. However, we do let them sell their blood and we let them sell their hair. I wonder if we would let them sell some of those things after death. If people really owned their bodies in the same way that they own property, we would presumably allow people to sell *all* of their body parts.

Do we let people destroy their bodies? For centuries there were laws against self-mutilation and against suicide—now they are pretty well gone. Still, while we do allow organ donations upon death, would we allow a person to give his or her heart, while alive? When Eisenhower was President and had a heart attack, a few people came along and said that they wanted to give him their hearts. The technology was not developed enough for this to become a reality and most members of the public thought that these people were crazy. (Others, however, remembered who was Vice President.) In any event, I do not think we would let living people give their hearts away merely because they were tired of living.

Ownership of our bodies, then, is a bit odd. Nevertheless, I think it's fair to say that the court in Pennsylvania was probably right.¹² The precedents were not strong enough to permit a judicial decision holding that one must give the bone marrow one possesses to someone who needs it.

What then of the constitutional issue? If a legislature passed a law saying that everyone who had good bone marrow must give it to people who needed it, would we hold that constitutional?

Interestingly, several justices and judges have addressed this issue, although they have not discussed it directly. Justice Brennan, based on his discussions of privacy, should say that such a law would not be constitutional.¹³ He should say that to force somebody to give his or her body to someone else would infringe on individual privacy and autonomy. On the other hand, Judge Bork,

Times, Jan. 20, 1991 (Magazine), at 10 (in custody battle involving surrogate mother contract where fertilized ovum from biological parents was implanted into another woman and resulted in birth of baby boy, California superior court awarded full custody to the biological mother and father and denied gestational surrogate mother any custody rights under "best interests of the child" analysis).

12. *McFall v. Shimp*, 10 Pa. D. & C. 3d 90 (1978).

13. In *Eisenstadt v. Baird*, 407 U.S. 453, 438 (1972), Justice Brennan observed that "... [if] the right of privacy means anything, it is the right of the individual (emphasis added) [sic] married or single, to be free from unwanted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." For a general overview of Justice Brennan's constitutional interpretation and application to privacy rights, see Brennan, *The Constitution of the United States: Contemporary Ratification*, 19 U.C. DAVIS L. REV. 1 (1985) (address by William J. Brennan Jr., Text and Teaching Symposium at Georgetown University (Oct. 12, 1985)).

if he were true to his position, should probably say that he had not read anything in the Constitution that would prohibit the forced donation of body parts, and if a legislature were to pass such a law, that law would be constitutional.¹⁴ He should say that the due process clause talks about property and about life in the same terms. We have allowed all sorts of laws shifting property, so why not the same with respect to life? Thus, if he were true to his position, Judge Bork should uphold the statute.

I think most of us who have good bodies and good brains and who are very comfortable owning them would probably say Brennan was right and Bork was wrong. (This would probably comport with most of our political prejudices anyway.)

But then one might ask: Under what circumstances would a legislature ever pass a law which required that we must give our kidney, bone marrow or blood to someone who needed them? It might happen if our attitudes towards body parts changed as dramatically as attitudes towards economic property changed between the 19th century and the New Deal. If a court were then to say that the legislature could not constitutionally pass such a law, I think there would be a latter day Oliver Wendell Holmes who would maintain that our Constitution "does not enact [the equivalent of] Mr. Herbert Spencer's Social Statics"¹⁵ in dealing with body parts. That is, he would say that this was not the court's role.

Such a dramatic change in attitude does not seem likely to happen. But this type of law might also be adopted if a massive Chernobyl took place, in which nuclear fallout caused a large number of people desperately to need bone marrow. If there were not enough volunteer donors to supply the need, the legislature, in an attempt to remedy the situation, might well require everyone who had good marrow to give it to those who needed it.

Assume that the judiciary found the law unconstitutional. We might then suspect that those who were injured and needed the bone marrow lived in the slums near the nuclear plant, while those who were not injured lived in the suburbs, along with the judges. At least that is what Bork should contend, since he maintains that

14. See R. BORK, *THE TEMPTING OF AMERICA* 220-21 (1990). See also *Dronenburg v. Zech*, 791 F.2d 1388 (1984). In discussing the right to homosexual conduct in that case, Judge Bork maintained that this right cannot be found by the court under a right to privacy, but can only be established through choices made by the people's elected representatives. Such right-to-privacy holdings, he argued, do not rest on constitutional principles, but on judicial fiat.

15. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, O.W., dissenting).

one cannot rely on judges because they represent the elite.¹⁶ I think we might be troubled by the judiciary overruling the legislature, which was elected by the majority, and letting the victims die for the convenience of the elite. But our concern over the court striking down such a law would probably worry us, because it makes Bork sound right.

Fortunately, for those who dislike Bork, there is a problem with his position. Bork does not take into account what would happen if, instead of a law that required everyone to give their bone marrow, the law required only those who had the *most suitable* marrow or kidneys to give them to the people who needed them. Assume that it turned out that the people who had the best marrow or kidneys were, just by chance, women, or those who had recessive sickle cell anemia (i.e., those we call Blacks), or who had recessive Tay-Sachs (i.e., those we call Jews). We might be concerned about such a law if, in practice, it required only people who had traditionally been discriminated against or inadequately represented in the legislature to donate their bodies. The law would be passed by the majority, not to discriminate or punish, but more insidiously to save those who needed the marrow, as long as those who had to bear the burden were not those who had elected the legislators. In these circumstances, a law like this would have to be constitutionally suspect.¹⁷

Under this view, if men became pregnant, anti-abortion laws would be constitutional. But men can't become pregnant, and such laws hence must inevitably be suspect. The fact that men do not become pregnant does not necessarily make anti-abortion laws unconstitutional. What it does say is that one cannot rely on a majority, or on a legislature who answers to the majority, to decide the issue. One has to have a group of people who do *not* answer to the majority to decide the question. This is very different from saying how they will ultimately decide it. It is also very different from the position that Brennan takes, which is that even if men could become pregnant, anti-abortion laws would be unconstitutional because one cannot take away the individual right and impose collectivist or communitarian values.¹⁸ It is ironic that Bork, "the Conservative,"

16. R. BORK, *supra* note 14, at 17 (1990) ("[l]egislation is far more likely to reflect majority sentiment while judicial activism is likely to represent an elite minority's sentiment").

17. *See, e.g., Craig v. Boren*, 429 U.S. 190 (1976) (laws discriminating on the basis of race and gender require a strict level of scrutiny because these are suspect classes).

18. Brennan, *supra* note 13.

is the one who contends that the legislature can impose communitarian values. Unfortunately, he has no strong sense of discrimination, so that he would apply his position across the board, even when—as in *Dronenburg*—it leads to discrimination.¹⁹ It is equally ironic that Brennan, “the Liberal,” is the one who maintains that a legislature cannot impose communitarian values. Brennan’s problem is that he is like the much criticized “old” Court in the New Deal with respect to these issues.

Now consider a communitarian-based law under which, even though women, Blacks, or Jews might still be the best donors, *everyone* would have to be donors because we wanted to show that we are *all* willing to take on the burden. The constitutional issue would then be totally different. Similarly, a legislature might require expectant fathers to be available, if needed, as bone marrow or kidney donors for an appropriate length of time. But why just fathers, why just men? Since men cannot become pregnant, and only women have to give up their bodies in a life-preserving service during pregnancy, this would be an effective way of demonstrating that we cared about life and wanted to put an equivalent burden on men to that which pregnancy imposes on women. Of course, it is unlikely that a legislature would actually do this, which again says something about whether or not we as a society are sufficiently concerned about “life” to be *nondiscriminating* communitarians. If we were, then I would argue the law might well be constitutional.

The role of the court would also be the same if one were in a communitarian society in which all body parts belonged to those who needed them. Would a law exempting kidneys from this requirement be constitutional? In that society a Brennan should again say “no” and a Bork should again say “yes”. I, instead, might ask: Who needs the kidneys? If it turned out that kidneys were needed predominately by women, or people who had recessive sickle cell anemia, or recessive Tay-Sachs, the same constitutional problem of discrimination, of a disparate impact, would exist, albeit in reverse. The same analysis applies whether one starts from a relatively individualistic society or from a communitarian, collectivist society.

To return to our society, I believe that we are not so libertarian or individualistic that a legislature would never pass a law giving body part rights to those who need them. But we are sufficiently libertarian, individualistic, and autonomistic so that a legislature

19. BORK, *supra* note 14.

would almost never pass such a law unless the law affected only those who were “outsiders.” Conversely, I also think that such a law could only be constitutional if the burden, in practice, was imposed on all of us, and not just on the convenient, traditional “losers.”²⁰

This brings us to the third issue. Should we be so libertarian with respect to body parts? I would first ask: What are the consequences of adopting a system in which body parts belong to those who need them, rather than to those who happen to possess them? The first consequence would be distributional. Some people who are currently very well off would be harmed, while others who are currently in a very bad way would become much better off. For example, beauty and strength are great attributes. We all like to have them as long as we own them. Historically, however, being a beautiful slave or a strong slave was frequently a disaster. If somebody else owns you, the same attributes that are great assets if they are yours, can become tragic liabilities.

Take the situation of a woman who became a multimillionaire because she had very rare blood and could sell it for an enormous amount.²¹ Think of what would have happened to her if her blood belonged to those who needed it. She would become a public utility, a cow to be milked by those who required her blood. Instead of being someone who could make millions, she would be in the worst possible situation.²²

Consider how different our society would be if we were required to put our body parts, indeed, all our qualities and skills at the disposal of those who needed them. We are, after all, the J.P. Morgans and Marie Antoinettes of body parts, of qualities and skills. They believed that caste or economic wealth came “naturally” to them while we believe that our good bodies, skills, and attributes

20. Incidentally, for those of you who are students of property, the requirement of compensation for eminent domain is not that different. Basically, the takings clause requires that if we all want a park, we must all be made to pay for it!

21. See, *U.S. v. Garber*, 607 F.2d 92 (5th Cir. 1979).

22. The woman was, however, convicted for willful tax evasion on the money she made from the sale of her blood. (This suggests that even when we own something and sell it, we do not own it completely.) She claimed it was the sale of a capital asset of which she did not know the basis, and so she did not need to pay taxes on it at the time. The argument, which worked for President Nixon with regard to some land, did not work for her. *U.S. v. Garber*, 589 F.2d 843 (5th Cir. 1979). The ruling of willful tax evasion was nevertheless reversed after rehearing en banc by the Fifth Circuit because the trial judge had ruled as a matter of law that the activity involved was the performance of a service and not the sale of a capital asset. *U.S. v. Garber*, 607 F.2d 92 (5th Cir. 1979)(en banc).

come "naturally" to us. But as they learned, and we should realize, such "natural" rights may be anything but secure!

So far, I have discussed the distributional consequences. What about efficiency considerations? From the standpoint of efficiency, one could say that it would seem to be better if body parts, or at least some body parts, belonged to those who needed them. We all have too many kidneys; we have two, and we really need only one. I do not mean to say that we are as well off without the second one, but compared to the person who has none, we all have one too many. By and large, we also have an excess of bone marrow and blood, since these replace themselves. Most of us have too much hair (although some of us do not).²³ These body parts are not of much use to us. And after death, they are of virtually no use to us at all. Wouldn't it be more efficient if they belonged to those who needed them?

Actually, from an efficiency point of view, things get more complicated. For instance, would people look after their body parts as well if they knew that they belonged to someone else? I think so, first because it is hard to be careless with body parts that *can* be replaced without also harming vital parts that *cannot* be. Self-interest with respect to the latter would probably dictate care with regard to the former as well. Moreover, in situations in which communitarianism rules (within a family unit) and in which, as a result, one is expected to be willing to donate spare body parts to those in need, there is little indication that this leads to carelessness either on the part of the donor or on the part of the donee. Somehow, I do not think that this behavior would alter very much outside of the family context, if communitarianism were to become dominant there, too.

The final utilitarian point of view has to do with value formation. If we own our own body parts, as we think we do, we tend to push society's values in an individualistic direction. If, instead, we say that body parts belong to those who need them, we focus on society and on its values in a communitarian way. This in turn might lead us to think of all of society more as one family. Interestingly, it is precisely within families that donations of body parts are most common today. If the law required donations to all those in need, it is at least possible that values that tended to push the whole society toward a more communitarian, more family-minded way,

23. See *supra* note 5.

might develop. Depending on one's ideological perspective, either situation could be seen as good or bad.

Someone, however, must surely be thinking: "Oh, come now, that's all too utilitarian. Is it fair to say that my kidney, or my bone marrow, belongs to someone else?" But if you are talking about fairness, I really do not understand why the fact that I have inherited good kidneys, or good bone marrow, or good brains, or indeed inherited a good environment, gives me more rights than the person who has inherited bad ones. I am not sure that a person deserves inherited desirable body parts any more than he or she deserves inherited wealth. I might even think the opposite, because with inherited wealth someone else worked so that the person would inherit. The inheritance of body parts, on the other hand, is entirely a matter of luck. Maybe, in these days of genetic engineering, body parts could rise to the level of inherited wealth. I guess some people do marry a particular person to increase the chances that their offspring will have superior body parts. But at most, that would only make the fairness of inherited body parts be no less than that of inherited wealth. It would not make it fairer.

Consider this situation from a Rawlsian point of view.²⁴ If one did not know whether or not one would have good marrow or kidneys, then what would one say if asked whether one preferred the right to obtain somebody else's bone marrow or kidneys or the right to retain one's own? In the real world, where there are more people who have the good kidneys than there are people who need them, it is all too easy to vote against a law which mandates donations. But what about voting behind a Rawlsian veil, where we would not know whether we were the needy or the well-endowed? Rawls refers to the least favored in terms of wealth distribution. But are those whom Rawls described as the least favored truly the least favored? Or are the least favored, in reality, those who are dying because they cannot get a marrow transplant or a kidney transplant?

In the alternative, one could apply the straightforward "Kantian" notion that one cannot use a person for another's benefit. This position is as self-justifying as that of the Marxist/Christian who says that we must all give our bodies to those who need them. In each case, this is just a statement of a conclusion. Very good philos-

24. J. RAWLS, *A THEORY OF JUSTICE* (1971). Rawls seeks to define fairness by means of a "veil of ignorance" behind which rights and duties are determined by people who do not know their position in society, class, fortune, intelligence, etc. As such, the decisions made partake of total impartiality.

ophers have taken each of these approaches, but they still do not quite answer the question.

Perhaps if we move to less dramatic examples, we might find that the issue would be a little simpler. Would it be really objectionable to decide that after death our body does not belong to us, but to those who need it, at least unless we make it very clear that we do not want this to happen? Consider minor, renewable body parts, like blood, hair, and maybe even bone marrow. Forcing donation of these is not the equivalent of requiring people to go into the army. It is more like requiring them to do jury duty. Maybe we ought to compensate people for donating renewable body parts, just as we compensate people for jury duty. But then, when we compensate people for their blood, we should not compensate them for the value of their rare blood, any more than the state takes into account the enormous amounts of money Yale Law School would have paid me if I had been at work instead of being away on jury duty. Instead, when I do jury service, I am "compensated" at the standard fare, like everyone else.

Being required to give one of my kidney's would be more serious. It is more like being conscripted in wartime, because in each case the conscript risks his or her life. Still if the need of the donee or of society is greater than the harm to the donor or the conscript, conscription may be appropriate. Again, compensation might be desirable. But should it be, as it is in the army, at one rate for all? Or, should it take into account the particular value/rarity of my kidney?

Vital organs, those without which the donor would die, are another matter. As to these, one might very well ask: "If it is a matter of luck, why should it be the potential donor who dies, rather than the donee?" There is no fairness either way; it is not a matter of either one deserving to live or not. Why, then, shift things around when there is no reason to?

Ultimately, the question can go beyond organs. In our society, it can go to the point of asking whether I should be allowed to keep the fruits of my brains, of my tremendous basketball-playing ability, of my extraordinary beauty, of all the things which I can sell. (I can sell my brains. I do it all the time.) Ought not these abilities and characteristics instead be at the disposal of society?

Having said all this, I admit I am still an individualistic, Kantian libertarian with regard to these things. I find it very hard to conceive of a situation in which the state should properly say: "Guido, you must give that magnificent hair, or blood, or marrow,

to someone else regardless of your will.” But I admit that I do not quite understand why I feel this way. I am a bit skeptical because this feeling seems natural to me, just as it probably seems natural to you. Yet it seemed natural to Marie Antoinette that she would receive the fruits of her station in life. And it did not take very long for that to change. It seemed natural to J.P. Morgan that his money should be his and that no one should take it. But that, too, did not take very long to change.

If this is true, then if we have inherited good brains and good bodies and good environments, we are the Marie Antoinettes and the J.P. Morgans of these things. And we should be a little skeptical of a starting point which maintains that it is that way, that it has always been that way, and that it can never change. It just may happen at some point in the future that we will be engulfed in a revolution of people in need as great as that which engulfed Marie Antoinette and, less dramatically, J.P. Morgan.

At that point, we must have better arguments than simply saying that owning our bodies is natural. We might then want to make distinctions between those organs that we may not have any right to, such as blood or bone marrow, and those that are very different, such as hearts and perhaps kidneys.

We should also be careful to avoid a situation where the revolution occurs only partially, so that the people who need body parts would become sufficiently organized and able to make scapegoats, but only out of some of the people who have good body parts. This has often happened in the past with castes and with economic property. In those situations, people were too readily told, and too readily believed, that the ones who were keeping them “poor” were, for example, the Jews. As a result, the Jews were the only ones who were forced to give up their properties.

Similarly, taking body parts from groups that traditionally have been discriminated against, whether it be Jews, or Blacks, or women, is a likely outcome if those in need get organized, but not so organized that they can take body parts from everyone who has good ones. We owe it to ourselves, to those who will be made the scapegoats in society, *and* to those who are in need of body parts to do more thinking about something which seems, at first glance, outlandish—like the question: “Do we own our own bodies?”