



SCHOOL OF LAW  
CASE WESTERN RESERVE  
UNIVERSITY

**Health Matrix: The Journal of Law-  
Medicine**

---

Volume 1 | Issue 1

---

1991

# Are We Morally Obligated to Make Gifts of our Bodies?

Thomas H. Murray

Follow this and additional works at: <https://scholarlycommons.law.case.edu/healthmatrix>



Part of the [Health Law and Policy Commons](#)

---

## Recommended Citation

Thomas H. Murray, *Are We Morally Obligated to Make Gifts of our Bodies?*, 1 Health Matrix 19 (1991)

Available at: <https://scholarlycommons.law.case.edu/healthmatrix/vol1/iss1/5>

This Symposium is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Health Matrix: The Journal of Law-Medicine by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

# ARE WE MORALLY OBLIGATED TO MAKE GIFTS OF OUR BODIES?

*Thomas H. Murray, Ph.D.†*

“DO WE OWN our own bodies” is not a silly question; Professor Calabresi has convinced us of that.<sup>1</sup> But neither is it a simple question, or even a single question. Rather it is several different questions: about the moral status of the human body; about the relations of persons to their bodies; about the needs of others, our moral obligations, and the proper limits of the state’s coercive powers.

In the course of his argument, Professor Calabresi presents us with ideas that are novel, even at times startling. This should be no surprise: Guido Calabresi is one of the most original and creative thinkers of our time; he is one of those rare scholars whose work is unfailingly worth careful study, and his article “Do We Own Our Own Bodies” is no exception.

Professor Calabresi begins his reflections with the case of *McFall v. Shimp*<sup>2</sup>, in which a man needed a bone marrow transplant, without which he would die. The only suitable donor at the time was his cousin. The cousin, fearing the procedure, refused to donate his bone marrow. The man needing the bone marrow sued for an injunction to order his cousin to give it to him. The court would not force the cousin to become a marrow donor<sup>3</sup>.

Professor Calabresi reaches three conclusions in his article, all

---

† Professor of Biomedical Ethics and Director of the Center for Biomedical Ethics, Case Western Reserve University School of Medicine. He is founding editor of the journal *Medical Humanities Review*, and is on the editorial boards of *Social Science in Medicine*, and *Physician and Sportsmedicine*. He is an elected Fellow of the Hastings Center and the Environmental Health Institute. He serves as a member of the US Olympic Committee’s Committee on Substance Abuse Research and Education, and is a member of the Working Group on Ethical, Legal and Social Issues to the National Institutes of Health Center for Human Genome Research.

1. Calabresi, *Do We Own Our Bodies?*, 1 HEALTH MATRIX: CASE W. RES. J.L. MED. (1991). Address by Dean Guido Calabresi, 1990 Case Western Reserve University Oliver Schroeder Scholar-in-Residence Lecture (April 3, 1990).

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

3. *Id.*

relating to the law as it is, or as it should be: that the court decided correctly the case at hand;<sup>4</sup> that a law requiring people to give marrow would not be obviously unconstitutional (if its obligations fell on us all and not just “outsiders”)<sup>5</sup>; and that legislators—and the rest of us—ought to give more thought to this apparently outlandish idea.<sup>6</sup> What legislators should *not* do is pass a law that would burden primarily the already burdened or benefit primarily the already well off.

Of the first two issues<sup>7</sup> I have nothing to say, being an ethicist, not a legal scholar. The third issue was a response to the question of whether a law stating that our body parts belong to those who need them rather than to those who possess them is constitutional and whether the legislature should permit this.<sup>8</sup> This raises some very interesting moral questions which I will explore.

At this time we have no *legal* obligations to give our body's parts or products to another; but might we have *moral* obligations to do this? The answer surprises even me: Yes, under certain circumstances we may have moral obligations to give body parts or products to another. This is a very controversial claim, so let me begin defending it with a discussion of some examples.

In recent months, two dramatic part-organ donations have made the news. In one instance, a mother gave a lobe of her liver to her child.<sup>9</sup> It is known that the liver can regenerate itself, so the mother may not suffer any long-term harm from her donation, although the pain and risk of the procedure should not be made light of. This procedure was experimental, meaning no one could say with confidence whether the child would benefit from it. The hope, apparently, is that the child's immune system would accept the mother's liver as a close antigenic match, and that the liver might grow with the child. In the other, even more recent case, a mother donated a part of her lung to her child.<sup>10</sup> This too was very

4. Calabresi, *supra* note 1, at 3.

5. *Id.* at 11-12.

6. *Id.* at 18-26.

7. “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 to be given? 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?” *Id.*

8. *Id.* at 3.

9. Steinbrook & Shryer, *Mother Gives Child Part of Liver in Historic Surgery*, L.A. Times, Nov. 28, 1989, at 1, col. 5.

10. Steinbrook, *Lung Transplant — Taking Risks to Save a Life*, L.A. Times, Oct. 29, 1990, at 3, col. 1.

much an experiment, with no benefit assured and with risks to both participants. Let us ask the skeptical question: Should parents even be *permitted* to do such a thing? Most people, I suspect, would say of course, if a child were gravely ill and there was something, even though risky and painful, that a parent might do to save him or her, the parent should be allowed to do it. What reasons would we give to defend our choice to make such a gift? In the “libertarian, individualistic, and autonomistic” culture we inhabit (so Professor Calabresi describes it), many are quick to cite a right to control one’s own body, perhaps grounded on a legal right to privacy. Can we offer a different defense? Could we say that our obligations to our children require sacrifices of many kinds? Giving a piece of an organ (or blood, or marrow) seems dramatic perhaps, but not so different in kind from other things we are asked to do for our children’s benefit. Should others not be permitted to interfere with our fulfilling our moral obligations to our children?

The problem with talking about moral obligations in the two examples just cited is that it is hard to imagine saying that any parent is obliged to participate in such risky, desperate, long-shot attempts. But suppose that the costs of helping—the pain and risks—were reduced to a minimum, and that the potential benefits were made vastly more probable and no less significant: might we then be willing to say that parents can indeed have a moral obligation to give some body part or product if it will almost surely save their child’s life?

Suppose that a small amount of a parent’s blood could be processed and used to supply a missing component of a child’s immune system, that this was very likely to be life-saving, and that the risks to the parent were trivial. In these circumstances, does the parent have a moral obligation to give that blood in order to save the child’s life? Most of us would agree that parenthood carries with it many obligations intended to assist children’s favorable development into healthy, responsible, loving, and energetic adults. It is not at all clear that giving blood is any more onerous or any less morally obligatory than keeping vigil by a child’s bed in sickness, or getting up in the middle of the night to feed or change them, or to console them when they are terrified by a dream. Good parents do such things, and the failure to do them seems more than just missing an opportunity to go above and beyond the call of duty—what philosophers call *supererogation*. It strikes us as a moral lapse, a failure to do what is our duty.

Parents have a range of moral obligations. We do not require

them to do what is impossible or futile, nor do we require them to sacrifice completely their own interests or the interests of others for the sake of their children. But we do expect them to accept minor inconveniences and even a little pain if their children might benefit enormously from it.

Does the fact that this act of parental caring involves the parents' own bodies make it different from other kinds of moral obligations to our children? I can find no good reason to think that it is all that different. Invoking a right to privacy is not a sufficient rejoinder. For one thing, the right to privacy is usually taken as a legal claim, something that imposes strict limits on what the state may do. The claim is that the state may not interfere with the decisions one makes about one's own body; not that every such decision made is morally the best or right one. The right to privacy encompasses the right to make my own moral choices, including mistakes. The discussion here is about the moral character of such decisions—not about the state's prerogatives to impose its moral views on us and our bodies.

At this point I must confess to a possible inconsistency. On the one hand, I am arguing that people at times may have moral obligations to give parts or products of their bodies, yet I also believe that certain body parts, in particular transplantable organs, should not be sold. The key to this apparent paradox lies in a little joke made by Professor Calabresi which begins with a paraphrase of Marx: "From each according to his ability, to each according to his utility functions."<sup>11</sup> (What Marx actually said was: "To each according to his need," but lawyer-economists have taught us that that is too vague, and that we should prefer, what sounds like, more precise terminology.)<sup>12</sup> Unless you are indeed a particular breed of lawyer-economist, or otherwise accept the claim that all desires are on equal footing, and there are no such things as needs, you will notice a difference between, the desire for a more powerful and expensive sports car and the need for life-saving bone marrow.

We do not have to believe that there is a simple definition of need that clearly marks off all those things that are mere desires and all those that count as genuine needs to accept that there are some things people should have without question, and other things that we may leave to other distributional mechanisms such as the market.

---

11. Calabresi, *supra* note 1, at 3-4.

12. *Id.* at 4 n. 8.

There is good reason to believe that needs are relative to history and culture. In a traditional farming community, children may not have needed to become literate, but they surely needed to learn how to farm. When most things physicians did were as likely to harm as help, it made little sense to say that people had a "need" for their services. In the U.S. today, access to good health care can make an enormous difference in our lives, and it makes sense to describe at least certain forms of health care as meeting needs and not merely catering to desires.

Needs can be met in many ways. In the U.S., a modified and supplemented market distributes most goods, including those that meet needs for food, shelter, clothing, health care, and education. We do not worry if we learn that not everyone has a VCR, because the market is accepted as a way of distributing such a commodity. On the other hand, we worry a great deal if everyone who needs a life-saving organ transplant cannot get one, and we would worry a great deal more if we learned that the wealthy got the organs supplied by the poor.

A market in organs is problematic for two reasons. First are the distributional consequences. Certain inequalities are tolerated in the name of particular concepts of justice, or liberty, or other values. But stark life-and-death inequalities in which disfavored groups once again bear most of the burdens, and reap few of the benefits, violate important values about equal treatment and equal regard. Second, the human body, in its symbolically significant manifestations, has long been treated in the Anglo-American tradition as something that should not be bought and sold. The human body deserves to be treated with a dignity which VCRs and sports cars do not.<sup>13</sup>

In the past, courts have had to deal with conflicts over dead bodies. For example, in *Pierce v. Proprietors of Swan Point Cemetery*<sup>14</sup> the court ruled that a dead body was "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>15</sup>

Prosser and Keaton offer this acerbic opinion about such cases:

---

13. Murray, *On the Human Body as Property: The Meaning of Embodiment, Markets and the Needs of Strangers*, 20 J. OF LAW REFORM 1055 (1987).

14. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R.I. 227 (1872).

15. *Id.* at 242-243.

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.<sup>16</sup>

Judges had to find some rubric in the law under which they could treat conflicts over the disposition of dead bodies. "Property," whatever its unhelpful connotations in dealing with human bodies and their parts, does provide a conceptual scheme permitting such conflicts to be resolved. Prosser and Keaton help by underlining the shortcomings of the "body as property" metaphor. However, they may misdirect us by asserting that the only important value being protected is the feelings of survivors.

Every culture has had to deal with the question of how to regard and treat their dead. The answers have not all been the same, but each answer seems to be in keeping with that culture's general attitude towards our embodiment—that is, that we only know of ourselves and each other in and through our bodies—and each culture seems to regard it as an important question. Our culture acts as if it believes that dead bodies deserve to be treated with dignity, not left exposed to the elements or predators, as the ancient Persians are said to have done.<sup>17</sup>

Given our beliefs about the moral significance of dead bodies, we do not permit them to be bought and sold, nor do we allow their organs to become commodities. Likewise, we forbid markets in organs such as kidneys from live donors. Our prohibitions go only so far. For example, There are no objections to someone selling their nail clippings or hair. We even permit people to sell their blood or plasma. Perhaps this is an anomaly, or perhaps it is our view that the sale of such replenishable substances that can be obtained with minimal risk and inconvenience does not threaten the dignity of the body.

Over the years there has been a remarkable transformation of the system in this country for obtaining whole blood. In the 1960s we assumed that people had to get something before they would part with their blood, so we offered them money or some assurance

---

16. PROSSER AND KEETON ON THE LAW OF TORTS § 12, at 63 (W. Keeton 5th ed. 1984).

17. L. KASS, TOWARD A MORE NATURAL SCIENCE 297 (1985).

that they would get blood if they ever needed it. But we discovered that we could get all the blood we needed—millions of units a year—by being organized enough to provide two things: the information that blood was needed, and a reasonably convenient opportunity to donate. People in sufficient numbers recognized the need, and felt that they should respond to it. We do not ban the sale of blood. In fact we would probably think that anyone who donated their blood to a company that used it to make a profit was being naive. But we have organized our whole blood supply—the blood that most directly meets needs—as a not-for-profit system of gifts among strangers.

In the case of blood, for many people the needs of others become the grounds of moral obligation. Michael Ignatieff, an historian, writes:

Need is a vernacular of justification, specifying the claims of necessity that those who lack may rightfully address to those who have. . . . The pathos of need, like the pathos of all purely verbal claims to the justice or mercy of another, is that need is powerless to enforce its right. It justifies an entitlement only if the powerful understand themselves to be obliged by it.<sup>18</sup>

When it comes to blood, bone marrow, or other body substances, the “powerful” or at least “wealthy” are usually those who have an adequate supply. Each year millions of such “powerful” people feel the obligation strongly enough to share their abundance with others.

If we are indeed the Marie Antoinettes and J. P. Morgans of body parts, then it is because we have in abundance what others need. Our selfish or indifferent hoarding of plenitude is open to the same accusation levelled against them—that we should respond generously to others’ needs. We should not be surprised that the accusation with respect to body parts is just now being first uttered. Until the time that body parts or substances actually could assuage another’s need, it made no sense to accuse someone of withholding that which could not benefit another. Only with the advent of safe blood transfusions and with the growing variety of uses of one person’s tissues and body fluids to heal another’s, is there this kind of need for my body.

Understanding the need, and accepting that obligation follows, does not mean that we must respond to every individual in need. And it most certainly does not mean that the state is justified in insisting that we satisfy such needs. But it does mean something.

---

18. M. IGNATIEFF, *THE NEEDS OF STRANGERS* 27 (1985).



Suppose the facts of the case were a bit different than those presented to the judge in *McFall v. Shimp*. Let us say that bone marrow transplantation for the particular disease had advanced to the state where, when a well-matching donor could be found, a near-certain cure was the likely outcome and the alternative was death. The reluctant could-be marrow donor was the patient's son, whom the patient-father had raised lovingly and generously. The marrow extraction procedure was virtually pain and risk-free. The son, nonetheless, refused.

This son, I believe, has acted in an ungrateful and cowardly manner. His father's impending death will be further blighted by the knowledge that the son has failed to exhibit the moral virtues the father had exemplified and tried to impart. He not only dies, but dies believing that he failed as a parent, with his own preventable death the proof of that failure. The stuff of a good drama perhaps, but a pitiful scenario.

Did the son in this case fail utterly to do his moral duty? As the relationship between prospective donors and those in need grows more distant and anonymous, the case for a strong moral obligation becomes less compelling. Likewise, as the risk and inconvenience of the donation increases, the probability of benefit diminishes, and the danger to the recipient becomes less grave, the case for moral obligation grows weaker.

This should not be surprising. Judgments of moral obligation in complex circumstances share similar characteristics: a number of relevant moral considerations of varying weight including the consequences to the various parties, promises made, the strength and intimacy of relationships, and the like. As the circumstances change, judgments may become less certain until finally the balance tips in the other direction. We are left with the question whether, and in what circumstances, the law should support or enforce this moral duty.

The law already supports the moral duty to give body parts to others in need. It does so with whole blood by treating blood as a service rather than a commodity, so that when someone is injured, non-negligently, by the small though ineliminable risks associated with transfusions, blood banks—and donors—are less likely to be devastated by lawsuits. It does so with other tissues and whole organs through the various statutes that permit donation from cadavers and, occasionally, living donors. Laws such as these support people's fulfillment of their moral duties, but do not force them to do so.

I describe this as a moral duty because if you attend to the reasons people give for making such donations, they are frequently couched in the language of obligation.<sup>19</sup> Studies of living-related kidney donors show that the decision to donate is most often made immediately; people usually do not need a great deal of convincing when a sister, brother, mother, father, or child needs a kidney.<sup>20</sup> This is evidence that people recognize their moral duty to donate in such circumstances.

What the law does not do, as least not yet, is enforce this particular set of moral duties. I want to explore briefly the reasons why this may be so. Professor Calabresi offers the military draft as an example of a situation where our bodies do not belong to us. In such circumstances, it is true that we are not permitted to choose whether to risk our lives. That decision is made, as Professor Calabresi says, by the collectivity. But being made, involuntarily, to risk our lives for the good of the community is not quite the same as saying our bodies "belong to" the collectivity. The government does not "own" our body. If the government did, then why couldn't it auction off my limbs, organs, bones, and marrow? As I understand it, soldiers on the battlefield can be ordered to give a unit of blood. This does not seem to be an outrageous imposition under those extraordinary circumstances. But I do not think that we would allow a healthy soldier to be carved up, and his or her organs distributed to several others in need of various parts, even if under the ethics of triage more fighting men and women could be put back into combat this way. The collectivity, or government, or Army does not own our body in this way. It may compel us to run grave risks, but it may not chop us up, even for good reasons.

We draw a thick but not impenetrable line at the body's perimeter. We may expose your body to risks, but we are loathe to puncture the boundary of your skin. We hesitate to make you accept drugs or medical treatments against your will. The exceptions we permit are usually justified by arguing that you are not old enough or sane enough or conscious enough (or free enough?) to refuse something that would help you. When you will not be helped by whatever body boundary crossing we propose, as for example in nontherapeutic research, voluntariness becomes an almost absolute principle.

---

19. R.M. TITMUS, *THE GIFT OF RELATIONSHIP* (1971).

20. R. SIMMONS, S. KLEIN, R. SIMMONS, *GIFT OF LIFE: THE SOCIAL AND PSYCHOLOGICAL IMPACT OF ORGAN TRANSPLANTATION* (1977).

One reason we are loathe to countenance the taking of body parts is the powerful belief most people have that their bodies—even if they do not “own” them like they own their car or house—are profoundly theirs, and no one else’s to appropriate. We may decide in time that this belief is wrong or unhelpful, but before we discard it we should ask from where this deep conviction comes and what purposes it serves.

Whatever its source, the idea that our physical body is a crucial moral boundary is widespread and potent. Violating that boundary with state sanctioned coercion evokes indignation and staunch resistance. Until people are willing to accept that they have a moral obligation to give body parts to others in need, a law forcing them to do so would be very costly—inspiring rampant disobedience and mistrust.

The benefits of a system of gifts of the body, in contrast, are subtle but far-reaching. Gifts of blood, other tissues, and organs attest to our connectedness with one another, our shared embodiment, and our always tenuous and threatened grasp on health. Especially in large impersonal societies where bureaucracies mediate between my resources and the needs of others, gifts of the body are a symbolically rich way to reaffirm the value of solidarity, that we are, in fact, members of one community, responsive to one another’s needs.<sup>21</sup>

I contend that there can be circumstances in which we have moral obligations to give parts of our bodies to others. These moral obligations will grow more visible and compelling as the likely benefits to others grow more dramatic and certain and the risks to donors become minimal. This does not justify laws forcing us to fulfill those moral duties, at least not yet. We have too much to lose by such coercive policies, both in the costs they would inflict, and the lost opportunities for reinforcing solidarity.

Professor Calabresi’s paper could be taken as proof that the metaphor of “ownership” for our relationship to our own bodies is inadequate and misleading. I agree completely. Our relationship with our bodies is both less and more than commercial ownership. We cannot (and should not) alienate our body parts (no “kidney futures” markets). We may be commanded to expose them to risks when community survival is at stake. Yet others are forbidden not only to take but even to touch our bodies without our permission.

---

21. Murray, *Gifts of the Body and the Needs of Strangers*, HASTINGS CTR. REP. 30, 35 (April 1987).

For the Marie Antonettes and J. P. Morgans of body parts among us, there may be times when we have a moral obligation to share our plenitude with others less fortunate. As these occasions become more common, and as the conviction grows that such moral obligations are sensible and real, a law compelling donation becomes less outrageous. But I wonder if, even then, such a law would be wise. Would it not be better to support a system built on gifts and the values of community and solidarity, as long as it came near meeting the need? We might have little to gain, and a great deal to lose, by transforming a gift inspired by positive social values into a state-enforced burden. We shall pay a high price if there is ever an IRS for body parts.

